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

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

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

5 CFR Part 1650

Methods of Withdrawing Funds From the Thrift Savings Plan

AGENCY: Federal Retirement Thrift Investment Board.

ACTION: Direct final rule.

SUMMARY: The Federal Retirement Thrift Investment Board (FRTIB) is amending its regulations to remove certain restrictions with respect to the election of installment payments calculated based on life expectancy.

DATES: This rule is effective without further action on January 11, 2021, unless significant adverse comment is received by December 30, 2020. If significant adverse comment is received, the FRTIB will publish a timely withdrawal of the rule in the **Federal Register**.

ADDRESSES: You may submit comments using one of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Office of General Counsel, Attn: Dharmesh Vashee, Federal Retirement Thrift Investment Board, 77 K Street NE, Suite 1000, Washington, DC 20002.
- *Facsimile:* Comments may be submitted by facsimile at (202) 942–1676.

Since March 23, 2020, the FRTIB has been operating in mandatory telework status due to the coronavirus pandemic, which has limited the ability to timely monitor mail and facsimiles. Therefore, we strongly encourage using the Federal Rulemaking Portal to submit comments.

FOR FURTHER INFORMATION CONTACT: Austen Townsend at (202) 864–8647.

SUPPLEMENTARY INFORMATION: The FRTIB administers the Thrift Savings Plan (TSP), which was established by the Federal Employees' Retirement System Act of 1986 (FERSA), Public Law 99–335, 100 Stat. 514. The TSP provisions of FERSA are codified, as amended, largely at 5 U.S.C. 8351 and 8401–79. The TSP is a tax-deferred retirement savings plan for Federal civilian employees and members of the uniformed services. The TSP is similar to cash or deferred arrangements established for private-sector employees under section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)).

Post-Separation Withdrawals

TSP participants who have separated from service have three basic methods of withdrawing money from their TSP accounts: (1) Installment payments; (2) single withdrawals; and (3) annuity purchases. A separated participant who elects to receive all or a portion of his or her account balance in the form of installment payments must choose the frequency of those payments (monthly, quarterly, or annual) and whether to receive fixed dollar payments or payments calculated based on life expectancy.

Restrictions on Life-Expectancy-Based Installment Payments

Currently, a separated TSP participant may change the amount and frequency of his or her fixed dollar installment payments at any time throughout the year. This includes the ability of a participant to make a one-time election to change from installment payments calculated based on life expectancy to fixed dollar installment payments. However, under existing rules, once a participant makes an election to receive fixed dollar installment payments, he or she may not switch to life-expectancy-based installment payments. In addition, although a TSP participant receiving installment payments may stop these payments at any time, if he or she stops life-expectancy-based installment payments, the participant may not elect to restart life-expectancy-based installment payments at a later date.

Need for Removal of Restrictions

Internal Revenue Service (''IRS'') rules regarding required minimum distributions (''RMDs'') apply to TSP participants. Under these rules, a TSP participant must receive RMDs beginning on April 1 of the year following the year in which the participant reaches age 72 and is separated from service and annually thereafter. However, on March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Public Law 116–136 (134 Stat. 281). Among other things, the CARES Act waives the requirement for any RMD that is required to be paid in 2020.

The COVID–19 pandemic caused a steep and sudden decline in the stock markets and put a severe strain on many household budgets. In order to give time for TSP account balances to recover, as authorized by the CARES Act, the TSP will not send any automatic RMD payments for 2020. However, the TSP will continue to send elected installment payments in 2020 unless the participant makes an affirmative election to stop installment payments.

Many separated TSP participants who are required to receive RMDs elect to receive life-expectancy-based installment payments as a way to ensure they satisfy this requirement. The existing restrictions on life-expectancy-based installment payments put these participants in an untenable situation—they must either continue to receive payments and forego the chance to let their account balances recover, or stop their payments and forego the ability to restart life-expectancy-based payments in the future. Moreover, over the years, separated participants of all ages have expressed a desire for more flexibility to change between fixed dollar and life-expectancy-based installment payments. Therefore, effective January 1, 2021, the FRTIB is removing the restrictions on life-expectancy-based installment payments described above.

The removal of these restrictions allows TSP participants who are eligible for installment payments to elect to receive payments based on life expectancy whether or not they previously started and then stopped installment payments. In order for a TSP participant who is currently receiving fixed dollar installment payments to receive installment payments calculated based on life expectancy, the participant must first stop his or her existing installment payments. The participant can then make a new withdrawal election to receive life-expectancy-based installment payments. (Participants who are currently receiving payments based on life expectancy will continue to have the ability to switch to fixed dollar payments simply by requesting a

specific dollar amount.) This new withdrawal election is subject to the spousal consent rules set forth at 5 U.S.C. 8435(a)(1)(B).

Tax Implications

The FRTIB recognizes the value of giving TSP participants more flexibility with respect to installment payments. However, TSP participants should be aware of potential tax consequences mandated by the Internal Revenue Code (Code) that may result from stopping installment payments calculated based on life expectancy.

TSP participants who separate from service before the age of 55 and choose to receive installment payments may be subject to a 10% early withdrawal penalty under Code section 72(t). Installment payments based on life expectancy are an exception to the rule. However, the penalty can be applied retroactively if the participant does any of the following within five years of beginning payments or before reaching age 59½: (1) Stopping life-expectancy-based payments; (2) switching life-expectancy-based payments to payments of a fixed dollar amount; or (3) withdrawing money in addition to the life-expectancy based payments. Doing any of these things in that period of time will make the participant liable for the penalty tax on the payments he or she previously received. These tax consequences are mandated by the Code and are not eliminated by this FRTIB rule change.

Direct Final Rulemaking

The FRTIB is publishing this regulation as a direct final rule. In a direct final rulemaking, an agency publishes its rule in the **Federal Register** along with a statement that the rule will become effective unless the agency receives significant adverse comment within a specified period.

The content of this direct final rule relieves a restriction on a TSP participant's ability to make a post-separation withdrawal election to receive installment payments based on life expectancy. Therefore, pursuant to 5 U.S.C. 553, notice and comment are not required, and this rule may become effective after publication in the **Federal Register** without public comment.

Nevertheless, the FRTIB appreciates that members of the public may have perspectives or information that could impact the FRTIB's views with respect to the removal of these restrictions. The FRTIB, therefore, is providing a 30-day public comment period, and intends to consider all comments submitted during that period. The FRTIB will withdraw the rule if it receives significant adverse comment. Comments that are not adverse may be considered for modifications to part 1650 at a future date. If no significant adverse comment is received, the rule will become effective 40 days after publication, without additional notice.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities. This regulation will affect Federal employees and members of the uniformed services who participate in the Thrift Savings Plan, which is a Federal defined contribution retirement savings plan created under the Federal Employees' Retirement System Act of 1986 (FERSA), Public Law 99–335, 100 Stat. 514, and which is administered by the FRTIB.

Paperwork Reduction Act

I certify that these regulations do not require additional reporting under the criteria of the Paperwork Reduction Act.

Unfunded Mandates Reform Act of 1995

Pursuant to the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 602, 632, 653, 1501–1571, the effects of this regulation on state, local, and tribal governments and the private sector have been assessed. This regulation will not compel the expenditure in any one year of $100 million or more by state, local, and tribal governments, in the aggregate, or by the private sector. Therefore, a statement under section 1532 is not required.

Submission to Congress and the General Accounting Office

Pursuant to 5 U.S.C. 810(a)(1)(A), the FRTIB submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States before publication of this rule in the **Federal Register**. This rule is not a major rule as defined at 5 U.S.C. 804(2).

List of Subjects in 5 CFR Part 1650

Alimony, Claims, Government employees, Pensions, Retirement.

Ravindra Deo,

Executive Director, Federal Retirement Thrift Investment Board.

For the reasons stated in the preamble, the FRTIB amends 5 CFR Chapter VI as follows:

PART 1650—METHODS OF WITHDRAWING FUNDS FROM THE THRIFT SAVINGS PLAN

■ 1. The authority citation for part 1650 continues to read as follows:

Authority: 5 U.S.C. 8351, 8432d, 8433, 8434, 8435, 8474(b)(5) and 8474(c)(1).

■ 2. Amend § 1650.13 by revising paragraph (b) to read as follows:

§ 1650.13 Installment Payments.

* * * * *

(b) A participant can make the following changes at any time as described in § 1650.17(c):

(1) A participant receiving installment payments calculated based on life expectancy can elect to change to fixed dollar installment payments;

(2) A participant receiving installment payments based on a fixed dollar amount can elect to stop these payments and make a new election to receive installment payments calculated based on life expectancy;

(3) A participant receiving installment payments based on a fixed dollar amount can elect to change the amount of his or her fixed payments; and

(4) A participant receiving fixed dollar installment payments can elect to change the frequency of his or her installment payments.

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[FR Doc. 2020–26339 Filed 11–25–20; 11:15 am]

BILLING CODE 6760–01–P

DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Parts 407 and 457

RIN 0563–AC70

[Docket ID FCIC–20–0008]

Area Risk Protection Insurance Regulations; Common Crop Insurance Policy Basic Provisions; Common Crop Insurance Regulations, Sunflower Seed Crop Insurance Provisions; and Common Crop Insurance Regulations, Dry Pea Crop Insurance Provisions

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule with request for comments.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) amends the Area Risk Protection Insurance (ARPI) Regulations; Common Crop Insurance Policy (CCIP), Basic Provisions; Common Crop Insurance Regulations, Sunflower Seed Crop Insurance

Provisions (Sunflower Seed Crop Provisions); and Common Crop Insurance Regulations, Dry Pea Crop Insurance Provisions (Dry Pea Crop Provisions). The intended effect of this action is to improve prevented planting provisions, revise beginning farmer or rancher and veteran farmer or rancher provisions and clarify arbitration provisions. In addition to these changes, FCIC is making clarifications to the Dry Pea Crop Provisions and revising the cancellation and termination dates in the Sunflower Seed Crop Provisions. The changes to the policy made in this rule are applicable for the 2021 and succeeding crop years for crops with a contract change date on or after November 30, 2020. For all other crops, the changes to the policy made in this rule are applicable for the 2022 and succeeding crop years.

DATES:

Effective Date: This final rule is effective November 30, 2020.

Comment Date: We will consider comments that we receive by the close of business January 29, 2021. FCIC may consider the comments received and may conduct additional rulemaking based on the comments.

ADDRESSES: We invite you to submit comments on this rule. You may submit comments by either of the following methods, although FCIC prefers that you submit comments electronically through the Federal eRulemaking Portal:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov/docket?D=FCIC-20-0008* and follow the instructions for submitting comments.
- *Mail:* Director, Product Administration and Standards Division, Risk Management Agency, US Department of Agriculture, P.O. Box 419205, Kansas City, MO 64133–6205. In your comment, specify docket ID FCIC–20–0008.

Comments will be available for viewing online at *www.regulations.gov.* Comments received will be posted without change, including any personal information provided. In addition, comments will be available for public inspection at the above address during business hours from 8 a.m. to 5 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Francie Tolle; telephone (816) 926–7829; or email *francie.tolle@usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

FCIC serves America's agricultural producers through effective, market-based risk management tools to strengthen the economic stability of agricultural producers and rural communities. The Risk Management Agency (RMA) administers the FCIC regulations. FCIC is committed to increasing the availability and effectiveness of Federal crop insurance as a risk management tool. Approved Insurance Providers (AIPs) sell and service Federal crop insurance policies in every state and in Puerto Rico through a public-private partnership. FCIC reinsures the AIPs who share the risk associated with catastrophic losses due to major weather events. FCIC's vision is to secure the future of agriculture by providing world class risk management tools to rural America.

Federal crop insurance policies typically consist of the Basic Provisions, the Crop Provisions, the Special Provisions, the Commodity Exchange Price Provisions, if applicable, other applicable endorsements or options, the actuarial documents for the insured agricultural commodity, the Catastrophic Risk Protection Endorsement, if applicable, and the applicable regulations published in 7 CFR chapter IV.

FCIC amends the ARPI Basic Provisions, the CCIP Basic Provisions, the Sunflower Seed Crop Provisions, and the Dry Pea Crop Provisions. The changes to the policy made in this rule are applicable for the 2021 and succeeding crop years for crops with a contract change date on or after November 30, 2020. For all other crops the changes to the policy made in this rule are applicable for the 2022 and succeeding crop years.

ARPI Basic Provisions

The changes to the ARPI Basic Provisions (7 CFR part 407) are:

FCIC is revising sections 23(d)(1), (2), and (5)(i) of the ARPI Basic Provisions to clarify the responsibility is on the producer to start dispute resolution through arbitration when the producer disagrees with an AIP determination. There has been confusion that this provision could require both the producer and the AIP to start arbitration prior to litigation.

FCIC is also making non-substantive changes to the regulation. Examples include making references consistent, making grammatical corrections, and clarifying word changes. These revisions are editorial in nature and are intended to provide clarity to the regulation.

CCIP Basic Provisions

The changes to the CCIP Basic Provisions (7 CFR part 457.8) are:

FCIC is revising section 3(l) to allow a producer that qualifies as a beginning farmer or rancher (BFR), or veteran farmer or rancher (VFR), to receive a yield based on the actual production history (APH) of the previous producer of the crop or livestock on the acreage, if the BFR or VFR was previously involved in the decision-making or physical activities of the crop or livestock on any farm. Previously, the provisions specified that the APH history of the acreage could only be used if the BFR or VFR was previously involved on the specific acreage acquired.

Prevented planting is a feature of many crop insurance plans that provides a partial payment to cover certain pre-plant costs for a crop that was prevented from being planted due to an insurable cause of loss. After unprecedented prevented planting in 2019, FCIC examined how to improve the prevented planting coverage within a policy. FCIC held discussions with stakeholders via a Prevented Planting Taskforce that included FCIC and industry representatives. The taskforce reviewed the previous policy, discussed impacts, and explored policy improvements. The goal of the taskforce was to improve coverage for producers when needed most, but not replace market incentives with government incentives, while maintaining program integrity. The taskforce identified several issues that are extremely uncommon but could occur in years when prevented planting is catastrophic and widespread. The following lists the changes in section 17 of the CCIP Basic Provisions:

FCIC is revising section 17(e)(1)(i) to add a reference to the new provisions in section 17(e)(1)(ii)(E).

FCIC is revising section 17(e)(1)(ii) to allow the use of an intended acreage report for the first 2 consecutive crop years the producer farms in a new county, instead of only the first year.

The CCIP Basic Provisions define ''intended acreage report'' as a report of the acreage a producer intends to plant, by crop, for the current crop year and used solely for the purpose of establishing eligible prevented planting acreage, as required in section 17. Further, section 17 states that if the insured did not plant any crop in the county for which prevented planting coverage was available in the 4 most recent crop years, the producer must complete and submit an intended acreage report to the AIP by the sales closing date, or within 10 days of land acquisition after the sales closing date, to establish the potential maximum number of eligible prevented planting acres.

Based on the previous provision, when a producer adds new land in a new county, the producer could only indicate intended acres for the first year. An issue arises in the second year if the producer, following good farming practices for crop rotation, intends to plant a different crop. Because the producer only has 1 year of history in the county, the producer is limited in the amount of acreage (and type of crop) that can be claimed for prevented planting purposes.

For example, a producer adds land in a new county. The first year, the producer files an intended acreage report for wheat and plants the entire acreage to wheat. The second year, the producer intends to plant corn, but is prevented from planting due to an insurable cause of loss. Under the previous regulations, the producer would not have any eligible prevented planting acreage for corn because they only have eligible wheat acres based on their first year's history in their APH database. The producer would receive a prevented planting payment based on the eligible wheat acres. This would result in a different prevented planting payment than the intended corn crop, which may not be reflective of their pre-plant costs.

As specified above, FCIC will revise section 17(e)(1)(ii) to allow the producer to submit an intended acreage report for the first 2 consecutive crop years the producer farms in a new county. In the above scenario, this will allow the producer to receive a prevented planting payment based on the acres contained on the intended acreage report for the second year and the payment will be based on corn. This change acknowledges rotational practices are a good farming practice. It will also result in more accurate prevented planting payments because they will be based on the producer's actual intended plantings for that year.

FCIC is revising section 17(e)(2) to provide that if following a failed first insured crop, an uninsured second crop is planted on the same acres within the same crop year, the planted acres of the uninsured crop will not be subtracted from the eligible prevented planting acreage.

Section 17(e)(2) of the CCIP Basic Provisions previously stated, ''Any eligible acreage determined in accordance with section 17(e)(1) will be reduced by subtracting the number of acres of the crop (insured and uninsured) that are timely and late planted, including acreage specified in section 16(b).'' If following a failed first insured crop, the producer plants an uninsured second crop on the same acres within the same crop year; acres from both plantings (first insured crop and second uninsured crop) are subtracted from the eligible prevented planting acreage, even though it is the same physical land subtracted twice. On occasion, this can lead to the producer having acres that do not receive a prevented planting payment due to inadequate eligible prevented planting acres. This occurrence is extremely rare, but it affected a small number of producers in the 2019 crop year. To illustrate the rarity of these circumstances, for the reduction to apply under the previous regulation, all of the following must have been true for the producer:

(1) Planted a first crop that fails,

(2) Planted a second crop on the same acreage following the failed crop, and

(3) Exhausted eligible prevented planting acres available to pay a claim.

The underlying concern is that the same physical acres are subtracted twice from overall prevented planting eligible acres. To illustrate the inequity of the double subtraction, the following is a simple example of the previous provisions. A producer has 100 total acres of cropland (fields A & B) and intends to plant all 100 acres to corn. Based on production history, the producer also has 100 prevented planting eligible acres (50 for corn and 50 for soybeans). The producer plants 50 acres of corn in field A, resulting in 50 corn acres subtracted from eligible prevented planting acres. At this point, there are 50 soybean eligible prevented planting acres and zero corn eligible prevented planting acres. A flood destroys the 50 acres of corn in field A, the AIP determines it is not practical to replant, and the producer does not have to replant to retain insurance. The producer files a claim for indemnity for the crop loss and receives an indemnity for the field A 50 destroyed corn acres. Later, the producer plants the 50 acres in field A to soybeans that are not insured. The second planting of field A (uninsured soybeans) would result in the subtraction of 50 acres of eligible prevented planting acres of soybeans. This equates to 100 eligible prevented planting acres being subtracted from the same 50 physical acres (field A); leaving 0 eligible prevented planting acres remaining for the 50 physical acres prevented from planting in field B that remains unplanted.

FCIC is removing the double subtraction on field A by no longer subtracting the uninsured second planting from eligible prevented planting acres. This would allow a prevented planting payment on field B, if those acres were unable to be planted, and if other policy provisions for prevented planting claims are met.

To illustrate the inequity of the previous provisions in a different way, see the following scenarios below. These scenarios show the disparate treatment of two producers in the same situation, except that their 100 prevented planting eligible acres are for different crops. Scenario 1: Producer has 100 acres of corn prevented planting eligible acres and 0 acres of soybean prevented planting eligibility. There is no impact on prevented planting eligibility for field B. Since there are 0 acres of soybean eligible prevented planting acres, the 50 planted acres of uninsured soybeans (field A) would not be subtracted from prevented planting eligibility. In this case, the producer would remain eligible for a prevented planting payment on the 50 acres of corn (field B) that were prevented from being planted.

Crop	Eligible acres	Planted (insured & uninsured)	Prevented from planting	Available for payment
Corn	100	50	50	50
Soybeans	0	50	0	0

Scenario 2: A producer has 50 acres of prevented planting corn eligibility and 50 acres of prevented planting soybean eligibility; prevented planting eligibility is eliminated on field B. Previously, prevented planting eligible acres are reduced by planted acres of insured and uninsured crops, and the 50 acres of planted and then failed corn in field A would exhaust corn prevented planting eligibility. The planting of 50 acres of uninsured soybeans in field A would exhaust the soybean prevented planting eligibility as well. There would be no remaining eligible prevented

planting acres for the 50 acres of corn prevented from being planted in field B.

Crop	Eligible acres	Planted (insured & uninsured)	Prevented from planting	Available for payment
Corn	50	50	50	0
Soybeans	50	50	0	0

Regulation change: For this example, the change to the regulation results in Scenario 2 having the same result as Scenario 1 with 50 eligible acres of prevented planting soybeans which can be used to make the corn payment claimed. Changing this to not subtract the uninsured acres of soybeans planted on field A will be a more equitable treatment of producers under catastrophic loss conditions.

Crop	Eligible acres	Planted (insured)	Planted (uninsured)	Prevented from planting	Available for payment
Corn	50	50	0	50	0
Soybeans	50	0	50	0	50

FCIC is revising section 17(f)(1) to provide an exception if the producer can prove intent to plant based on inputs applied or available to apply, rotation, etc., the producer could then be paid a prevented planting payment based on their intended crop, even if it's different than the crop that was planted in the field.

Previously, section 17(f)(1) of the CCIP Basic Provisions stated, ''Any prevented planting acreage within a field that contains planted acreage will be considered to be acreage of the same crop, type, and practice that is planted in the field.''

For example, a producer intends to plant a 100-acre field to corn, but it is too wet prior to the final plant date. Prior to the end of the late planting period for corn, she begins planting the field to soybeans. She planted 20 acres of soybeans before getting rained out. The producer submits a claim for the remaining 80 acres as prevented planting corn. The producer does not have history of producing both corn and soybeans in the same field in the same crop year. Prevented planting is common to the area and the producer has adequate corn prevented planting eligible acres to cover the 80 acres prevented from planting.

As a result, the producer has receipts for seed and other inputs to prove intent to plant corn. She expects to be paid prevented planting for corn at a higher per acre amount on 80 acres. However, because she planted 20 acres of soybeans in the same field as her prevented planting claim, section 17(f)(1) requires the 80 acres to be considered soybeans and be paid at a lower per acre amount. The previous provision may have incentivized the producer to not plant soybeans in order to maintain the higher prevented planting payment on corn. Revising the provision could reduce prevented planting payments when this situation arises in the future.

With the revisions to section 17(f)(1) to provide an exception if the producer can prove intent to plant by inputs applied or available to apply, rotation, etc., in the example, the producer could provide documentation that fertilizer application, seed purchases, historical crop rotation patterns, etc. were consistent with intentions to plant corn. The producer could then be paid using available corn prevented planting acres, rather than having to consider the prevented planting acres soybeans.

FCIC is adding a new section 17(f)(5)(iii) to clarify prevented planting coverage will not be provided if the act of haying or grazing a cover crop contributed to the acreage being prevented from planting or the cover crop was otherwise harvested prior to the end of the late planting period. In a previous final rule, section 17(f)(5)(ii) was revised to remove the words ''or cover'' following the word ''volunteer,''. In addition, FCIC removed a Special Provisions statement that read: ''In lieu of Section 17(f)(5)(ii) of the Common Crop Insurance Basic Provisions, haying or grazing a cover crop will not impact eligibility for a prevented planting payment provided such action did not contribute to the acreage being prevented from planting.'' FCIC received comments regarding concerns this change could lead to misunderstanding and unforeseen consequences. Some may interpret this to mean that a cover crop could be hayed or grazed even if the act contributed to the acreage being prevented from planting or that a cover crop could be otherwise harvested prior to the end of the late planting period. Therefore, the additional language incorporates the previous Special Provisions statements.

FCIC is revising section 17(f)(8) to implement the ''1 in 4'' requirement nationwide (beyond just the Prairie Pothole National Priority Area discussed below). Acreage must be physically available for planting to be eligible for a prevented planting payment. The ''1 in 4'' requirement is contained in a Special Provisions statement and is an extension of the CCIP Basic Provisions that the acreage must be physically available for planting. The ''1 in 4'' requirement states that the acreage must have been planted to a crop, insured, and harvested (or if not harvested, adjusted for claim purposes due to an insurable cause of loss) in at least 1 out of the previous 4 crop years.

The ''1 in 4'' requirement has been in place since the 2012 crop year in the Prairie Pothole National Priority Area, which encompasses the states of Iowa, Minnesota, Montana, North Dakota, and South Dakota. The requirement in that area addressed prevented planting payments that were repeatedly made on acreage not physically available for planting (that is, acreage that is perpetually wet, such as potholes). Adding the language to the CCIP Basic Provisions for national applicability will allow for equal treatment for all areas of the United States and further mitigate waste, fraud and abuse for all acreage that is not physically available for planting to a crop to be insured. The Special Provisions statement had a requirement that the acreage must have been harvested, or if not harvested, was adjusted for claim purposes under the

authority of the Act due to an insured cause of loss (other than a cause of loss related to flood or excess moisture). FCIC identified perpetual drought conditions as a vulnerability and received requests to expand the ''1 in 4'' requirement in previous years. Therefore, FCIC added that in order to meet the ''1 in 4'' requirement, claim purposes could not be ''due to drought'' to address prevented planting payments that were repeatedly made on acreage not physically available for planting on perpetually dry acreage when a crop was not harvested. This incorporates provisions from a Special Provisions statement and as a result, the Special Provisions statement is removed.

FCIC is revising section 20(a) and 20(b)(1) to clarify the responsibility is on the producer to start dispute resolution through arbitration when the producer disagrees with an AIP determination. The AIP is the only party that makes a determination so the producer is the only party to the contract that could disagree with the determination the AIP made. There has been confusion that this provision could require both the producer and the AIP to start arbitration prior to litigation.

FCIC is also making non-substantive changes to the regulation. Examples include making references consistent, making grammatical corrections, and clarifying word changes. These revisions are editorial in nature and are intended to provide clarity to the regulation.

Sunflower Seed Crop Insurance Provisions

FCIC is revising section 4 of the Sunflower Seed Crop Insurance Provisions (7 CFR part 457.108) to change the cancellation and termination dates in 4 Texas counties from March 15 to January 31 to align with the January 31 sales closing date in these counties. This change is being made after a data mining exercise where FCIC identified that the sales closing date and cancellation/termination date did not match in these 4 counties.

FCIC is also making non-substantive changes to the regulation, including removing commas and correcting a spelling error.

Dry Pea Crop Insurance Provisions

FCIC is making non-substantive changes in the Dry Pea Crop Insurance Provisions (7 CFR part 457.140). Examples include making technical corrections and clarifying language changes. Changes were made to the Dry Pea Crop Insurance Provisions in a Final rule with request for comments, published in the **Federal Register** on June 26, 2020 (85 FR 38276). In reviewing the changes made, FCIC found some of the changes described in that rule were not made in the Code of Federal Regulations. Additionally, FCIC received comments to that final rule and is making revisions that are editorial in nature are intended to provide clarity to the regulation. There are other comments that FCIC received in response to the final rule published June 26, 2020, that FCIC is continuing to review.

Effective Date and Notice and Comment

The Administrative Procedure Act (APA, 5 U.S.C. 553) provides that the notice and comment and 30-day delay in the effective date provisions do not apply when the rule involves specified actions, including matters relating to contracts. This rule governs contracts for crop insurance policies and therefore falls within that exemption. Although not required by APA or any other law, FCIC has chosen to request comments on this rule.

For major rules, the Congressional Review Act requires a delay to the effective date of 60 days after publication to allow for Congressional review. This rule is not a major rule under the Congressional Review Act, as defined by 5 U.S.C. 804(2). Therefore, this final rule is effective November 30, 2020.

Executive Orders 12866, 13563, 13771 and 13777

Executive Order 12866, ''Regulatory Planning and Review,'' and Executive Order 13563, ''Improving Regulation and Regulatory Review,'' direct agencies to assess all costs and benefits of available regulatory alternatives, and if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasized the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13777, ''Enforcing the Regulatory Reform Agenda,'' established a federal policy to alleviate unnecessary regulatory burdens on the American people.

The Office of Management and Budget (OMB) designated this rule as not significant under Executive Order 12866, ''Regulatory Planning and Review,'' and therefore, OMB has not reviewed this rule and analysis of the costs and benefits is not required under either Executive Order 12866 or 13563.

Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs,'' requires that in order to manage the private costs required to comply with Federal regulations that for every new significant or economically significant regulation issued, the new costs must be offset by savings from deregulatory actions. As this rule is designated as not significant, it is not subject to Executive Order 13771. In a general response to the requirements of Executive Order 13777, USDA created a Regulatory Reform Task Force, and USDA agencies were directed to remove barriers, reduce burdens, and provide better customer service both as part of the regulatory reform of existing regulations and as an ongoing approach. FCIC reviewed this regulation and made changes to improve any provision that was determined to be outdated, unnecessary, or ineffective.

Clarity of the Regulation

Executive Order 12866, as supplemented by Executive Order 13563, requires each agency to write all rules in plain language. In addition to your substantive comments on this rule, we invite your comments on how to make the rule easier to understand. For example:

- Are the requirements in the rule clearly stated? Are the scope and intent of the rule clear?
- Does the rule contain technical language or jargon that is not clear?
- Is the material logically organized?
- Would changing the grouping or order of sections or adding headings make the rule easier to understand?
- Could we improve clarity by adding tables, lists, or diagrams?
- Would more, but shorter, sections be better? Are there specific sections that are too long or confusing?
- What else could we do to make the rule easier to understand?

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–612), as amended by SBREFA, generally requires an agency to prepare a regulatory analysis of any rule whenever an agency is required by APA or any other law to publish a proposed rule, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule is not subject to the Regulatory Flexibility Act because as noted above, this rule is exempt from APA and no other law requires that a proposed rule be published for this rulemaking initiative.

Environmental Review

In general, the environmental impacts of rules are to be considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321–4347) and the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508). FCIC conducts programs and activities that have been determined to have no individual or cumulative effect on the human environment. As specified in 7 CFR 1b.4, FCIC is categorically excluded from the preparation of an Environmental Analysis or Environmental Impact Statement unless the FCIC Manager (agency head) determines that an action may have a significant environmental effect. The FCIC Manager has determined this rule will not have a significant environmental effect. Therefore, FCIC will not prepare an environmental assessment or environmental impact statement for this action and this rule serves as documentation of the programmatic environmental compliance decision.

Executive Order 12372

Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' requires consultation with State and local officials that would be directly affected by proposed Federal financial assistance. The objectives of the Executive Order are to foster an intergovernmental partnership and a strengthened Federalism, by relying on State and local processes for State and local government coordination and review of proposed Federal financial assistance and direct Federal development. For reasons specified in the final rule related notice regarding 7 CFR part 3015, subpart V (48 FR 29115, June 24, 1983), the programs and activities in this rule are excluded from the scope of Executive Order 12372.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, ''Civil Justice Reform.'' This rule will not preempt State or local laws, regulations, or policies unless they represent an irreconcilable conflict with this rule. Before any judicial actions may be brought regarding the provisions of this rule, the administrative appeal provisions of 7 CFR part 11 are to be exhausted.

Executive Order 13132

This rule has been reviewed under Executive Order 13132, ''Federalism.'' The policies contained in this rule do not have any substantial direct effect on States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government, except as required by law. Nor does this rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

Executive Order 13175

This rule has been reviewed in accordance with the requirements of Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments.'' Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

RMA has assessed the impact of this rule on Indian Tribes and determined that this rule does not, to our knowledge, have Tribal implications that require Tribal consultation under E.O. 13175. The regulation changes do not have Tribal implications that preempt Tribal law and are not expected have a substantial direct effect on one or more Indian Tribes. If a Tribe requests consultation, RMA will work with the USDA Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions and modifications identified in this rule are not expressly mandated by Congress.

The Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA, Pub. L. 104–4) requires Federal agencies to assess the effects of their regulatory actions of State, local, and Tribal governments or the private sector. Agencies generally must prepare a written statement, including cost benefits analysis, for proposed and final rules with Federal mandates that may result in expenditures of $100 million or more in any 1 year for State, local or Tribal governments, in the aggregate, or to the private sector. UMRA generally requires agencies to consider alternatives and adopt the more cost effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates, as defined in Title II of UMRA, for State, local, and Tribal governments or the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

Federal Assistance Program

The title and number of the Federal Domestic Assistance Program listed in the Catalog of Federal Domestic Assistance to which this rule applies is No. 10.450—Crop Insurance.

Paperwork Reduction Act of 1995

In accordance with the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35, subchapter I), the rule does not change the information collection approved by OMB under control numbers 0563–0053.

E-Government Act Compliance

FCIC is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects

7 CFR Part 407

Acreage allotments, Administrative practice and procedure, Barley, Corn, Cotton, Crop insurance, Peanuts, Reporting and recordkeeping requirements, Sorghum, Soybeans, Wheat.

7 CFR Part 457

Acreage allotments, Crop insurance, Reporting and recordkeeping requirements.

Final Rule

For the reasons discussed above, FCIC amends 7 CFR parts 407 and 457, effective for the 2021 and succeeding crop years for crops with a contract change date on or after November 30, 2020, and for the 2022 and succeeding crop years for all other crops, as follows:

PART 407—AREA RISK PROTECTION INSURANCE REGULATIONS

■ 1. The authority citation for 7 CFR part 407 continues to read as follows:

Authority: 7 U.S.C. 1506(l) and 1506(o).

■ 2. Amend § 407.9 as follows:

■ a. In section 1:

■ i. In the definition of ''Code of Federal Regulations (CFR)'', remove the phrase ''*http://ecfr.gpoaccess.gov/*'' and add ''*https://www.ecfr.gov/*'' in its place;

■ ii. In the definition of ''total premium'', remove the phrase ''section 7(e)(1)'' and add ''section 7(d)(1)'' in its place;

■ b. In section 2:

■ i. In paragraph (k)(1)(ii), remove the phrase ''sections (k)(2)(i)(A), (B) or (D)'' and add ''sections 2(k)(2)(i)(A), (B), or (D)'' in its place; and

■ ii. In paragraph (k)(2)(ii), add a comma following the phrase ''2(k)(2)(i)(A), (B)''; and

■ c. In section 13, revise paragraph (d)(1);

■ d. In section 23 [Reinsured policies], revise paragraph (d)(1) introductory text, (d)(2), and (d)(5)(i).

The revisions read as follows:

§ 407.9 Area risk protection insurance policy.

* * * * *

13. Indemnity and Premium Limitations

* * * * *

(d) * * *

(1) If the records you provided are from acreage you double cropped in at least two of the last four crop years, you may apply your history of double cropping to any acreage of the insured crop in the county (for example you have 100 cropland acres in the county and have double cropped wheat and soybeans on all 100 acres in the county and you acquire an additional 100 acres in the county, you can apply your history of 100 double cropped acres to any of the 200 acres in the county); or

* * * * *

[Reinsured Policies]

23. Mediation, Arbitration, Appeal, Reconsideration, and Administrative and Judicial Review

* * * * *

(d) * * *

(1) If you do not agree with any determination not covered by sections 23(a) and (c), the disagreement may be resolved through mediation. To resolve any dispute through mediation, you and we must both:

* * * * *

(2) If the disagreement cannot be resolved through mediation, or you and we do not agree to mediation, you must timely seek resolution through arbitration in accordance with the rules of the American Arbitration Association (AAA), unless otherwise stated in this subsection or rules are established by FCIC for this purpose. Any mediator or arbitrator with a familial, financial or other business relationship to you or us, or our agent or loss adjuster, is disqualified from hearing the dispute.

* * * * *

(5) * * *

(i) You must initiate arbitration proceedings within 1 year of the date we denied your claim or rendered the determination with which you disagree, whichever is later;

* * * * *

PART 457—COMMON CROP INSURANCE REGULATIONS

■ 3. The authority citation for part 457 continues to read as follows:

Authority: 7 U.S.C. 1506(l) and 1506(o).

■ 4. Amend § 457.8 as follows:

■ a. Under the heading ''FCIC Policies'', in the first paragraph, remove the phrase ''on the RMA's website'' and add ''on RMA's website'' in its place;

■ b. Under the heading ''Reinsured Policies'', in the first paragraph, remove the phrase ''bulletins) published on the RMA's website'' and add ''bulletins), published on RMA's website'' in its place;

■ c. In section 1:

■ i. Revise the definition of ''approved yield'';

■ ii. In the definition of ''Code of Federal Regulations (CFR)'', remove the website address of ''*http://www.access.gpo.gov/*'' and add ''*https://www.ecfr.gov/*'' in its place;

■ iii. In the definition of ''RMA's website'', add the word ''or'' following the website address of ''*www.rma.usda.gov;*''

■ iv. Revise the definition of ''second crop'';

■ d. In section 3, in paragraph (l)(1), remove the phrase ''acreage you were previously involved with'' and add ''new acreage'' in its place;

■ e. Revise section 15(i)(1);

■ f. In section 17:

■ i. In section 17(e)(1)(i), add the phrase '', unless you qualify for the exception in section 17(e)(1)(ii)(E)'' at the end of the paragraph before the colon;

■ ii. In section 17(e)(1)(i)(B)(*3*), remove the phrase ''you lease the previous year and continue to leased'' and add ''you leased the previous year and continue to lease'' in its place;

■ iii. Add paragraphs (e)(1)(ii)(E) and (F);

■ iv. Revise paragraph (e)(2);

■ v. In paragraph (f)(1) introductory text, remove the phrase ''to be'';

■ vi. In paragraph (f)(1)(ii), remove the word ''or'' at the end of the paragraph;

■ vii. Revise paragraph (f)(1)(iii);

■ viii. Add paragraph (f)(1)(iv);

■ ix. Revise paragraph (f)(4)(ii) introductory text and (f)(4)(ii)(A);

■ x. Add paragraph (f)(5)(iii);

■ xi. Add paragraphs (f)(8)(i) and (ii);

■ g. In section 18, in paragraph (f)(1)(iii), add a comma following the phrase ''for the crop''; and

■ h. In section 20 [For reinsured policies]:

■ i. Revise paragraph (a) introductory text;

■ ii. Revise paragraph (b)(1);

The revisions and additions read in part as follows:

§ 457.8 The application and policy.

* * * * *

Common Crop Insurance Policy

* * * * *

1. Definitions.

* * * * *

Approved yield. The actual production history (APH) yield, calculated and approved by the verifier, used to determine the production guarantee by summing the yearly actual, assigned, adjusted or unadjusted transitional yields and dividing the sum by the number of yields contained in the database, which will always contain at least four yields. The database may contain up to 10 consecutive crop years of actual or assigned yields. The approved yield may have yield options elected under section 36, revisions according to section 3, or other limitations according to FCIC procedures applied when calculating the approved yield.

* * * * *

Second crop. With respect to a single crop year, the next occurrence of planting any agricultural commodity for harvest following a first insured crop on the same acreage. The second crop may be the same or a different agricultural commodity as the first insured crop, except the term does not include a replanted crop. If following a first insured crop, a cover crop that is planted on the same acreage and harvested for grain or seed is considered a second crop. A cover crop that is covered by FSA's noninsured crop disaster assistance program (NAP) or receives other USDA benefits associated with forage crops will be considered a second crop. A crop meeting the conditions stated in this definition is considered to be a second crop regardless of whether or not it is insured.

* * * * *

15. Production Included in Determining an Indemnity and Payment Reductions

* * * * *

(i) * * *

(1) If the records you provided are from acreage you double cropped in at least two of the last four crop years, you may apply your history of double cropping to any acreage of the insured crop in the county (for example, you have 100 cropland acres in the county

and have double cropped wheat and soybeans on all 100 acres in the county and you acquire an additional 100 acres in the county, you can apply your history of 100 double cropped acres to any of the 200 acres in the county); or

* * * * *

17. Prevented Planting

* * * * *

(e) * * *

(1) * * *

(ii) * * *

(E) If you were eligible to file an intended acreage report the first crop year, you may file an intended acreage report for the second crop year. If you choose to file an intended acreage report for the second crop year, the number of eligible acres will be the number of acres specified on your intended acreage report and not the number of eligible acres determined in accordance with section 17(e)(1)(i).

(F) You cannot file an intended acreage report more than 2 consecutive crop years.

* * * * *

(2) Any eligible acreage determined in accordance with section 17(e)(1) will be reduced by subtracting the number of acres of the crop (insured and uninsured) that are timely and late planted, including acreage specified in section 16(b), unless your first insured crop failed and you plant an uninsured second crop on the same acres within the same crop year, the acres for the uninsured second crop will not be subtracted from the eligible prevented planting acreage.

* * * * *

(f) * * *

(1) * * *

(iii) The insured crop planted in the field would not have been planted on the remaining prevented planting acreage (*e.g.,* where due to Crop Provisions, Special Provisions, or processor contract specifications rotation requirements would not be met, or you already planted the total number of acres specified in the processor contract); or

(iv) The acreage that was prevented from being planted constitutes at least 20 acres or 20 percent of the total insurable acreage in the field and you provide proof that you intended to plant another crop or crop type on the acreage (including, but not limited to inputs purchased, applied or available to apply, or that acreage was part of a crop rotation).

* * * * *

(4) * * *

(ii) For the insured crop that is prevented from being planted, you provide records acceptable to us of acreage and production that show (your double cropping history is limited to the highest number of acres double cropped within the applicable four-year period unless your double cropping history is determined in accordance with section 15(i)(3)):

(A) You have double cropped acreage in at least 2 of the last 4 crop years in which the insured crop that is prevented from being planted in the current crop year was grown (you may apply your history of double cropping to any acreage of the insured crop in the county (for example, you have 100 cropland acres in the county and have double cropped wheat and soybeans on all 100 acres and you acquire an additional 100 acres in the county, you can apply your history of 100 double cropped acres to any of the 200 acres in the county)); or

* * * * *

(5) * * *

(iii) The act of haying or grazing a cover crop contributed to the acreage being prevented from being planted or the cover crop was otherwise harvested prior to the end of the late planting period.

* * * * *

(8) * * *

(i) In order for acreage to be considered physically available for planting, the acreage must:

(A) Be free of trees, rocky outcroppings, or other factors that prevent proper and timely preparation of the seedbed for planting and harvest of the crop in the crop year;

(B) Not be enrolled in a USDA program that removes the acreage from crop production;

(C) Not be planted to a perennial crop (*i.e.,* trees or vines either planted on the acreage, or not removed from the acreage in a proper or timely manner, thus preventing the timely planting of a crop for the crop year);

(D) Not have pasture, rangeland or forage in place (see section 17(f)(6));

(E) In at least 1 of the 4 most recent crop years immediately preceding the current crop year, have been planted to a crop:

(*1*) Using recognized good farming practices;

(*2*) Insured under the authority of the Act; and

(*3*) That was harvested, or if not harvested, was adjusted for claim purposes under the authority of the Act due to an insured cause of loss (other than a cause of loss related to flood, excess moisture, drought, or other cause of loss specified in the Special Provisions).

(ii) Once any acreage does not satisfy the criteria set-forth in section 17(f)(8)(i)(E)*(1), (2),* and *(3)* in 1 of the 4 most recent crop years immediately preceding the current crop year, such acreage will be considered physically unavailable for planting until the acreage has been planted to a crop in accordance with 17(f)(8)(i)(E)*(1), (2),* and *(3)* for 2 consecutive crop years.

* * * * *

[For Reinsured Policies]

20. Mediation, Arbitration, Appeal, Reconsideration, and Administrative and Judicial Review

(a) If you do not agree with any determination made by us except those specified in section 20(d) or (e), the disagreement may be resolved through mediation in accordance with section 20(g). If the disagreement cannot be resolved through mediation, or you and we do not agree to mediation, you must timely seek resolution through arbitration in accordance with the rules of the American Arbitration Association (AAA), except as provided in sections 20(c) and (f), and unless rules are established by FCIC for this purpose. Any mediator or arbitrator with a familial, financial or other business relationship to you or us, or our agent or loss adjuster, is disqualified from hearing the dispute.

* * * * *

(b) * * *

(1) You must initiate arbitration proceedings within 1 year of the date we denied your claim or rendered the determination with which you disagree, whichever is later;

* * * * *

■ 4. Amend § 457.108 as follows:

■ a. In the introductory text, remove the year ''2017'' and add ''2021'' in its place;

■ b. In section 1, in the definition of ''planted acreage'', remove the word ''ini'' and add ''in'' in its place;

■ c. Revise section 4;

■ d. In section 11:

■ i. In paragraph (c)(iv)(A), remove the comma following the phrase ''in locations acceptable to us'';

■ ii. In paragraph (d)(3)(i), remove the comma following the phrase ''or conditions''.

The revision reads as follows:

§ 457.108 Sunflower seed crop insurance provisions.

* * * * *

■ 5. Cancellation and Termination Dates.

In accordance with section 2 of the Basic Provisions, the cancellation and termination dates are:

State and county	Cancellation and termination dates
Hidalgo, Jim Wells, Nueces, and Starr Counties, Texas	January 31.
All other Texas counties and all other States	March 15.

* * * * *

■ 6. Amend § 457.140 as follows

■ a. In section 1, in the definition of ''price election'', remove the phrase ''the provisions of'';

■ b. In section 2, remove the phrase ''FSA farm serial number'' and add the phrase ''FSA farm number'' in its place;

■ c. In section 3, in paragraph (b)(1), remove the word ''documentsdo'' and add ''documents do'' in its place;

■ d. In section 7:

■ i. In paragraph (a)(2)(ii), remove the word ''and'' at the end of the paragraph;

■ ii. Revise paragraphs (a)(3) and (a)(4);

■ iii. In paragraph (c), remove the phrase ''the sales closing date'' and add the phrase ''its sales closing date'' in its place;

■ e. In section 8:

■ i. In paragraph (c) introductory text, remove the ''al'' at the end of the paragraph;

■ ii. In paragraph (c)(2), remove the phrase ''to be'';

■ iii. In paragraph (d), remove the word ''fall'' and add ''fall-planted'' in its place;

■ f. In section 9:

■ i. Remove one of the duplicate section 9 headings ''Insurance Period'';

■ ii. In paragraph (a), remove the phrase ''fall and spring-planted types'' and add ''fall-planted and spring-planted types'' in its place;

■ e. In section 11, in paragraph (a)(6), remove the phrase ''fall-planted dry pea acreage'' and add ''fall-planted types'' in its place;

■ h. In section 13:

■ i. In Example 2, paragraph (3), remove the comma and add a semi-colon in its place and add a semi-colon at the end of the paragraph;

■ ii. In Example 2, paragraph (6), remove the number ''1.0'' and add ''1.00'' in its place;

■ iii. In Example 2, paragraph (7), remove the comma and add a semi-colon in its place;

■ iv. In paragraph (e) introductory text, remove the phrase ''If applying a moisture adjustment, it'' and add ''Any adjustment for moisture'' in its place;

■ i. In section 14, in paragraph (a), remove the word ''fall'' and add ''fall-planted'' in its place;

■ j. In section 15:

■ i. In paragraph (d), remove the phrase ''both a both fall and spring-planted types'' and add ''both fall-planted and spring-planted types'' in its place; and

■ ii. In paragraph (e)(4), remove the phrase ''insured fall-plantedacreage'' and add ''insured fall-planted acreage'' in its place.

The revision read as follows:

§ 457.108 Dry pea crop insurance provisions.

* * * * *

7. Insured Crop

(a) * * *

(3) That are not planted to plow down, graze, harvest as hay, or otherwise not planted for harvest as a mature dry pea crop; and

(4) That are not (unless allowed by the Special Provisions or by written agreement):

(i) Interplanted with another crop;

(ii) Planted into an established grass or legume; or

(iii) Planted as a nurse crop.

* * * * *

Martin Barbre,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 2020–26036 Filed 11–27–20; 8:45 am]

BILLING CODE 3410–08–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 50

RIN 3038–AE33

Swap Clearing Requirement Exemptions

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is adopting amendments to the regulations governing which swaps are exempt from the clearing requirement set forth in applicable provisions of the Commodity Exchange Act (CEA). These amendments exempt from the clearing requirement swaps entered into by certain central banks, sovereign entities, international financial institutions, bank holding companies, savings and loan holding companies, and community development financial institutions. The Commission also is publishing a compliance schedule setting forth all the past compliance dates for the 2012 and 2016 swap clearing requirement regulations. Finally, the Commission is making certain other, non-substantive technical amendments.

DATES: The effective date for this final rule is December 30, 2020.

FOR FURTHER INFORMATION CONTACT: Sarah E. Josephson, Deputy Director, at 202–418–5684 or *sjosephson@cftc.gov;* Megan A. Wallace, Senior Special Counsel, at 202–418–5150 or *mwallace@cftc.gov;* Melissa D'Arcy, Special Counsel, at 202–418–5086 or *mdarcy@cftc.gov;* Division of Clearing and Risk; or Ayla Kayhan, Office of the Chief Economist, at 202–418–5947 or *akayhan@cftc.gov,* in each case at the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

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I. Background

A. Ongoing Review of 17 CFR Part 50 Regulations and May 2020 Proposal

On May 9, 2017, the Commission published in the **Federal Register** a request for information seeking suggestions from the public for simplifying the Commission's regulations and practices, removing unnecessary burdens, and reducing costs.[1] In response, a number of commenters asked the Commission to codify certain staff no-action letters and Commission guidance, including those that are the subject of this rulemaking.[2] The Commission also engaged in an agency-wide review of its regulations and practices to make them simpler, less burdensome, and less costly.

On May 12, 2020, the Commission published a notice of proposed rulemaking[3] that would exempt from the swap clearing requirement (1) swaps entered into by certain central banks, sovereign entities, and international financial institutions (IFIs), as set forth in the preamble to the 2012 End-User Exception final rule;[4] (2) swaps entered into by four additional IFIs that previously received staff no-action letters from the Commission's Division of Clearing and Risk (DCR) in 2013 and 2017;[5] and (3) swaps entered into by certain bank holding companies and savings and loan holding companies, as well as community development financial institutions (CDFIs).[6]

The Commission also proposed revisions to part 50 intended to simplify the requirements and minimize compliance burdens for market participants. The Commission proposed to add a compliance date chart for all swaps that the Commission has determined are required to be cleared under Commission regulation § 50.4.[7] In addition, the Commission proposed improvements to the structure and organization of 17 CFR part 50 through heading changes and restructuring amendments.[8] Finally, the Commission proposed the creation of a new subpart D to distinguish 17 CFR part 50 exemptions that apply to specific swaps from the exceptions and exemptions for market participants eligible to elect an exception or exemption under subpart C.[9]

B. Swap Clearing Requirement

Title 17 CFR part 50 of the Commission's regulations implements the swap clearing requirement under section 2(h) of the CEA. The swap clearing requirement under section 2(h)(1)(A) of the CEA states that if the Commission requires a swap to be cleared, then it is unlawful for any person to engage in that swap unless the swap is submitted for clearing to a derivatives clearing organization (DCO) that is registered under the CEA or a DCO that the Commission has exempted from registration. The Commission has adopted swap clearing requirement determinations for certain classes of interest rate swaps and credit default swaps.[10] Swaps that are subject to the Commission's swap clearing requirement are described in Commission regulation § 50.4 (Clearing Requirement).

Title 17 CFR part 50 of the Commission's regulations also includes a number of exceptions to and exemptions from the Clearing Requirement. Certain of these exceptions or exemptions are based on statutory principles (*e.g.,* the end-user exception),[11] and others were adopted pursuant to the Commission's public interest exemption authority (*e.g.,* the exemption for swaps entered into by certain cooperatives and the exemption for swaps between affiliated entities).[12]

C. Swaps With Central Banks, Sovereign Entities, and IFIs

In the preamble to the 2012 End-User Exception, the Commission determined that foreign central banks, foreign governments, and IFIs should not be subject to the swap clearing requirement set forth in section 2(h)(1) of the CEA.[13] This determination was based on considerations of comity and was in keeping with the traditions of the international system.[14] The Commission also stated that the Bank for International Settlements (BIS), of which the Federal Reserve and foreign central banks are members, should be considered to be a foreign central bank, and, therefore, swaps entered into by the BIS should not be subject to the Clearing Requirement.[15]

The Commission provided several reasons in support of its determination. First, the Federal Reserve Banks and the Federal Government are not subject to the Clearing Requirement under the CEA.[16] Therefore, the Commission

[1] *See* Project KISS, 82 FR 21494 (May 9, 2017) and Project KISS, 82 FR 23765 (May 24, 2017).

[2] *See, e.g.,* Comment letter from the Institute of International Banking, International Swaps and Derivatives Association, Inc., and Securities Industry and Financial Markets Association, dated July 24, 2017, at 2.

[3] Swap Clearing Requirement Exemptions, 85 FR 27955 (May 12, 2020) (hereinafter referred to as the May 2020 Proposal).

[4] May 2020 Proposal at 27957–27961 (citing the End-User Exception to the Clearing Requirement for Swaps, 77 FR 42560 (Jul. 19, 2012)).

[5] *See* CFTC Letter No. 13–25 (June 10, 2013) (providing no-action relief to the Corporación Andina de Fomento); CFTC Letter No. 17–57 (Nov. 7, 2017) (providing no-action relief to Banco Centroamericano de Integración Económica); CFTC Letter No. 17–58 (Nov. 7, 2017) (providing no-action relief to the European Stability Mechanism and for which an expiration date was added in CFTC Letter Nos. 19–23 (Oct. 16, 2019), 20–13 (Apr. 14, 2020), and 20–22 (Aug. 27, 2020) (providing that no-action relief to the European Stability Mechanism expires on December 31, 2020)); and CFTC Letter No. 17–59 (Nov. 7, 2017) (providing no-action relief to the North American Development Bank).

[6] The May 2020 Proposal included a supplemental notice of proposed rulemaking related to an August 2018 proposal issued by the Commission. *See* Amendments to Clearing Exemption for Swaps Entered Into by Certain Bank Holding Companies, Savings and Loan Holding Companies, and Community Development Financial Institutions, 83 FR 44001 (Aug. 29, 2018) (hereinafter referred to as the August 2018 Proposal). Both the August 2018 Proposal and the May 2020 Proposal (together, the Proposals) proposed to codify CFTC Letter No. 16–01 (Jan. 8, 2016) (providing no-action relief to certain small bank holding companies and savings and loan holding companies pursuant to a request from the American Bankers Association); and CFTC Letter No. 16–02 (Jan. 8, 2016) (providing no-action relief to community development financial institutions pursuant to a request from a coalition of such entities).

[7] May 2020 Proposal, 85 FR at 27962.

[8] For example, the Commission proposed that the provisions exempting eligible banks, savings associations, farm credit institutions, and credit unions from the definition of ''financial entity'' for purposes of the swap clearing requirement be moved to a separate regulation at 17 CFR 50.53 so that the exemption is easier to locate and the conditions to claim the exemption are set forth more clearly. *See* May 2020 Proposal, 85 FR at 27962–27963.

[9] *See id.* at 27959–27960.

[10] Clearing Requirement Determination Under Section 2(h) of the CEA, 77 FR 74284 (Dec. 13, 2012) (hereinafter referred to as the 2012 Clearing Requirement Determination) and Clearing Requirement Determination Under Section 2(h) of the CEA for Interest Rate Swaps, 81 FR 71202 (Oct. 14, 2016) (hereinafter referred to as the 2016 Clearing Requirement Determination).

[11] 2012 End-User Exception, 77 FR 42560.

[12] Clearing Exemption for Certain Swaps Entered Into by Cooperatives, 78 FR 52286 (Aug. 22, 2013); Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 FR 21750 (Apr. 11, 2013); and Exemption from the Swap Clearing Requirement for Certain Affiliated Entities—Alternative Compliance Frameworks for Anti-Evasionary Measures, 85 FR 44170 (Jul. 22, 2020).

[13] *See* 2012 End-User Exception, at 42561–42562.

[14] *See id.*

[15] *Id.* at 42561, n.13.

[16] *Id.* at 42562. Under the Dodd-Frank Act, Congress specifically excluded any agreement,

Continued

stated it would expect that if any part of the Federal Government, the Federal Reserve Banks, or IFIs of which the United States is a member were to engage in swaps in a foreign jurisdiction, the actions of those entities with respect to those swaps should not be subject to foreign regulation.[17] Second, the Commission stated that canons of statutory construction ''assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.'' [18] Third, the Commission noted that IFIs operate with the benefit of certain privileges and immunities under U.S. law, which indicates that such entities may be treated similarly under certain circumstances.[19] Finally, the Commission stated that there is nothing in the text or legislative history of the swap-related provisions of the Dodd-Frank Act to establish that Congress intended to deviate from the traditions of the international system by subjecting foreign central banks, foreign governments, or IFIs to the Clearing Requirement set forth in section 2(h)(1) of the CEA.[20]

In the preamble to the 2012 End-User Exception, the Commission also determined that the IFIs that would be exempt from the Clearing Requirement to be those institutions defined as such in section 262r(c)(2) of Title 22 of the U.S. Code,[21] and the multilateral development banks (MDBs) included in the Proposal for the Regulation of the European Parliament and of the Council of the European Union Final Compromise Text, Article 1(4a(a)) (March 19, 2012).[22] Under EMIR, European authorities exempted 12 MDBs from all requirements apart from reporting obligations.[23] Based on these two sources, the Commission identified 17 IFIs that would not be subject to the Clearing Requirement under its policy determination.[24]

D. DCR No-Action Letters for Four Additional IFIs

Based on the Commission's action in the preamble to the 2012 End-User Exception, DCR issued staff no-action letters to four additional IFIs stating that the division would not recommend the Commission take enforcement action against such entities for not clearing swaps that otherwise would be subject to the Clearing Requirement, provided the IFIs satisfied certain conditions.[25] These institutions include: (1) The Corporación Andina de Fomento (CAF), an economic development financing institution established pursuant to a treaty among 10 Latin American countries;[26] (2) Banco Centroamericano de Integración Económica (CABEI), an economic development financing institution established pursuant to a treaty among 11 Latin American countries, Spain, and Taiwan;[27] (3) the European Stability Mechanism (ESM), a lending institution established by European Union member states to provide emergency financial assistance to member states located in the Eurozone;[28] and (4) the North American Development Bank (NADB), a financing institution established by the United States and Mexico under the auspices of the North American Free Trade Agreement to finance environmentally sustainable infrastructure projects in the region along the U.S.-Mexican border.[29] In their request letters, CAF, CABEI, ESM, and NADB each stated that their functions, missions, and ownership structures are analogous to the functions, missions, and ownership structures of the IFIs included in the 2012 End-User Exception.[30]

E. DCR No-Action Letters for Certain Bank Holding Companies and Savings and Loan Holding Companies and CDFIs

In 2016, DCR staff issued a no-action letter providing that the division would not recommend enforcement action against certain bank holding companies and savings and loan holding companies for not clearing swaps

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contract, or transaction a counterparty of which is a Federal Reserve bank, the Federal Government, or a Federal agency that is expressly backed by the full faith and credit of the United States from the definition of a swap under section 1a(47)(B)(ix) of the CEA. Public Law 111–203, 124 Stat. 1376 (2010). Only transactions that are swaps are subject to the Clearing Requirement. *See* section 2(h) of the CEA.

[17] *Id.* at 42561–42562.

[18] *Id.* at 42562 (citing *F. Hoffman-LaRoche Ltd.* v. *Empagran S.A.,* 542 U.S. 155, 164 (2004)).

[19] *Id.* at 42562 (citing various provisions of the U.S. Code and a CFTC staff interpretative letter, which stated that ''[b]ased on the unique attributes and status of the World Bank Group as a multinational member agency, . . . the CFTC believes that the World Bank Group need not be treated as a U.S. person for purposes of application of the CFTC's Part 30 rules.''). The Commission also cited to a determination of the Board of Governors of the Federal Reserve that the Bank Holding Company Act does not apply to foreign governments because they are not ''companies'' as such term is defined in the Bank Holding Company Act. *Id.*

[20] *Id.* at 42562. The Commission also noted that if a foreign central bank, foreign government, or IFI enters into an uncleared swap with a counterparty that is subject to the CEA and Commission regulations with regard to that transaction, then the counterparty should still comply with applicable Commission requirements under parts 23 and 45 of the Commission's regulations. *Id.*

[21] 22 U.S.C. 262r(c)(2). The IFIs included in the U.S. Code in 2011 were the International Monetary Fund, International Bank for Reconstruction and Development, European Bank for Reconstruction and Development, International Development Association, International Finance Corporation, Multilateral Investment Guarantee Agency, African Development Bank, African Development Fund, Asian Development Bank, Inter-American Development Bank, Bank for Economic Cooperation and Development in the Middle East and North Africa, and Inter-American Investment Corporation.

[22] 77 FR at 42561 n.14. This provision was enacted as Article 1(5)(a) of the European Market Infrastructure Reform (EMIR), and exempts those entities from all but the reporting requirement of EMIR. *See* Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, 2012 OJ (L201)1. Section 4.2 of part 1 of Annex VI to Directive 2006/48/EC, available at *http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012R0648* and *http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0048. See also* discussion below regarding subsequent updates to EMIR.

[23] The 12 entities exempt from the EMIR were the following: (1) International Bank for Reconstruction and Development; (2) International Finance Corporation; (3) Inter-American Development Bank; (4) Asian Development Bank; (5) African Development Bank; (6) Council of Europe Development Bank; (7) Nordic Investment Bank; (8) Caribbean Development Bank; (9) European Bank for Reconstruction and Development; (10) European Investment Bank; (11) European Investment Fund; and (12) Multilateral Investment Guarantee Agency. The Commission noted that the exemption for IFIs would be consistent with EMIR and other foreign laws. 77 FR at 42561 n.14.

[24] The 17 international financial institutions identified in the preamble to the 2012 End-User Exception final rule are: (1) African Development Bank; (2) African Development Fund; (3) Asian Development Bank; (4) Bank for Economic Cooperation and Development in the Middle East and North Africa; (5) Caribbean Development Bank; (6) Council of Europe Development Bank; (7) European Bank for Reconstruction and Development; (8) European Investment Bank; (9) European Investment Fund; (10) Inter-American Development Bank; (11) Inter-American Investment Corporation; (12) International Bank for Reconstruction and Development (part of the World Bank Group); (13) International Development Association (part of the World Bank Group); (14) International Finance Corporation (part of the World Bank Group); (15) International Monetary Fund; (16) Multilateral Investment Guarantee Agency (part of the World Bank Group); and (17) Nordic Investment Bank. 77 FR at 42561–42562 n.14.

[25] DCR required each IFI to comply with other provisions of the CEA and the Commission's regulations, such as the recordkeeping and reporting requirements under parts 23 and 45 of the Commission's regulations, which would apply to an uncleared swap entered into by an IFI opposite a counterparty that is otherwise subject to the CEA and Commission regulations.

[26] CFTC Letter No. 13–25.

[27] CFTC Letter No. 17–57.

[28] CFTC Letter No. 17–58. In CFTC Letter No. 20–22, on August 27, 2020, DCR staff extended the expiration date of this no-action letter until December 31, 2020. The relief provided in CFTC Letter No. 20–22 will continue until the effective date of these final rules.

[29] CFTC Letter No. 17–59.

[30] For example, NADB was included as a MDB in the report required by 22 U.S.C. 262r(c)(2) since as early as 2012. The 2012 Report to Congress from the Chairman of the National Advisory Council on International Monetary and Financial Policies (December 2013) (referred to herein as the 2012 NAC Report), and subsequent reports, are available at *https://www.treasury.gov/resource-center/international/development-banks/Pages/congress-index.aspx.*

subject to the Clearing Requirement if such entities satisfy certain conditions.[31] At the same time, staff issued a no-action letter providing that DCR would not recommend enforcement action against CDFIs for not clearing certain swaps subject to the Clearing Requirement, under specific conditions.[32] These bank holding companies, savings and loan holding companies, and CDFIs were not eligible to elect an exception to the Clearing Requirement under Commission regulation § 50.50(d) because they are not depository institutions.

The 2016 DCR no-action letter for bank holding companies and savings and loan holding companies applies only to holding companies with no more than $10 billion in consolidated assets.[33] This limitation is consistent with the statutory provisions under section 2(h)(7)(C)(ii) of the CEA and Commission regulation § 50.50(d) applicable to depository institutions and savings associations. The DCR letter also requires that such a holding company be using swaps to hedge or mitigate commercial risk and notify the Commission how it generally meets the obligations associated with entering into uncleared swaps.[34] Many bank holding companies and savings and loan holding companies enter into interest rate swaps to hedge interest rate risk that they incur as a result of issuing debt securities or making loans to finance their subsidiary banks or savings associations.[35] In addition, these swaps generally have a notional amount of $10 million or less, and the bank holding companies and savings and loan holding companies enter into swaps less frequently than other swap counterparties. Further, the bank holding company or savings and loan holding company, rather than the subsidiary bank or savings association, must enter into the swap in order to gain hedge accounting treatment.[36]

Also, in 2016, in response to a request from a coalition of CDFIs, DCR staff issued a no-action letter providing that the division would not recommend that the Commission take enforcement action against a CDFI for failure to comply with the Clearing Requirement, provided certain conditions are met.[37] DCR limited the letter to CDFIs certified as such by the U.S. Department of the Treasury that engage in no more than 10 interest rate swaps per year, with an aggregate notional value cap of $200 million per year.[38] However, DCR recognized that there are public interest benefits that may be served by permitting CDFIs to engage in limited swaps activity that serves smaller, local communities.[39] DCR also was persuaded that status as a CDFI, pursuant to certification by the Treasury Department's Community Development Financial Institutions Fund (CDFI Fund), would ensure that CDFIs operate under a specific community development organizational mission and provide financial and community development services to a targeted market.[40]

II. Final Rule for Swaps Not Subject to the Clearing Requirement

A. May 2020 Proposal

On May 12, 2020, the Commission proposed amendments to Part 50 of the Commission's regulations to create new exemptions from required clearing consistent with the policy statements made by the Commission in the 2012 End-User Exception and six no-action letters issued by DCR beginning in 2013, to add a compliance date chart, and to make other non-substantive technical amendments. The Commission requested comments from market participants on all aspects of the May 2020 Proposal.

B. Comments Received

The Commission received ten comment letters in response to the May 2020 Proposal.[41] Nearly all the comments letters supported the Commission's proposal. Specific aspects of these comments, including suggested changes to the rule text and other clarifications, are discussed in detail below.

One commenter, Better Markets, expressed opposition to the proposed exemptions for a number of reasons. Better Markets stated that the Commission's proposal to permit financial entities to elect not to clear swaps subject to the Clearing Requirement is unnecessarily complex, undermines the Dodd-Frank Act's financial reform effort, and could serve as a drain on liquidity in the cleared swap market. The Commission believes that the final rules make the overall regulatory framework for cleared swaps less complex, codify longstanding practice, and are narrowly tailored to limit any impact on cleared swaps market liquidity.

C. Swaps Entered Into by Central Banks, Sovereign Entities, and IFIs

In the May 2020 Proposal, the Commission proposed to codify its determination that swaps entered into by central banks, sovereign entities, and IFIs, set forth in the preamble to the 2012 End-User Exception final rule,[42] are not subject to the Clearing Requirement under section 2(h)(1) of the CEA.[43] The Commission received six comment letters addressing this aspect of the proposal.[44] After considering the

[31] CFTC Letter No. 16–01 (Jan. 8, 2016) (providing no-action relief to certain small bank holding companies and savings and loan holding companies pursuant to a request from the American Bankers Association).

[32] CFTC Letter No. 16–02 (Jan. 8, 2016) (providing no-action relief to CDFIs pursuant to a request from a Coalition of CDFIs).

[33] Under CFTC Letter No. 16–01, the limitation of no more than $10 billion in consolidated assets means that the aggregate value of all the assets of all the bank holding company's or savings and loan holding company's subsidiaries on the last day of each subsidiary's most recent fiscal year, do not exceed $10 billion. CFTC Letter No. 16–01, at 4.

[34] *See* CFTC Letter No. 16–01, at 4.

[35] CFTC Letter No. 16–01, at 3.

[36] *Id.*

[37] *See* CFTC Letter No. 16–02, at 4. DCR required CDFIs to file a notice of election and additional information as described in Commission regulation § 50.50(b), and limited the election of the exception to swaps entered into for the sole purpose of hedging or mitigating commercial risk as described in Commission regulation § 50.50(c). *Id.* Letter No. 16–02 also noted that the letter did not excuse the affected persons from compliance with any other applicable requirements contained in the CEA or in the Commission's regulations. *Id.*

[38] *See* Certification as a Community Development Financial Institution, 12 CFR 1805.201.

[39] CFTC Letter No. 16–02, at 3.

[40] Community development financial institutions are small in scale and tend to serve smaller, local markets. They operate under an organizational mission of providing financial and community development services to underserved target markets. Community development financial institutions are entities that must apply for, and receive, certification from the CDFI Fund. The CDFI Fund was created by section 104 of the Community Development Banking and Financial Institutions Act of 1994, which is contained in Title I of the Riegle Community Development and Regulatory Improvement Act of 1994. *See* Public Law 103–325, 108 Stat. 2160 (1994). *See* CFTC Letter No. 16–02, at 3.

[41] The Commission received comments from the following: (1) American Bankers Association; (2) Asian Infrastructure Investment Bank (AIIB); (3) BIS; (4) Better Markets, Inc. (Better Markets), (5) Chris Barnard; (6) the Capital Impact Partners, Community Housing Capital, Enterprise Community Loan Fund, IFF, Low Income Investment Fund, Reinvestment Fund, and Self-Help Ventures Fund (CDFI Coalition); (7) ESM; (8) Inter-American Development Bank, the Inter-American Investment Corporation, the International Bank for Reconstruction and Development, and the International Finance Corporation (collectively referred to as Commenting IFIs); (9) New South Wales Treasury Corporation and (10) the Opportunity Finance Network. All comments are available on the Commission's website at: *https://comments.cftc.gov/PublicComments/CommentList.aspx?id=3112.*

[42] *See* 2012 End-User Exception, 77 FR at 42561–42562.

[43] *Id.* at 42562. As discussed in the preamble to the May 2020 Proposal, the Commission will refer to ''foreign governments'' as ''sovereign entities'' because it considers ''foreign governments'' and ''sovereign entities'' to mean the same thing. 85 FR at 27956 n.7, 27959.

[44] The following comments addressed this proposal: Chris Barnard, AIIB, ESM, BIS, New South Wales Treasury Corporation, and Commenting IFIs.

comments, the Commission is adopting the rules largely as proposed. The final regulations are consistent with the policy the Commission set out in the preamble to the 2012 End-User Exception, and in finalizing the exemption for swaps entered into by central banks and sovereign entities in regulation § 50.75 and the exemption for swaps entered into by IFIs in regulation § 50.76, the Commission is providing legal certainty that such swaps entered into by a narrow group of entities are not subject to the Clearing Requirement.

In response to comments received, the Commission is making one important modification to the final regulations to clarify that the exemption is not dependent on the exempted swaps being reported to a swap data repository under Commission regulation §§ 45.3 and 45.4, and this reporting obligation does not fall to central banks, sovereign entities, or IFIs.[45] As discussed further below, the Commission did not intend this result and is modifying the rule text accordingly.

1. Definition of Central Bank—§ 50.75(a)

The Commission proposed to define ''central bank'' to mean a reserve bank or monetary authority of a central government (including the Board or Governors of the Federal Reserve System or any of the Federal Reserve Banks) or the Bank for International Settlements. The Commission did not receive any comment on its proposed definition of central bank and is adopting the definition for ''central bank'' as proposed.

2. Definition of Sovereign Entity—§ 50.75(b)

The Commission proposed to define ''sovereign entity'' to mean a central government (including the U.S. Government), or an agency, department, or ministry of a central government. In the 2012 End-User Exception final rule, the Commission referred to certain exempt swap counterparties as ''foreign governments.'' The term ''foreign government'' is intended to refer to sovereigns, similar to the U.S. Federal Government, that are located outside of the United States. Because the Commission distinguished the Federal Government from state and local government entities, the term ''foreign government'' is intended to apply only to the Federal level of governmental organizations.[46]

The Commission requested comment on the scope of the proposed definition and whether an alternative definition should be adopted. The Commission received one comment from New South Wales Treasury Corporation addressing this issue and proposing alternative definitions for consideration.

The commenter stated that comity and the traditions of the international system support including foreign states and instrumentalities (such as agencies, departments, or ministries) under the definition of ''sovereign entity.'' The commenter further stated that the Commission should not limit its concept of ''sovereign entities'' based on the American distinction between states and the Federal Government because this would adversely impact foreign governments that operate under systems where the Federal and state governments exist as independent bodies but operate within a financially integrated system. The commenter proposed that the Commission consider alternative definitions of ''sovereign entity'' including: (1) A definition that includes all foreign state governments, agencies, departments, and ministries; (2) a definition that includes named jurisdictions that have a constitutional basis for sovereign authority based on a comparable recognition of the foreign state or public authority as a ''sovereign'' under national laws; (3) a definition based on recognition of foreign public sector entities based on government (state or Federal) ownership; or (4) a definition based on the alignment of an entity with capital adequacy standards under foreign laws.

The Commission considered this comment and its proposed alternative definitions of ''sovereign entity.'' The Commission believes the definition of ''sovereign entity'' adopted in this final rule appropriately limits the exemption in a manner that is consistent with the 2012 End-User Exception and provides clarity regarding the scope of swaps that are not subject to the Clearing Requirement. The second and fourth alternatives proposed by the commenter would require the Commission periodically to reassess which entities are included in the definition based on geopolitical events or whether a specific entity meets capital adequacy standards under foreign law. The Commission does not believe that these alternatives provide standards that are feasible to implement; nor are they helpful in identifying foreign government entities that are similar to the U.S. Federal Government. Rather, the Commission has purposefully defined the term ''sovereign entity'' so that it excludes the concept of ''state governments.''

The first and third alternatives proposed by the commenter would add references to foreign state governments or entities based on state government ownership. Under the best reading of section 2(h)(7) of the CEA, it is appropriate to limit the exemption from the Clearing Requirement to national governments thereby excluding state, regional, provincial, or municipal governments. This limitation applies equally to U.S. and non-U.S. governmental entities. The Commission continues to believe, as it did in 2012, that most governmental entities are predominantly engaged in non-banking and non-financial activities related to their core public functions and, therefore, are not likely to be ''financial entities'' ineligible to elect an exception from the Clearing Requirement under section 2(h)(7)(C) of the CEA.[47] The activities of state and local government entities in the United States and internationally that might be in the business of banking or financial in nature under section 2(h)(7)(C)(i)(VIII) of the CEA ''are likely to be incidental, not primary, activities of those entities.''[48] Nevertheless, because some state or local government entity's swap activity may be commercial in nature, the Commission does not believe that a *per se* exclusion for state and local government entities from the Clearing Requirement is appropriate. Accordingly, the Commission has determined not to include these entities or any of the four suggested alternatives in the definition of ''sovereign entity'' and is adopting the definition of ''sovereign entity'' as proposed.

In addition, adopting any of the alternative definitions of ''sovereign entity'' proposed by the commenter would diverge from the approach taken by the Commission in the margin for uncleared swaps rules under Part 23. Maintaining consistency between the application of the Clearing Requirement and the application of the margin for uncleared swaps regulations avoids introducing unnecessary complication and possible confusion for swap market participants due to the interrelationship between the two sets of regulations.

[45] Under one reading of the proposed rule text, the exemption is dependent on reporting the swap to a swap data repository. *See* May 2020 Proposal, 85 FR at 27959.

[46] 77 FR at 42562. The Commission stated that Congress did not expressly exclude state and local government entities form the ''financial entity'' definition. On the contrary, in section 2(h)(7)(C)(i)(VII) of the CEA, Congress expressly included employee benefit plans of state and local governments in the ''financial entity'' definition, thereby prohibiting them from using the end-user exception. *Id.*

[47] 85 FR at 27960 (citing 2012 End-User Exception, 77 FR at 42562–42563).

[48] *Id.* at 27960 (quoting 2012 End-User Exception, 77 FR at 42562–42563).

3. Definition of IFI—§ 50.76(b)

As proposed, regulation 50.76 would define ''international financial institution'' to mean the 17 entities the Commission identified in the 2012 End-User Exception final rule,[49] the four entities to whom DCR issued no-action letters in 2013 and 2017,[50] the Islamic Development Bank,[51] and any other entity that provides financing for national or regional development in which the U.S. Government is a shareholder or contributing member.

The Commission received one comment on the definition of IFI. The Asian Infrastructure Investment Bank (AIIB) requested that it be included as an IFI because it is similar to other IFIs under proposed regulation § 50.76(b).[52] According to AIIB, inclusion on the list would encourage international comity and promote cross-border cooperation, particularly with regard to European Union authorities because AIIB is exempt from the clearing obligation under European law.[53] AIIB also states that the CEA does not require that the U.S. Government be a shareholder or contributing member of a foreign institution in order to qualify for an exemption from the Clearing Requirement, and ten of the 22 institutions included in regulation 50.76 do not have the U.S. Government as a shareholder or contributing member.[54] AIIB argues that it is comparable to the other IFIs under the proposed rule and should be afforded similar treatment.[55]

The Commission does not believe it would be appropriate to include AIIB as an IFI for purposes of an exemption from the Clearing Requirement for a number of reasons. First, the CEA does not prescribe that the swaps of all foreign central banks, foreign sovereign entities, or IFIs should be exempt from the Clearing Requirement. Rather, pursuant to section 4(c) of the CEA, the Commission must find that exempting swaps entered into with AIIB from required clearing is consistent with public interest, taking into account principles of international comity.

In the 2012 End-User Exception, the Commission did not exempt all IFIs from the Clearing Requirement. Rather, the Commission based its identification of IFIs on the expectation that if any of the Federal Government, Federal Reserve Banks, or *international financial institutions of which the United States is a member* were to engage in swap transactions in foreign jurisdictions, the actions of those entities with respect to those transactions would not be subject to foreign regulation.[56] As explained above, the Commission determined that the exemption from the Clearing Requirement would apply to IFIs defined under 22 U.S.C. 262r(c)(2) and the IFIs defined as MDBs under the proposal for the regulation that became Regulation (EU) No 648/2012, of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories (EMIR).[57]

The IFIs defined in 22 U.S.C. 262r(c)(2) are entities in which the United States is a direct shareholder (or member) and therefore is able to influence the IFI and promote U.S. foreign policy, economic interests, and national security interests abroad.[58] Thus, while there is no requirement in the CEA that the U.S. Government be a shareholder or contributing member of an IFI in order to qualify for an exemption from the Clearing Requirement, the 2012 End-User Exception established a policy that recognized the importance of furthering U.S. policy goals when the Commission listed IFIs of which the United States is a member as the type of entity it would expect to be entitled to relief from mandatory clearing in foreign jurisdictions.

Further, it is appropriate to exempt the swaps entered into by CAF, CABEI, ESM, and NADB from the Clearing Requirement.[59] Each of these entities is sufficiently similar to the IFIs identified in the 2012 End-User Exception in that each entity's function, mission, and ownership structure (*i.e.,* comprised of national authorities) is analogous to those IFIs. In addition, it is appropriate to include the Islamic Development Bank as an IFI because it is included as a MDB under Commission regulation § 23.151, the definitions section for the margin for uncleared swaps rules. As noted above, consistency between the regulations for required clearing and margin for uncleared swaps helps avoid unnecessary complication and reduce possible confusion among market participants due to the interrelationship between the two sets of regulations.

AIIB differs from the other IFIs in two important respects. First, as AIIB notes, the United States is not a shareholder under AIIB's Articles of Agreement,[60] and the Commission has indicated that the exemption from the Clearing Requirement should apply to IFIs of which the United States is a member. The United States made a determination not to become a shareholder or contributing member of AIIB.[61] This

[49] The 17 IFIs identified in the 2012 End-User Exception final rule are the following: (1) African Development Bank; (2) African Development Fund; (3) Asian Development Bank; (4) Bank for Economic Cooperation and Development in the Middle East and North Africa; (5) Caribbean Development Bank; (6) Council of Europe Development Bank; (7) European Bank for Reconstruction and Development; (8) European Investment Bank; (9) European Investment Fund; (10) Inter-American Development Bank; (11) Inter-American Investment Corporation; (12) International Bank for Reconstruction and Development (part of the World Bank Group); (13) International Development Association (part of the World Bank Group); (14) International Finance Corporation (part of the World Bank Group); (15) International Monetary Fund; (16) Multilateral Investment Guarantee Agency (part of the World Bank Group); and (17) Nordic Investment Bank.

[50] CAF; CABEI; ESM; and NADB.

[51] The Islamic Development Bank is included in the definition of ''multilateral development bank'' under Commission regulation § 23.151, the definitions applicable to the Commission's margin for uncleared swaps rules and was included as an IFI in the May 2020 Proposal for this reason.

[52] AIIB notes that in 2018 it submitted a request to DCR for no-action relief from the Clearing Requirement based on the same factors discussed in the DCR letters issued in 2013 and 2017. AIIB Letter at 3, n. 8. AIIB is a MDB that began operating on January 16, 2016. AIIB is an international organization with its principal office located in Beijing, People's Republic of China.

[53] AIIB Comment at 4. AIIB explains that it could not have been included as a MDB under European law in 2012 because it was not yet established. AIIB, along with CAF and CABEI, is included on a new list of MDBs that are not subject to the European clearing obligation under Regulation (EU) No 375/2013, Article 117(1) and (2)(p), available at *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02019R0876-20200627.* AIIB argues that the European Union's subsequent recognition of AIIB as a MDB should mean that it is *de facto* an IFI for purposes of an exemption from the CFTC's Clearing Requirement.

[54] AIIB Comment at 4. These institutions include the Bank for Economic Cooperation in the Middle East and North Africa, Caribbean Development Bank, Council of Europe Development Bank, European Investment Bank, European Investment Fund, Islamic Development Bank, Nordic Investment Bank, CABEI, CAF, and ESM.

[55] AIIB further states that it has not entered into any swaps with any U.S. counterparty because it is not exempt from the Clearing Requirement and margin requirements. AIIB Comment at 8.

[56] 77 FR at 42561–42562 (emphasis added).

[57] 77 FR at 42561 n.14.

[58] The United States also can exert this influence through its membership in an IFI that is a member of another IFI. *See generally* 2012 NAC Report.

[59] The Commission notes that NADB was considered a MDB in 2012 and is included in the 2012 NAC Report.

[60] The Articles of Agreement may be found here: *https://www.aiib.org/en/about-aiib/who-we-are/financing-operations/index.html.* Under the Articles of Agreement, the number of shares is set at 1,000,000. Membership is divided between regional members and non-regional members, with regional members controlling 750,000 shares, and non-regional members controlling 250,000 shares. China owns 297,804 of the 750,000 regional member shares, with 16,150 shares unallocated.

[61] According to a report from the Congressional Research Service, AIIB was conceived in 2013 as part of China's ''one belt, one road'' policy. The United States did not join this development bank for two reasons. First, China's voting share (28.7%) is substantially larger than that of the second-largest AIIB member nation (India at 8.3%). This is the

Continued

decision was based on, among other things, concerns that the goals of AIIB may not necessarily align with the interest of U.S. foreign policy, economic interests, and national security interests. It would not now be appropriate for the Commission to treat AIIB as if the United Stated had elected to become a member of AIIB. Further, with respect to the IFIs included in regulation 50.76, the member governments generally have a collective majority control and governance over the entities. In AIIB, China is the largest shareholder (controlling 297,804 of 1,000,000 shares), with no other member government holding a block of shares that could realistically influence policy.[62]

Second, AIIB's stated purpose appears to be broader than the entities added pursuant to DCR no-action letters. The stated purpose of CAF is ''to promote sustainable development and regional integration, by providing multiple financial services to clients in the public and private sectors of its Shareholder Countries.'' [63] CABEI's objective is ''to promote the economic integration and the balanced economic and social development of the Central American region.'' [64] ESM's purpose is ''to mobilize funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States.'' [65]

By contrast, AIIB's purpose is to ''foster sustainable economic development, create wealth and improve infrastructure connectivity in Asia by investing in infrastructure and other productive sectors'' and ''promote regional cooperation and partnership in addressing development challenges by working in close cooperation with other multilateral and bilateral development banks.'' [66] The Commission notes AIIB's broader purpose—particularly to create wealth—along with AIIB's comments that ''AIIB is posed to be a major issuer in the international capital markets'' and ''will be required to negotiate a significant volume of swaps in connection with issuances under this program'' goes beyond other IFIs that serve the public interest needs of developing countries through lending capital.[67]

Finally, the Commission is not persuaded by AIIB's argument that international comity with European authorities will be enhanced by exempting AIIB's swaps from the CFTC's Clearing Requirement. Global authorities, including the CFTC and European authorities, have long acknowledged that there will be differences in the scope of products and participants covered by their respective mandatory clearing regimes.[68] In addition, the relevant country for purposes of considering international comity with regard to AIIB is more likely to be China given that AIIB's headquarters are in Beijing. The Commission notes that China has issued a clearing mandate for Renminbi interest rate swaps, however, the Commission has not determined that such swaps are required to be cleared.

For these reasons, the exclusion of AIIB from the definition of ''international financial institution'' for purposes of the Clearing Requirement is an appropriate exercise of the Commission's discretion under section 4(c) of the CEA and is consistent with the 2012 End-User Exception.[69]

D. Exemption for Swaps With Central Banks, Sovereign Entities, and IFIs—§ 50.75(a) and 50.76(a)

Proposed regulation 50.75(a) would exempt from the Clearing Requirement swaps entered into by central banks and sovereign entities. Proposed regulation 50.76(a) would exempt from the Clearing Requirement swaps entered into with IFIs. Under both proposed rules, the Commission included the phrase ''and this part if reported to a swap data repository pursuant to §§ 45.3 and 45.4 of this chapter.''

The Commission received two comments on the inclusion of this reporting requirement. Both commenters, the BIS and the Commenting IFIs, supported the codification of the proposed exemptions from the Clearing Requirement, but noted that the Commission did not impose a reporting requirement on central banks, sovereign entities and IFIs in the 2012 End-User Exception. Rather, the commenters explained that under current market practice their swap counterparties report the swap to a swap data repository. The commenters stated that the Commission should clarify that the eligibility to claim an exemption is not conditioned on: (i) The central bank, sovereign entity, or IFI itself reporting the swap to a swap data repository; or (ii) its counterparty reporting the swap to a swap data repository.[70]

The Commission agrees with the comments received and did not intend to impose a reporting requirement on central banks, sovereign entities, or IFIs under regulations 50.75(a) and 50.76(a). The Commission is revising the text of the regulation to delete the reference to

largest gap between first and second largest shareholders at any existing MDB. Second, there are two key differences in governance structures: AIIB does not have a resident board of executive directors that represents member countries' interests on a day-to-day basis; and AIIB gives more decision-making authority to regional countries and its largest shareholder (China). Congressional Research Service, Asian Infrastructure Investment Bank, R44754, at 8–10 (Feb. 3, 2017).

[62] *Id.*

[63] Article 3, Agreement Establishing Corporación Andina de Fomento (March 2015).

[64] Article 2, CABEI Constitutive Agreement (Aug. 22, 2018).

[65] Article 3, Treaty Establishing ESM (Feb. 2, 2012), available at *https://www.esm.europa.eu/legal-documents/esm-treaty.*

[66] Article 1, AIIB's Articles of Agreement (Dec. 25, 2015), available at *https://www.aiib.org/en/about-aiib/basic-documents/articles-of-agreement/index.html.*

[67] AIIB Letter at 7.

[68] 2016 Clearing Requirement Determination, 81 FR at 71203–71205 (providing an overview of relevant clearing mandates adopted in non-U.S. jurisdictions with which the CFTC sought to align its clearing requirement, despite differences in terms of product and participant scope). *See also* the International Organization of Securities Commissions' Information Repository for Central Clearing Requirements for OTC Derivatives (last updated Dec. 12, 2019), available at *https://www.iosco.org/publications/?subsection=information_repositories.*

[69] The Commission also notes that its decision regarding the scope of the definition of IFI is consistent with the Commission's recently issued Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 FR 56924 (Sep. 14, 2020). In the context of determining the registration threshold for swap dealers, the Commission stated that the term ''U.S. person'' does not include the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies and pension plans, and any other similar international organizations, and their agencies and pension plans. 85 FR at 56937. The Commission based its definition on 22 U.S.C. 262r(c)(2) and the European Union's 2012 regulation on ''OTC derivatives, central counterparties and trade repositories.'' *Id.* (citations omitted). Additionally, the Commission stated there is nothing in the text or history of the swap-related provisions of Title VII to suggest that Congress intended to deviate from the traditions of the international system by including such IFIs within the definitions of the term ''U.S. person.'' *Id.* (quoting Further Definition of Swap Dealer, Security-Based Swap Dealer, Major Swap Participant, Major Security-Based Swap Participant and Eligible Contract Participant, 77 FR 30596, 30692 n.1189 (May 23, 2012) (citing to 22 U.S.C. 262r(c)(2) and the 2012 European Union definition for support in identifying IFIs as excluded from the definition of ''U.S. person'' as a discretionary and appropriate exercise of international comity-based doctrines). Finally, as noted above, the list of IFIs recognized in the European Union has since been superseded and updated in Regulation (EU) No 575/2013, Article 117(2).

[70] *See* Commenting IFIs comment at 4–5 and BIS comment at 2–4.

swap data repository reporting.[71] This edit also is intended to respond to commenters concerns that a counterparty's failure to report a swap to a swap data repository could make those swaps ineligible for the exemption, even if the central bank, sovereign entity, or IFI had no knowledge of the counterparty's failure to report appropriately. The removal of the citation to part 45 reporting from the regulation is intended to permit current practice to continue regarding which counterparty reports the swap to a swap data repository. The removal of the citation is not intended to relieve any swap counterparty's independent obligation to report the swap to a swap data repository under Commission regulation §§ 45.3 and 45.4.

E. Data Related to Swaps Entered Into by IFIs

The Commission requested comment on the data it presented regarding the use of swaps by IFIs from the Depository Trust & Clearing Corporation's (DTCC's) swap data repository, DTCC Data Repository (DDR). As the Commission noted in the May 2020 Proposal, from January 1, 2018 to December 31, 2018, 16 IFIs named in proposed regulation 50.76 were counterparties to a swap that was entered into and reported to DDR during that time period. Overall, the 16 IFIs entered into approximately 2,500 uncleared interest rate swaps with an estimated total notional value of $220 billion. Of those 16, four IFIs entered into more than one hundred swaps during calendar year 2018. Compared to data that the Commission gathered from DDR during calendar year 2017, the number of IFIs entering into interest rate swaps increased from nine to 16, and the total number and total notional value of all uncleared interest rate swaps entered into by IFIs increased from 381 swaps totaling $59.8 billion to approximately 2,500 swaps totaling $220 billion.

The Commission did not receive any comments on the data and has no reason to believe this data is not an accurate representation of swaps entered into by IFIs. Based on this data, the scope of swaps entered into by IFIs and eligible for this exemption is quantifiable and does not represent a significant shift in swaps away from the Clearing Requirement. The data also reflects continued interest from IFIs in entering into uncleared swaps with their counterparties.

F. Swaps Entered Into With Certain Bank Holding Companies, Savings and Loan Holding Companies, and CDFIs

The Commission proposed to exempt from the Clearing Requirement swaps entered into to hedge or mitigate commercial risk if one of the counterparties to the swap is either (a) a bank holding company or savings and loan holding company, each having no more than $10 billion in consolidated assets, or (b) CDFI transacting in certain types and quantities of swaps.[72] Such an exemption would be consistent with Commission regulation § 50.50(d), which permits banks, savings associations, farm credit system institutions, and credit unions with total assets of $10 billion or less (small financial institutions) to elect not to clear their swaps that are used to hedge or mitigate commercial risk.[73]

In adopting Commission regulation § 50.50(d), the Commission noted that small financial institutions tend to serve smaller, local markets, and are well situated to provide swaps to the customers in their markets for the purpose of hedging commercial risk.[74] The Commission also noted that small financial institutions typically hedge customer swaps by entering into matching swaps, and if those swaps had to be cleared, small financial institutions would have to post margin to satisfy the requirements of the DCO, which could raise the costs associated with hedging the risks of their swaps with customers.[75] In addition, the Commission acknowledged that some of these small financial institutions may incur initial and annual fixed clearing fees and other expenses that may be incrementally higher relative to the number of swaps executed over a given period of time.[76] Finally, the Commission stated that given the relatively low notional volume of swap books held by these small institutions, and the commercial customer purposes these swaps satisfy, the swaps executed by these entities were what Congress was considering when it directed the Commission to consider the exemption for small financial entities.[77]

The proposed amendments would codify two no-action letters issued by DCR in 2016.[78] The Commission believes that codifying both of these staff no-action letters is consistent with the policy rationale behind the exemption from the Clearing Requirement that the Commission granted for swaps entered into by banks, savings associations, farm credit institutions, and credit unions in the 2012 End-User Exception.[79]

The Commission received four comments letters on this aspect of the proposal.[80] While most of the comments were supportive, Better Markets opposed the Commission's use of its public interest exemptive authority to exempt from the Clearing Requirement swaps entered into by these entities. As discussed below, the Commission is adopting the regulations as proposed with one minor clarification.

1. Definition of Community Development Financial Institution—§ 50.77(a)

The Commission proposed to define ''community development financial institution'' to mean a CDFI, as defined in section 103(5) of the Community Development Banking and Financial Institutions Act of 1994, that is certified by the Treasury Department's Community Development Financial

[71] Regulation § 50.75(a) is being amended to state that swaps entered into by a central bank or sovereign entity shall be exempt from the clearing requirement of section 2(h)(1)(A) of the Act. Regulation § 50.76(a) is being amended to state that swaps entered into by an international financial institution shall be exempt from the clearing requirement of section 2(h)(1)(A) of the Act.

[72] *See* August 2018 Proposal, 83 FR 44001 and May 2020 Proposal, 85 FR 27955.

[73] Commission regulation § 50.50(d); *see also* 2012 End-User Exception, 77 FR 42560. Commission regulation § 50.50(d) exempts for the purposes of the Clearing Requirement, a person that is a ''financial entity'' solely because of section 2(h)(7)(C)(i)(VIII) of the CEA if the person: (1) Is organized as a bank, as defined in section 3(a) of the Federal Deposit Insurance Act, the deposits of which are insured by the Federal Deposit Insurance Corporation; a savings association, as defined in section 3(b) of the Federal Deposit Insurance Act, the deposits of which are insured by the Federal Deposit Insurance Corporation; a farm credit system institution chartered under the Farm Credit Act of 1971; or an insured Federal credit union or State-chartered credit union under the Federal Credit Union Act; and (2) has total assets of $10,000,000,000 or less on the last day of such person's most recent fiscal year. Commission regulation § 50.50(d) does not excuse the affected persons from compliance with any other applicable requirements of the CEA or in the Commission's regulations. As discussed below, the Commission is recodifying Commission regulation § 50.50(d) as a separate rule, § 50.53, so that it is easier to locate and the conditions to claim the exemption are set forth more clearly. The Commission does not consider this relocation to alter the substance of the exemption.

[74] 77 FR at 42578. The Commission acknowledged that, as indicated by commenters, that a large portion of the swaps executed by these financial institutions with customers likely hedge interest rate risk associated with commercial loans. *Id.*

[75] *Id.* These costs would largely be driven by the costs of clearing in terms of funding the cost of posting initial margin and paying variation margin to the DCO.

[76] *Id.*

[77] *Id.*

[78] CFTC Letter No. 16–01 (request from the American Bankers Association) and CFTC Letter No. 16–02 (request from a coalition of CDFIs).

[79] *See* August 2018 Proposal at 44004. *See also* 2012 End-User Exception, 77 FR at 42590–42591.

[80] *See* Comments submitted by the American Bankers Association, Opportunity Finance Network, Better Markets, and the CDFI Coalition.

Institution Fund under the requirements set forth in 12 CFR 180.201(b).[81] CDFIs certified by the Treasury Department must meet certain community development finance criteria intended to show they promote economic revitalization and community development in low-income communities that lack adequate access to affordable financial products and services.[82] The Commission did not receive any comment on its proposed definition and is adopting the definition as proposed.

2. Definition of Bank Holding Company—§ 50.78(a)

The Commission proposed to define ''bank holding company'' to mean an entity that is organized as a bank holding company, as defined in section 2 of the Bank Holding Company Act of 1956.[83] This definition represents the accepted meaning for ''bank holding company.'' The Commission did not receive any comments on the proposed definition and is adopting the definition as proposed.

3. Definition of Savings and Loan Holding Company—§ 50.79(a)

The Commission proposed to define ''savings and loan holding company'' to mean an entity that is organized as a savings and loan holding company, as defined in section 10 of the Home Owners' Loan Act of 1933.[84] This definition represents the accepted meaning for ''savings and loan holding company.'' The Commission did not receive any comments on the proposed definition and is adopting the definition as proposed.

G. Exemption From the Clearing Requirement for CDFIs—§ 50.77(b)

The Commission proposed to exempt swaps entered into by a CDFI from the Clearing Requirement if: (1) The swap is a U.S. dollar denominated interest rate swap in the fixed-to-floating class or the forward rate agreement class that would otherwise be subject to the Clearing Requirement under Commission regulation § 50.4(a); (2) the total aggregate notional value of the all swaps entered into by the CDFI during the 365 calendar days prior to the day of execution of the swap is less than or equal to $200,000,000; (3) the swap is one of ten or fewer swap transactions that the CDFI enters into within a period of 365 calendar days; (4) one of the counterparties to the swap reports the swap to a swap data repository pursuant to Commission regulation §§ 45.3 and 45.4, and reports all information described under Commission regulation § 50.50(b) to a swap data repository; and (5) the swap is used to hedge or mitigate commercial risk as defined under Commission regulation § 50.50(c). The proposal is consistent with the 2016 DCR no-action relief previously afforded CDFIs.[85]

The Commission received strong support for the proposal. The CDFI Coalition supported the proposal because interest rate swaps help CDFIs manage risk, and CDFIs borrow funds at floating rates and lend to customers at fixed rates. The floating rate leaves the CDFI exposed to future adverse interest rate moves, and interest rate swaps allow the CDFI to hedge its interest rate exposure by converting that exposure to a fixed rate thereby enhancing its ability to lend to customers and fund projects.[86] The CDFI Coalition stated that an exemption from the Clearing Requirement will eliminate the costs of clearing (posting of margin, cost of initial and annual fixed clearing fees and other expenses) and free up the time, effort, and resources that would be necessary to establish intermediary and clearinghouse access. The CDFI Coalition stated that ''while the potential volume of interest rate swap activity may increase in the future, it will not reach the level of systemic importance.''[87]

The CDFI Coalition also confirmed that CDFIs enter into swaps to hedge risk from financing transactions infrequently and have relatively low notional volume swap books.[88] As was the case when the Commission provided an exception for the small banks, farm credit system institutions, and credit unions under regulation 50.50(d), the CDFI Coalition stressed the public interest benefits that will be served by permitting CDFIs to engage in tailored and limited swaps to pursue their public interest goals without incurring the costs of central clearing.

Better Markets opposed the exemption for CDFIs, as well as for bank holding companies, and savings and loan holding companies, as unnecessary and detrimental to the derivatives reforms of the Dodd-Frank Act. Better Markets stated that under section 2(h)(7)(C)(ii) the CFTC may consider excluding only certain categories of financial entities and that Congress intended to insure financial institutions broadly mitigate risks through the derivatives clearing system.[89] Better Markets is concerned that these exemptions will permit swaps activities to occur outside of regulated, transparent, impartially access markets, and will draw liquidity away from markets.[90]

The Commission disagrees with Better Markets' view that the proposed exemption for CDFI is not permitted because Congress did not include CDFIs under section 2(h)(7)(C)(ii) of the CEA. As discussed further in Section V, below, Congress did not exclude section 2(h) from the Commission's statutory authority under section 4(c) of the CEA if the Commission finds an exemption from the Clearing Requirement to be in the public interest.

CDFIs are sufficiently similar to the type of entities Congress included when it directed the Commission to consider an exemption from the Clearing Requirement for small banks and savings associations.[91] CDFIs certified

[81] Under section 103, a ''community development financial institution'' means a person (other than an individual) that: (i) Has a primary mission of promoting community development; (ii) serves an investment area or targeted population; (iii) provides development services in conjunction with equity investments or loans, directly or through a subsidiary or affiliate; (iv) maintains, through representation on its governing board or otherwise, accountability to residents of its investment area or targeted population; and (v) is not an agency or instrumentality of the United States, or of any State or political subdivision of a State. 12 U.S.C. 4702(5).

[82] *See* Certification as a Community Development Financial Institution, 12 CFR 1805.201(b)(1) through (6) (setting forth the following criteria for a community development financial institution to obtain Treasury Department certification: (1) It has a primary mission of community development; (2) its predominant business activity is the provision of financial products or financial services; (3) it serves one or more target markets such as an investment area or target population; (4) it has a track record of providing development services to borrowers in conjunction with financing activities; (5) it maintains accountability to the residents of its target market; and (6) it is a non-government entity). *See also* Community Development Financial Institutions Fund, Notice of Funds Availability, 83 FR 4750 (Feb. 1, 2018) (stating the priorities of the CDFI Fund).

[83] Section 2 of the Bank Holding Company Act generally defines a ''bank holding company,'' subject to limited exceptions, as any company which has control over any bank or over any company that is or becomes a bank holding company. 12 U.S.C. 1841(a)(1) (subject to exceptions described in paragraph (5) therein).

[84] Section 10 of the Home Owners' Loan Act generally defines a ''savings and loan holding company,'' subject to limited exceptions, as any company that directly or indirectly controls a savings association or that controls any other company that is a savings and loan company. 12 U.S.C. 1467(a)(1)(D)(i) (subject to exclusions described in clause (ii)).

[85] August 2018 Proposal, 83 FR at 44005 (citing CFTC Letter No. 16–02).

[86] CDFI Coalition Letter at 3.

[87] CDFI Coalition Letter at 6.

[88] *Id.* The CDFI Coalition confirmed the swap data used in the proposed rule is correct: Eight different CDFIs entered into 13 uncleared interest rate swaps in 2018 with an aggregate notional value of almost $84 million.

[89] Better Markets comment at 4–5.

[90] *Id.* at 6–7.

[91] *See* 77 FR at 42578. The Commission notes that uncleared swaps with a counterparty that is subject

by the CDFI Fund serve rural and urban low-income communities across the nation that lack adequate access to affordable financial products and services.[92] Through financial assistance and grants from the CDFI Fund, CDFIs are able to make loans and investments, and to provide related services for the benefit of designated investment areas, target populations, or both.[93] CDFIs enter into a limited number of interest rate swaps and forward rate agreement swaps in order to hedge interest rate risk incurred as a result of issuing debt securities or making loans in pursuit of their organizational missions.[94]

The CDFI Coalition requested that the Commission clarify that regulation 50.77(b)(1) applies equally to both fixed-to-floating and floating-to-fixed interest rate swaps. The Commission confirms that the regulation is intended to apply to both fixed-to-floating and floating-to-fixed interest rate swaps, and that both formulations are included within the fixed-to-floating swap class that is subject to the Clearing Requirement according to the specifications outlined in Table 1a to Commission regulation § 50.4(a).[95] Given that the same language is used elsewhere in part 50 to describe the fixed-to-floating interest rate swap class, the Commission declines to amend regulation § 50.77(b)(1). However, the Commission confirms that both fixed-to-floating and floating-to-fixed interest rate swaps are covered by regulation § 50.77 for swaps entered into by CDFIs.

The Commission also believes that the conditions set forth in proposed regulation § 50.77(b)(1) through (5) are consistent with the conditions under regulation § 50.50(d). By limiting the product scope to U.S. dollar interest rate swaps in the fixed-to-floating swap class and forward rate agreement class, the Commission is recognizing the need for CDFIs to hedge or mitigate interest rate risk created by the loans, investments, and financial services provided to their target populations. In addition, limiting the total aggregate notional value of all swaps and forward rate agreements entered into during the 365 calendar days prior to the day of execution to less than or equal to $200,000,000 ensures that the swaps are being used to hedge or mitigate commercial risk. In that same regard, the requirement that a given CDFI enter into ten or fewer swaps over the course of 365 calendar days will prevent these entities from arbitrarily increasing the number of swaps into which they enter. Lastly, the reporting requirement will permit the Commission to verify that the exemption is being used in the manner intended.

The Commission did not receive any comments on the proposed conditions set forth in proposed rule 50.77(b)(2) through (5), and is adopting those conditions as proposed.

H. Exemption From the Clearing Requirement for Bank Holding Companies—§ 50.78(b) and Savings and Loan Holding Companies—§ 50.79(b)

As described above, the Commission proposed to codify the 2016 staff no-action letter extending relief from the Clearing Requirement to certain bank holding companies and savings and loan holding companies that otherwise would have qualified for the exception for small banks and savings associations under regulation 50.50(d).[96] In response to this proposal, the Commission received one comment from the American Bankers Association stating its support,[97] and as discussed above, one comment letter from Better Markets generally opposing the proposed exemptions.

Better Markets states that section 2(h)(7)(C)(ii) of the CEA does not cover bank holding companies or savings and loan holding companies and that if Congress intended to authorize such an exemption, it would have done so explicitly.[98] The Commission disagrees with Better Markets that the exemptions for bank holding companies and savings and loan holding companies are not permitted because the entities are not specifically listed under section 2(h)(7)(C)(ii) of the CEA. Bank holding companies and savings and loan holding companies with consolidated assets of no more than $10 billion are sufficiently similar to the type of entities Congress was considering when it directed the Commission to consider an exemption from the Clearing Requirement for small banks.[99] Because Congress allowed the Commission to exempt small banks and small savings and loan associations with assets of no more than $10 billion from the Clearing Requirement, it follows that the parent companies of such small entities, when subject to the same size limit, should be eligible for a similar exemption from the Clearing Requirement under an appropriate exercise of the Commission's exemptive authority under section 4(c).

Bank holding companies and savings and loan holding companies generally enter into interest rate swaps to hedge interest rate risk that they incur as a result of making loans or issuing debt securities, the proceeds of which are generally used to finance their subsidiaries, which are themselves small financial institutions exempt from the Clearing Requirement under regulation 50.50(d), renumbered as Commission regulation § 50.53. These entities enter into swaps to hedge risk from financing transactions infrequently and have relatively low notional volume swap books. These entities also pose less counterparty credit risk insofar as they generally enter into swaps with a notional amount of $10 million or less.[100] As discussed further below, commenters relied on data in the supplemental proposal regarding the

to the CEA and Commission regulations with regard to that transaction must still comply with the CEA and Commission regulations as they pertain to uncleared swaps, *e.g.,* the recordkeeping and reporting requirements under parts 23 and 45 of the Commission's regulations.

[92] *See also* Community Development Financial Institutions Fund, Notice of Funds Availability, 83 FR 4750 (Feb. 1, 2018) (stating the priorities of the CDFI Fund). In the event certification is not maintained, a CDFI would no longer meet the definition and would no longer be able to rely on this exemption from the Clearing Requirement.

[93] *See* Community Development Financial Institutions Program, 68 FR 5704, 5704 (Feb. 4, 2003). Additional information is available at the CDFI Fund's website, *https://www.cdfifund.gov/about/Pages/default.aspx.*

[94] CDFI Coalition comment at 5–6; Better Markets comment at 6.

[95] Although the language in new regulation § 50.77(b)(1) and Commission regulation § 50.4 is written as applying to an interest rate swap in the ''fixed-to-floating class'' this does not mean that the provision applies only to swaps if the first leg is a fixed rate and the second leg is a floating rate. As the Commission explained when it determined that the class of ''fixed-to-floating swaps'' should be subject to the Clearing Requirement, a fixed-to-floating swap is a swap in which the payment or payments owed for one leg of the swap is calculated using a fixed rate and the payment or payments owed for the other leg are calculated using a floating rate. 2012 Clearing Requirement Determination at 74302. This description from the 2012 Clearing Requirement Determination helps to explain why it is unnecessary to list fixed-to-floating swaps and floating-to-fixed swaps separately; these two phrases are referring to the same swaps (*i.e.,* one leg is a fixed rate and one leg is a floating rate, regardless of which leg is characterized as the first leg).

[96] In CFTC Letter No. 16–01, subject to certain conditions, bank holding companies and savings and loan holding companies are permitted to elect the exception from the Clearing Requirement under Commission regulation § 50.50(d) as if the bank holding company or savings and loan holding company were a bank or savings association having no more than $10 billion in assets.

[97] American Bankers Association comment, at 2. The American Bankers Association's comment also expressed the position that all financial entities, apart from swap dealers and major swap participants, should be exempted from the Clearing Requirement. This comment is beyond the scope of this rulemaking.

[98] Better Markets comment at 5–6.

[99] In the preamble to the 2012 End-User Exception final rule, the Commission determined that small banks and small savings associations were not ''financial entities'' for purposes of the Clearing Requirement. 77 FR at 42578.

[100] *See* August 2018 Proposal, 83 FR at 44005; *see also* CFTC Letter No. 16–01 at 3.

number of swaps entered into by eligible bank holding companies and savings and loan holding companies to complete their own analyses related to swap market effects of the proposal.[101]

Regulation §§ 50.78(b)(2) and 50.79(b)(2) require that the information described in paragraph (b) of Commission regulation § 50.50 be reported to a swap data repository. Commission regulation § 50.50(b) requires that the electing counterparty notify the Commission of how it generally meets its financial obligations associated with its non-cleared swaps. This reporting requirement is needed in order to verify that the exemption from the Clearing Requirement is being used in the manner intended by the Commission and the exception is not being misused.[102]

Regulation §§ 50.78(b)(3) and 50.79(b)(3) also require that only swaps used to hedge or mitigate commercial risk, as defined under paragraph (c) of Commission regulation § 50.50, may be exempt from the Clearing Requirement. This limitation appropriately reflects how these entities use swaps and also responds to Better Market's comment that the Commission does not have the authority to exempt swaps entered into by bank holding companies and savings and loan holding companies from the Clearing Requirement.[103]

Congress saw the benefit in exempting small banks, savings associations, farm credit system institutions, and credit unions from the Clearing Requirement when it allowed the Commission to consider such an exemption. The Commission issued such an exemption in the 2012 End-User Exception provided that such swaps are used for hedging and not speculation and are reported to a swap data repository.[104] Since 2016, by virtue of a staff no-action letter, small bank holding companies and savings and loan holding companies have been permitted to elect the exemption under regulation § 50.50(d) on behalf of their underlying small bank or savings and loan. In the intervening four years, the Commission has not discovered or been made aware of any abuse of this no-action letter. Accordingly, the Commission believes that the extension of the 2012 End-User Exception's exemption for small banks to bank holding companies and savings and loan holding companies subject to this new regulation is appropriate and consistent with Congressional intent. The Commission is adopting regulation §§ 50.78 and 50.79 as proposed.

I. Data Related to Swaps of CDFIs, Bank Holding Companies, and Savings and Loan Holding Companies

As the Commission did in the May 2020 Proposal, it is including a discussion of data related to past swaps activity to provide context for this final rule. All interest rate swaps data included in this section was reported to DDR as events-based data and was analyzed by Commission staff.[105]

During the time period between January 1, 2018, and December 31, 2018, eight different CDFIs entered into interest rate swaps and four of those entities entered into more than one swap. Over this one year, CDFIs entered into thirteen uncleared interest rate swaps with an aggregate notional value of almost $84 million. According to this data, more CDFIs entered into uncleared interest rate swaps during the calendar year 2018 than during the previous 18-month time period between January 2017 and June 2018.[106] At the same time, the aggregate notional value of all uncleared interest rate swaps entered into during calendar year 2018 ($83.9 million) was less than the aggregate notional value of swaps entered into by CDFIs during the 18-month time period between January 2017 and June 2018 ($251.6 million). The CDFI Coalition agreed with the data presented by the Commission in the May 2020 Proposal related to CDFI swaps activities.[107]

Similarly, the Commission provided data in the May 2020 Proposal regarding the number of swaps entered into by eligible bank holding companies and savings and loan holding companies. Between January 1, 2018 and December 31, 2018, eleven bank holding companies executed 18 interest rate swaps with an aggregate notional value of $152.5 million.[108] Seven of these bank holding companies entered into more than one swap during the calendar year 2018. In calendar year 2018 the aggregate notional value of all swaps entered into by eligible bank holding companies increased substantially ($152.5 million in 2018 compared to $68.6 million in 2017), but this increase was also the result of more eligible bank holding companies entering into uncleared interest rate swaps.

Based on this data, Better Markets concluded that the scope of the exemptions was limited and not likely to dramatically shift the level of swap clearing pursuant to the Clearing Requirement.[109] The data, together with the market observations and statements by commenters, demonstrates that these entities have an ongoing interest in entering into uncleared swaps and likely will benefit from the Commission's codification of the relief currently afforded under CFTC staff letters.

J. Adoption of Subpart D of Part 50

The creation of subpart D is part of an effort to distinguish exemptions that apply to specific swaps from the exceptions and exemptions for market participants eligible to elect an exception or exemption under subpart C of Part 50. This distinction is important because the exemptions for swaps under subpart D are not eligible for an exemption from margin for uncleared swaps, as discussed further below. Additionally, some of the exemptions for swaps are more limited and, in some cases, have additional conditions.

The exemptions in subpart D are intended to be consistent with the Commission's determinations set forth in the 2012 End-User Exception and do not limit the applicability of any CEA provision or Commission regulation to any person or transaction, except as provided in this final rulemaking. The exemptions in subpart D will include transactions with central banks,

[101] *See* Better Markets comment at 6 (stating that the data shows the proposal ''would not dramatically shift swaps current trading away from the Dodd-Frank Act's clearing and multilateral trading framework, it nevertheless would permit more than $200 million of swaps activities to occur outside of regulated, transparent, impartially accessed markets.'') *See also* 85 FR at 27965 (noting that between January 1, 2018, and December 31, 2018, eleven bank holding companies executed 18 interest rate swaps with an aggregate notional value of $152.5 million. Seven of those bank holding companies entered into more than one swap during the calendar year 2018.).

[102] 2012 End-User Exception, 77 FR at 42565. *See* Section 2(h)(7)(F) of the CEA; Regulation § 50.10.

[103] *See* August 2018 Proposal, 83 FR at 44006.

[104] *See* Section 2(h)(7)(A) of the CEA. The Commission notes that uncleared swaps with a counterparty that is subject to the CEA and Commission regulations with regard to that transaction must still comply with the CEA and Commission regulations as they pertain to uncleared swaps, *e.g.,* the recordkeeping and reporting requirements under parts 23 and 45 of the Commission's regulations.

[105] This section does not include credit default swaps data because the relief provided to CDFIs does not extend to credit default swaps and there has been no credit default swaps activity by eligible bank holding companies or savings and loan holding companies in the time periods analyzed.

[106] During an earlier 18-month time period, between January 1, 2017 and June 29, 2018, three CDFIs executed interest rate swaps: One executed two swaps with an aggregate notional value of $5.6 million; another executed three swaps with an aggregate notional value of $116 million; and another executed three swaps with an aggregate notional value of $130 million.

[107] CDFI Coalition comment at 5–6.

[108] During the previous year, between January 1, 2017 and December 31, 2017, one bank holding company executed ten interest rate swaps with an aggregate notional value of $43.6 million, and a second bank holding company executed one interest rate swap with a notional value of $25 million.

[109] Better Markets comment at 6.

sovereign entities, IFIs, bank holding companies, savings and loan holding companies, and CDFIs, as defined in the regulations. The same policy reasons that the Commission considered when exempting these institutions in the 2012 End-User Exception final rule support the adoption of subpart D.

III. Clearing Requirement Compliance Schedule and Compliance Dates

The Commission implemented the Clearing Requirement through two separate rulemakings: (i) The 2012 Clearing Requirement Determination; and (ii) the 2016 Clearing Requirement Determination. Under each of these final rules, the Commission made the decision to phase-in the compliance requirement. Neither clearing requirement determination required compliance by all market participants for all swaps included in Commission regulation § 50.4 on a single date. The Commission proposed to improve transparency and to provide the information about compliance dates for both the 2012 Clearing Requirement and the 2016 Clearing Requirement in one location that would be convenient for market participants to reference.

The Commission did not receive any comments on proposed regulation § 50.26. The compliance schedule is adopted as proposed.

IV. Technical Amendment to Subpart C for Banks, Savings Associations, Farm Credit System Institutions, and Credit Unions—§ 50.53

The Commission proposed technical amendments to subpart C of part 50 to reorganize the subpart by re-codifying the existing regulatory provision for certain banks, savings associations, farm credit system institutions, and credit unions to create a new numbered section and heading, proposed regulation § 50.53. The Commission believed that a stand-alone regulation for this exemption would facilitate swap counterparties' use and understanding of Part 50 of the Commission's regulations by separating this exemption from the non-financial entities' exception.

The Commission views this as a non-substantive change, and the minor changes to the text of the regulations serve to clarify and update the requirements in light of current swap reporting conventions, specifically related to swap data reporting by entities eligible for an exception or exemption from the Clearing Requirement. The Commission did not receive any comments on the proposed changes. The change is adopted as proposed, and the Commission is changing cross-references to Commission regulation § 50.50(d) to new regulation § 50.53 throughout part 50.

V. Commission's Section 4(c) Authority

Section 4(c) of the CEA provides the Commission with the authority to exempt certain transactions from the requirements of the CEA if the Commission determines that the exemption is consistent with the public interest. Section 4(c)(1) of the CEA authorizes the Commission to ''promote responsible economic or financial innovation and fair competition'' by exempting any transaction or class of transactions, including swaps, from any of the provisions of the CEA (subject to exceptions not relevant here).[110] In enacting CEA section 4(c)(1), Congress noted that the goal of the provision ''is to give the Commission a means of providing certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner.'' [111]

Section 4(c)(2) of the CEA further provides that the Commission may not grant exemptive relief unless it determines that: (A) The exemption is consistent with the public interest and the purposes of the CEA; and (B) the transaction will be entered into solely between ''appropriate persons'' and the exemption will not have a materially adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory responsibilities under the CEA.[112] Section 4(c)(3) of the CEA includes within the term ''appropriate person'' a number of specified categories of persons, including any governmental entity (including the United States, any state, or any foreign government) or political subdivision thereof, or any multinational or supranational entity or any instrumentality, agency, or department of any of the foregoing,[113] banks,[114] savings associations,[115] and such other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.[116]

The Commission requested comment regarding whether the proposed amendments would be an appropriate exercise of the Commission's authority under section 4(c) of the CEA, including whether the proposal promotes the public interest.[117] The Commission also requested comment on whether there are any entities that would not be ''appropriate persons'' under section 4(c)(3) of the CEA, and on whether the Proposals provide certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner.[118]

The Commission received one comment generally opposing the Commission's exercise of its authority under section 4(c) to exempt from the Clearing Requirement swaps entered into with CDFIs, bank holding companies, and savings and loan holding companies, but the commenter stated that the Commission was correct to condition the exemptions to limit their scope and provide oversight of financial institutions relying on the exemptions.[119] The Commission did not receive any comment on its proposed exercise of its authority under section 4(c) to exempt from the Clearing Requirement swaps entered into with central banks, sovereign entities, and IFIs. As discussed in detail above, the Commission believes that the exemptions from the Clearing Requirement for swaps entered into by central banks, sovereign entities, IFIs, banks holding companies, savings and loan holding companies, and CDFIs are a proper exercise of its exemptive authority under section 4(c) of the CEA.

A. Central Banks, Sovereign Entities, and IFIs

The Commission believes that it is consistent with the public interest and the purposes of the CEA to exempt from the Clearing Requirement swaps entered into with central banks, sovereign entities, and certain IFIs under its broad exemption authority under section 4(c) of the CEA. In 2012, the Commission

[110] Pursuant to section 4(c)(1) of the CEA, in order to promote responsible economic or financial innovation and fair competition, the Commission by rule, regulation, or order, after notice and opportunity for hearing, may (on its own initiative or on application of any person) exempt any agreement, contract, or transaction (or class thereof) that is otherwise subject to subsection (a) of section 4(c)(1), either unconditionally or on stated terms or conditions, or for stated periods and either retroactively or prospectively, or both, from any of the requirements of subsection (a) of CEA section 4(c), or from any other provision of the CEA. The Commission is finalizing these exemptive rules pursuant to sections 4(c)(1) and 8a(5) of the CEA.

[111] H.R. Rep. No. 102–978, 102d Cong. 2d Sess. at 81 (Oct. 2, 1992), *reprinted in* 1992 U.S.C.C.A.N. 3179, 3213.

[112] Section 4(c)(2) of the CEA.

[113] Section 4(c)(3)(H) of the CEA.

[114] Section 4(c)(3)(A) of the CEA.

[115] Section 4(c)(3)(B) of the CEA.

[116] Section 4(c)(3)(K) of the CEA.

[117] May 2020 Proposal, 85 FR at 27966; August 2018 Proposal, 83 FR at 44008.

[118] *Id.*

[119] Better Markets comment at 5.

established a policy that transactions with central banks, sovereign entities (then referred to as foreign governments), and certain IFIs should be exempt from the Clearing Requirement on the basis of comity and in keeping with the traditions of the international system. The Commission continues to believe, as it did in 2012, that based on the canons of statutory construction and considerations of comity, and in keeping with the traditions of the international system, sovereign entities and central banks should not be subject to section 2(h)(1) of the CEA.[120] With respect to IFIs, these entities serve an important public policy purpose. The member governments of IFIs generally have majority control and governance over these entities. The Commission therefore continues to believe that an exemption is appropriate because, in a real sense, an IFI is not separable from its government owners. Codifying the Commission's 2012 policy determination through a section 4(c) exemption provides clarity and certainty for market participants.[121]

The amendments to exempt swaps entered into by central banks, sovereign entities, and certain IFIs from the Clearing Requirement are available only to ''appropriate persons'' under section 4(c)(3)(H) of the CEA. No commenter disputed that these entities are ''appropriate persons'' under section 4(c)(3)(H) of the CEA, which states that any governmental entity (including the United States, any state, or any foreign government), or political subdivision thereof, or any multinational or supranational entity or any instrumentality, agency, or department of any of the foregoing.

The Commission also notes that these entities are considered ECPs as set forth in section 1a(18)(A)(vii) of the CEA. Given that only ECPs are permitted to enter into uncleared swaps, and that the ECP definition is generally more restrictive than the comparable elements of the ''appropriate persons'' definition of section 4(c)(3)(H) of the CEA, the Commission believes that there is no risk that the exemption could be used by any entity other than an ECP or ''appropriate person.'' Accordingly, the class of persons eligible to rely on regulation §§ 50.75 and 50.76 is limited to appropriate persons within the scope of section 4(c) of the CEA.

Additionally, the Commission notes that the applicable central banks, sovereign entities and IFIs have been relying on the language in the preamble to the 2012 End-User Exception and the DCR no-action letters for many years. The Commission is not aware of any increase in counterparty risk attributable to the affected entities' reliance on the 2012 preamble language and the staff no-action letters.

Finally, the exemptions for swaps entered into with central banks, sovereign entities, and certain IFIs will not have a materially adverse effect on the ability of the Commission to discharge its regulatory responsibilities under the CEA. The exemptions from the Clearing Requirement are limited to swaps entered into with specific central banks, sovereign entities, and IFIs and do not limit the applicability of any other CEA provision or Commission regulation except as discussed above. The Commission will continue to have access to information regarding the exempted swaps because the non-electing counterparty to the swap must report the swap to a swap data repository. Uncleared swaps with a counterparty that is otherwise subject to the CEA and Commission regulations with regard to such swaps must comply with the CEA and Commission regulations as they pertain to uncleared swaps. Additionally, the Commission retains its special call, anti-fraud, and anti-evasion authorities, which enables the Commission to adequately discharge its regulatory responsibilities under the CEA.

B. CDFIs, Certain Bank Holding Companies, and Savings and Loan Holding Companies

The Commission believes it is consistent with the public interest and the purposes of the CEA to exempt from the Clearing Requirement swaps entered into by CDFIs, bank holding companies, and savings and loan holding companies under section 4(c) of the CEA. The Commission believes that the same policy reasons that Congress considered in directing the Commission to consider exempting swaps entered into with small financial institutions (small banks, savings associations, farm credit system institutions, and credit unions) from the financial entity definition, making them eligible for the End-User Exception of section 2(h)(7)(c)(ii) of the CEA, support an exemption for swaps entered into by CDFIs, bank holding companies, and savings and loan holding companies.[122]

In the 2012 End-User Exception, the Commission determined that the small financial institutions should be excepted from the financial entity definition because these entities tend to serve smaller, local markets, and the swaps executed by the small financial institutions likely hedge interest rate risk associated with making commercial loans.[123] Small financial institutions typically hedge their swaps with customers by entering into matching swaps in the swap market, and if those matched swaps had to be centrally cleared, the small financial institutions would have to post margin to satisfy the requirements of the DCOs. The Commission determined that mandatory clearing could raise the costs for small financial institutions and such costs may be prohibitively high given the small number of swaps such entities execute over a given period of time.[124]

Swaps are an important risk management tool, and CDFIs, bank holding companies, and savings and loan holding companies should be afforded the means to hedge their capital costs economically in order to promote the public interest objectives of smaller financial institutions serving smaller, local markets. Commenters agreed with the Commission that the swaps entered into by CDFIs, bank holding companies, and savings and loan holding companies have smaller notional amounts and that these financial entities use swaps infrequently.[125] While the Commission recognizes that these entities may enter into more swaps to hedge against rising interest rates, the conditions on the exemption make it unlikely that the volume of swaps entered into by these entities will reach a systemic level.

These exemptions from the Clearing Requirement may serve to promote responsible financial innovation and fair competition due to the substantial fixed costs associated with clearing swaps. The cost of clearing on a per-swap basis cannot be supported by the small number of trades into which the entities eligible to elect these

[120] The Commission continues to believe that transactions with sovereign wealth funds or similar entities should not be exempt from the Clearing Requirement because these entities generally act as investment funds. *See* 2012 End-User Exception, 77 FR at 42562, n.18 (noting that the foregoing rationale and considerations do not, however, extend to sovereign wealth funds or similar entities due to the predominantly commercial nature of their activities).

[121] As with the other exemptions from the Clearing Requirement, the Commission reminds the counterparties that these swaps exempted from the Clearing Requirement by this final rule and the existing 2012 determination must be reported to a swap data repository.

[122] *See* 2012 End-User Exception, 77 FR at 42578. These entities are not eligible to elect the End-User Exception under Commission regulation § 50.50, and they remain financial entities under the definition of financial entity of section 2(h)(7)(C) of the CEA.

[123] 2012 End-User Exception, 77 FR at 42578.

[124] *Id.*

[125] *See* CDFI Coalition comment at 6; Better Markets comment at 6 (acknowledging that the scope of the exemption is limited and will not dramatically shift transactions away from clearing).

exemptions enter. While the Commission did not receive any comments on the cost of clearing, the Commission notes that in 2012, the cost estimate for small financial institutions included between $2,500 and $25,000 in legal fees related to reviewing and negotiating clearing-related documents, and a minimum of between $75,000 and $125,000 per year on fees paid to each futures commission merchant with which it maintains a relationship.[126] The Commission believes an exemption from the Clearing Requirement for CDFIs, bank holding companies, and savings and loan holding companies will lower costs, which enables these entities to better manage their financing risks and provide cost-effective loans to their subsidiaries, as well as to small and middle market businesses. In addition, this exemption from the Clearing Requirement may support commercial lending and depository activities of the holding company's subsidiaries.

The Commission believes that the specific amendments to exempt swaps entered into by CDFIs, bank holding companies, and savings and loan holding companies from the Clearing Requirement are available to only ''appropriate persons.'' Under section 4(c)(3)(A) and (B) of the CEA, ''appropriate person'' includes a bank or a trust, and a savings association. The extension of the term ''appropriate person'' to include CDFIs, bank holding companies, and savings and loan holding companies aligns with the statute's determination that banks and savings associations are ''appropriate persons.'' The Commission did not receive any comments on whether these entities are ''appropriate persons.''

The bank holding companies, savings and loan holding companies, and CDFIs eligible to elect these exemptions are ECPs pursuant to section 1a(18)(A)(i) of the CEA.[127] Given that only ECPs are permitted to enter into uncleared swaps, and that the ECP definition is generally more restrictive than the comparable elements of the enumerated ''appropriate person'' definition, there is no risk that a non-ECP or a person who does not satisfy the requirements for an ''appropriate person'' could enter into an uncleared swap using these exemptions from the Clearing Requirement. Accordingly, the Commission believes that the class of persons eligible to rely on the exemptions codified in new regulation §§ 50.75 through 50.79 will be limited to ''appropriate persons'' within the scope of section 4(c) of the CEA.

The Commission notes that the CDFIs, bank holding companies, and savings and loan holding companies have been relying on the DCR no-action letters since 2016. The Commission is not aware of any increase in counterparty risk attributable to affected entities' reliance on the staff no-action letters, and commenters did not point to any instances of increased counterparty risk. These exemptions from the Clearing Requirement are limited in scope, and the Commission will continue to have access to information regarding the swaps subject to these exemptions because such swaps will be reported to a swap data repository by one of the counterparties to the swap.[128]

The Commission further notes that the exemptions are intended to be consistent with the Commission's policy determinations set forth in the 2012 End-User Exception with respect to the exception from the Clearing Requirement for small financial institutions, and do not limit the applicability of any CEA provision or Commission regulation to any person or transaction except as provided in this final rulemaking. In addition, the Commission retains its special call, anti-fraud, and anti-evasion authorities, which will enable it to adequately discharge its regulatory responsibilities under the CEA. The Commission therefore believes the exemptions will not have a materially adverse effect on the ability of the Commission to discharge its regulatory responsibilities under the CEA.

For the reasons discussed above, it is appropriate and consistent with the public interest to adopt new regulation §§ 50.75 through 50.79 as set forth in subpart D.

VI. Final Rules Do Not Effect Margin Requirements for Uncleared Swaps

In the Proposals, the Commission explained that these exemptions, if finalized, would not affect the Commission's margin requirements for uncleared swaps.[129] The Commission did not receive any comments on the effect of the exemptions on the Commission's margin requirements for uncleared swaps.

The Commission affirms its position as set forth in the Proposals. Under Commission regulation § 23.150(b)(1), the margin requirements for uncleared swaps under part 23 of the Commission's regulations do not apply to a swap if the counterparty qualifies for an exception from clearing under section 2(h)(7)(A) and implementing regulations.[130] Commission regulation § 23.150(b) was added to the final margin rules after the Terrorism Risk Insurance Program Reauthorization Act of 2015 (TRIPRA)[131] amended section 731 of the Dodd-Frank Act by adding section 4s(e)(4) to the CEA to provide that the initial and variation margin requirements will not apply to an uncleared swap in which a non-financial entity (including a small financial institution and a captive finance company) qualifies for an exception under section 2(h)(7)(A) of the CEA, as well as two exemptions from the Clearing Requirement that are not relevant in this context.[132]

The final rules are not implementing section 2(h)(7)(A) of the CEA. Instead, the Commission, pursuant to its 4(c) authority (as discussed above), is exempting swaps entered into by central banks, sovereign entities, IFIs, bank holding companies, savings and loan holding companies, and CDFIs from the Clearing Requirement. The Commission is not excluding these entities from the ''financial entity'' definition of section 2(h)(7)(C) of the CEA. Therefore, these entities are not eligible to elect the End-User Exception under Commission regulation § 50.50, and they remain financial entities under the definition of financial entity of section 2(h)(7)(C) of the CEA. For these reasons, the new regulation §§ 50.75 through 50.79 do not implicate any of the provisions of section 4s(e)(4) of the CEA or Commission regulation § 23.150.[133]

[126] 2012 End-User Exception, 77 FR at 42577 n.74.

[127] August 2018 Proposal, 83 FR at 44008.

[128] Uncleared swaps with a counterparty that is subject to the CEA and Commission regulations with regard to such swaps are required to comply with the CEA and Commission regulations, including data reporting and uncleared margin rules.

[129] May 2020 Proposal, 85 FR at 27966, August 2018 Proposal, 83 FR at 44008 (citing to relevant margin for uncleared swaps provisions in Commission regulation § 23.150(b)(1)).

[130] Commission regulation § 23.150(b)(1).

[131] Public Law 114–1, 129 Stat. 3.

[132] Commission regulation § 23.150(b)(2) provides that certain cooperative entities that are exempt from the Commission's clearing requirement pursuant to section 4(c)(1) authority also are exempt from the initial and variation margin requirements. None of the entities included in this proposal is a cooperative that would meet the conditions in Commission regulation § 23.150(b)(2). In addition, the regulation § 23.150(b)(3), which pertains to affiliated entities, does not apply in this context.

[133] The Commission believes that the final rules do not affect the margin rules for entities that are supervised by the prudential regulators. The prudential regulators' rules contain provisions that are identical to Commission regulation § 23.150. *See* Margin and Capital Requirements for Covered Swap Entities, 80 FR 74916, 74923 (Nov. 20, 2015).

VII. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires Federal agencies to consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis on the impact.[134] The Commission previously has established certain definitions of small entities to be used in evaluating the impact of its regulations on small entities in accordance with the RFA.[135] As discussed in the Proposals, the final regulations do not affect any small entities as that term is used in the RFA. The regulations will affect specific counterparties to an uncleared swap, namely, central banks, sovereign entities, IFIs, bank holding companies, savings and loan holding companies, and CDFIs. Pursuant to sections 2(e) and 5(d)(11)(A) of the CEA, only ECPs may enter into uncleared swaps.[136] As discussed above, the entities whose transactions are covered by these exemptions from the Clearing Requirement are ECPs.[137] The Commission has stated previously that ECPs, by the nature of the definition, should not be considered small entities for RFA purposes.[138] Because ECPs are not small entities, and persons not meeting the definition of ECP may not conduct transactions in uncleared swaps, the Commission need not conduct a regulatory flexibility analysis respecting the effect of these rules on ECPs.

The Commission received no comments on the RFA discussions in the May 2020 Proposal or the August 2018 Proposal. Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the final regulations will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA)[139] imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information, as defined by the PRA. In the Proposals, the Commission determined that these regulations would not impose a new collection of any information or any new recordkeeping requirements on any persons and would not require approval of the Office of Management and Budget (OMB) under the PRA.[140] The Commission received no comments on these determinations. As such, the final rules do not impose any new burden or any new information collection requirements in addition to those that already exist pursuant to Commission regulations.

C. Cost-Benefit Considerations

As discussed in detail above, the Commission is amending its regulations to add new regulation §§ 50.75 through 50.79, as set forth in subpart D, to exempt swaps entered into with central banks, sovereign entities, IFIs, certain bank holding companies, savings and loan holding companies, and CDFIs from the Clearing Requirement consistent with the policies set forth in the 2012 End-User Exception and subsequent staff no-action letters.[141] Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating regulations under the CEA or issuing certain orders.[142] 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; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations (collectively referred to as the Section 15(a) Factors).

1. Consideration of the Costs and Benefits of the Commission's Action

The baseline for the Commission's consideration of the costs and benefits of this final rulemaking is the existing statutory and regulatory framework of section 2(h)(1) of the CEA and part 50 under which any swap subject to the Clearing Requirement would be required to be cleared by central banks, sovereign entities, IFIs, bank holding companies, savings and loan holding companies, and CDFIs. The regulatory baseline, however, has been affected by Commission statements in the 2012 End-User Exception and CFTC no-action letters, which have been relied on by central banks, sovereign entities, IFIs, bank holding companies, savings and loan holding companies, CDFIs, and their counterparties when entering into swaps that otherwise would be subject to the Clearing Requirement. The final regulations in this adopting release largely codify the current practice that has been in place since 2012. The Commission recognizes that the actual costs and benefits of the final rules as realized in the market may not be as significant as compared to that regulatory baseline. The Commission endeavors to assess the expected costs and benefits of the final rules in quantitative terms where possible. Where estimation or quantification is not feasible, the Commission discusses the costs and benefits in qualitative terms.

This consideration of costs and benefits is based on an understanding that the swap markets function internationally with many transactions involving U.S. firms taking place across international boundaries. Some Commission registrants are organized outside of the United States, some leading industry members typically conduct their operations both within and outside of the United States, and some industry members follow substantially similar business practices wherever they may be located. Where the Commission does not specifically refer to matters of location, this discussion of costs and benefits refers to the effects of the final rule on all activity subject to the amended part 50 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.[143] In particular, the Commission notes that some entities affected by this rulemaking are located outside of the United States.

In the sections that follow, the Commission discusses: (1) The costs and benefits of the new part 50 exemptions to the Clearing Requirement for swaps entered into by entities that meet the definitions of central bank, sovereign entity, IFI, bank holding company, savings and loan holding company, and CDFI as set forth in these rules; and (2) the impact of such exemptions on the Section 15(a) Factors.

[134] 5 U.S.C. 601 *et seq.*

[135] 47 FR 18618 (Apr. 30, 1982).

[136] Section 2(e) of the CEA limits non-ECPs to executing swap transactions on a board of trade designated as a contract market (DCM) and section 5(d)(11)(A) of the CEA requires all DCM transactions to be cleared. Accordingly, the two provisions read together permit only ECPs to execute uncleared swap transactions.

[137] *See* Section 1a(18)(A)(i) and 1a(18)(A)(vii) of the CEA.

[138] *See* Opting Out of Segregation, 66 FR 20740, 20743 (Apr. 25, 2001).

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

[140] The applicable collection of information is ''Swap Data Recordkeeping and Reporting Requirements,'' OMB control number 3038–0096. Parties wishing to review the CFTC's information collections may do so at *www.reginfo.gov,* at which OMB maintains an inventory aggregating each of the CFTC's currently approved information collections, as well as the information collections that presently are under review.

[141] The other non-substantive amendments made to part 50 do not affect the cost-benefit considerations of this rulemaking.

[142] Section 15(a) of the CEA.

[143] Section 2(i) of the CEA.

a. Costs

New Commission regulation §§ 50.75 through 50.79 exempt swaps entered into by central banks, sovereign entities, IFIs, certain bank holding companies, savings and loan holding companies, and CDFIs from the Clearing Requirement under section 2(h)(1)(A) of the CEA. In the Proposals, the Commission recognized that the protections of central clearing will not accrue to swaps entered into by these entities, which is a cost.[144] The Clearing Requirement is designed to mitigate the counterparty credit risk associated with swaps and, in turn, to mitigate the potential systemic impact that an accumulation of counterparty credit risk through swaps activity could cause instability in the financial system.

In general, central clearing mitigates counterparty credit risk through the substitution of the DCO as counterparty to the swap. After this novation occurs, a DCO manages risk by collecting initial margin from its clearing members for all their swap positions and collecting and paying out variation margin among its clearing members based on marking the swap positions to market prices on a daily basis. The collection of margin allows a DCO to mitigate the possibility of a clearing member or customer default, as well as to cover potential losses due to such a default. Central clearing also provides protection through a default fund that is made up of mutualized contributions from the DCO's clearing members and can be used in the case of a default by one or more of those members.

New Commission regulation §§ 50.75 through 50.77 exempting swaps entered into by central banks, sovereign entities, and IFIs codify the policy determination made in the Commission's 2012 End-User Exception that is based on considerations of international comity, and in keeping with the traditions of the international system. Under the final rules, swaps entered into by central banks (including BIS), sovereign entities, and IFIs are treated like swaps entered into by the Federal Reserve Banks, the Federal Government, or a Federal agency and are not subject to the Clearing Requirement. As discussed above, Congress exempted swaps entered into by the Federal entities expressly backed by the full faith and credit of the United States when it excluded any agreement, contract, or transaction entered into by these entities from the definition of a swap and consequently from the application of the Clearing Requirement.[145]

The costs of not subjecting swaps exempted from the Clearing Requirement under these final rules, as identified in the May 2020 Proposal, include the possibility of increased counterparty credit risk that is left unmitigated by the protections of central clearing. The costs associated with exempting swaps entered into by central banks, sovereign entities, and IFIs from the Clearing Requirement also are reflected in data showing the low notional amounts and number of such swaps.[146]

The Commission received no comments directly related to the costs of regulation §§ 50.75 through 50.77. The Commission continues to believe that swaps entered into by central banks, sovereign entities, and certain IFIs should not be subject to the Clearing Requirement, and the minimal costs associated with this determination have been taken into account. Central banks, and the sovereign entities backing those central banks, are the very entities that protect the global financial system against systemic risk. IFIs provide financing for national and regional development and are fully backed by their governmental members. As such, the swaps into which they enter do not pose the type of risk that the Clearing Requirement was intended to address.

Turning to new regulation §§ 50.78 and 50.79, which exempt from the Clearing Requirement swaps entered into by certain bank holding companies, savings and loan holding companies, and CDFIs, the direct cost associated with these final rules is that the exempted swaps will not be subject to the Clearing Requirement and the entities entering into the swaps will not benefit from the risk-mitigating aspects of clearing described above. Under this view, costs are measured in terms of increased risk to the counterparties to the swap and to the financial system. However, the Commission notes that, as was the case when the Commission exempted small financial institutions from the definition of ''financial entity'' for purposes of the codifying the end-user exception in 2012, these final regulations implementing the exemption for swaps entered into by bank holding companies, savings and loan holding companies, and CDFIs are appropriately conditioned to minimize risk.[147] For example, the notice and reporting requirements under regulation §§ 50.77(b)(4) through (5), 50.78(b)(2) through (3), and 50.79(b)(2) through (3) will afford some degree of risk mitigation because the electing entity is required to indicate how the electing counterparty generally meets its financial obligations with regard to its uncleared swaps. These requirements also help ensure that counterparties are aware of the potential exposure each swap may have on the entity's overall risk profile.

The Commission also considered the regulatory reporting costs for bank holding companies, savings and loan holding companies, and CDFIs under new Commission regulation §§ 50.77(b)(4), 50.78(b)(2), and 50.79(b)(2) and concluded that the regulations do not impose any additional costs. In general, the Commission understands that in most cases reporting swaps to the swap data repository is done by swap counterparties that are swap dealers. The bank holding company, savings and loan holding company, and CDFI entities that are electing an exemption from the Clearing Requirement under these regulations would report the swaps to the swap data repository only in extremely rare cases.[148] Because these entities have been operating pursuant to no-action letters that have the same reporting requirements, the Commission believes that the final rules will not impose any new compliance costs on bank holding companies, savings and loan holding companies, or CDFIs.

The Commission also considered the additional cost to the financial system that could result from the imposition of the $10 billion size threshold for bank holding companies and savings and loan holding companies eligible for the exemption and has determined that there is no additional cost associated with the imposition of a size

[144] May 2020 Proposal, 85 FR at 27968; August 2018 Proposal, 83 FR at 44009.

[145] Section 1a(47)(B)(ix) of the CEA.

[146] May 2020 Proposal, 85 FR at 27967–27969. *See also* discussion of data above. From January 1, 2018 to December 31, 2018, 16 IFIs named in proposed regulation § 50.76 were counterparties to a swap that was entered into and reported to DDR during that time period. Overall, the 16 IFIs entered into approximately 2,500 uncleared interest rate swaps with an estimated total notional value of $220 billion. Of those 16, four IFIs entered into more than one hundred swaps during calendar year 2018.

[147] 2012 End-User Exception, 77 FR at 42578 (explaining the policy rationale for adopting the Clearing Requirement exception for small financial institutions and setting conditions on the exception).

[148] As the Commission explains above, the election of an exemption from the Clearing Requirement by any central bank, sovereign entity, or identified IFI is not dependent on reporting the swap to a swap data repository. That obligation rests with the non-electing counterparty to the trade based upon independent obligations under part 23 or 45 of the Commission regulations.

threshold.[149] As noted in the 2018 Proposal, the $10 billion cap is a bright line and, due to the nature of using a bright line as a threshold, it is possible that some entities with attributes similar to those entities whose transactions are exempted from the Clearing Requirement, may not be eligible to use the exemption from the Clearing Requirement. It is also possible that some bank holding companies or savings and loan holding companies could make operational and business decisions that would allow them to qualify to use the exemption from the Clearing Requirement. However, the Commission does not expect that an entity would limit its potential revenue in order to maintain a smaller size in order to be able to rely on this exemption. As such, the Commission believes that the $10 billion size threshold is appropriate and will not impose additional costs on entities covered by these regulations.

The comment letter received from Better Markets raises a number of indirect and hard to quantify costs.[150] For example, the letter states that piecemeal exemptions and carve-outs diminish the effectiveness of the swap market regulatory reforms, result in less transparency, and fragment markets.[151] Furthermore, the letter notes that the trades that will remain uncleared as a result of exemptions codified in this adopting release will be intermediated bilaterally with one of a handful of already dominant derivatives dealers, which limits participation and diversity in the cleared swaps markets and results in reduced liquidity in the marketplace.[152] Despite these concerns, the Commission continues to believe that the conditions imposed on the swap exemptions under this adopting release limit these costs.

Finally, another mitigating factor related to the costs of not centrally clearing these exempted swaps, is that the Commission's uncleared margin requirements may apply to some of the swaps exempted under these final rules. In these instances, the costs that may result from not requiring central clearing by a DCO may be mitigated.

b. Benefits

The Commission has identified a number of benefits associated with the final regulations. The Commission notes that to the extent that market participants have been relying on Commission statements in the 2012 End-User Exception and DCR no-action letters, the actual benefits of the final rules as realized in the market may not be as significant as compared to the regulatory baseline. First, central banks, sovereign entities, IFIs, certain bank holding companies, savings and loan holding companies, and CDFIs will benefit from lower transaction costs as a result of these final exemptions from the Clearing Requirement. In terms of project financing and risk management, these entities will not face the added expense of central clearing and can put those cost savings to good use. For example, the costs savings achieved through these exemptions could allow CDFIs and IFIs to enter into more public service projects in furtherance of their missions.

There are other important benefits associated with these amendments to part 50. If the Commission were to subject foreign governments (sovereign entities), central banks, or IFIs to regulation under the CEA in connection with their swaps, foreign regulators could reciprocate with regard to the United States Federal Government, Federal Reserve Banks, or IFIs of which the United States is a member in a similar manner. The Commission expects that these swap exemptions from the Clearing Requirement will help ensure that if any of the Federal Government, Federal Reserve Banks, or IFIs of which the United States is a member were to engage in swaps in foreign jurisdictions, the actions of those entities with respect to those transactions would not be subject to foreign regulation.[153]

In addition, there are benefits to the financial system from having certain bank holding companies, savings and loan holding companies, and CDFIs enter into interest rate swaps to hedge interest rate risk they incur as a result of issuing debt securities or making loans to finance their subsidiary banks or savings associations at a lower cost. For some bank holding companies and savings and loan holding companies, interest rate swaps need to be entered into by the holding company in order to gain hedge accounting treatment and promote efficiencies to benefit their subsidiaries.[154] Finally, the costs savings from the final regulations may result in more projects being funded in small communities where certain bank holding companies, savings and loan holding companies, and CDFIs operate. As several commenters noted, there can be significant benefits from exempting swaps entered into by small banks and CDFIs for the communities these entities serve.[155]

The Commission believes that most of the central banks, sovereign entities, IFIs, bank holding companies, savings and loan holding companies, and CDFIs that will benefit from these regulations also benefit from relief from the uncleared margin requirements under part 23 of the Commission's regulations. For entities that would be required to comply with the Commission's uncleared margin requirements, their benefit from an exemption would be mitigated. In addition, actual benefits may be less than expected if central banks, sovereign entities, and IFIs and their counterparties choose to clear their swaps voluntarily instead of relying on this exemption from the Clearing Requirement. As a practical matter, however, the Commission reviewed swap data and found that the entities that will benefit from the final rules are not clearing their swaps subject to the Clearing Requirement.[156] In that regard, the practical effect and primary benefit of the final regulations is to provide regulatory certainty, which will reduce the legal costs faced by these entities.

2. Section 15(a) Factors

The discussion that follows supplements the related cost and benefit considerations addressed in the preceding section and addresses the overall effect of the final rule in terms of the factors set forth in section 15(a) of the CEA.

[149] The Commission did not propose a size threshold for CDFIs because the Commission believes these entities generally fall under the $10 billion size threshold.

[150] Better Markets comment at 1–3.

[151] *Id.* at 4.

[152] *Id.* at 5.

[153] *See* discussion in the May 2020 Proposal, 85 FR at 27957 (citing 2012 End-User Exception, 77 FR at 42561–42562).

[154] *See* August 2018 Proposal, 83 FR at 44010.

[155] *See* CDFI Coalition comment at 1–2 (''providing regulatory certainty through codification of the no-action relief will help to ensure that community development financing remains available and commercially feasible for our country's most distressed communities''); *id.* at 4–6 (''CDFIs, like small financial institutions, face the same costs [cost of posting margin to a DCO, cost of initial and annual fixed clearing fees, other expenses, in addition to time, effort and resources necessary to establish relationships with an intermediary and clearinghouse access] and provide similar public benefits by serving smaller, local markets and providing financial and community development services to a target market''); and Opportunity Finance Network comment at 1 (''the exemption will save CDFIs the expense of clearing swaps through a third-party clearinghouse, allowing more of their resources to be devoted to their community development mission'').

[156] Again, as the Commission noted in the May 2020 Proposal, the Commission reviewed data from January 1, 2018 to December 31, 2018 that was reported to DDR and found that 16 international financial institutions entered into approximately 2,500 uncleared interest rate swaps with an estimated total notional value of $220 billion. Three IFIs elected to clear a portion of their interest rate swaps.

a. Protection of Market Participants and the Public

Section 15(a)(2)(A) of the CEA requires the Commission to evaluate the costs and benefits of a final regulation in light of considerations of protection of market participants and the public. The Commission considers the costs and benefits of the final regulations exempting swaps entered into with central banks, sovereign entities, IFIs, bank holding companies, savings and loan holding companies, and CDFIs from the Clearing Requirement in light of its responsibility for determining which swaps should be required to be cleared.

In recognition of the significant risk-mitigating benefits of central clearing, Congress amended the CEA to direct the Commission to review all swaps that are offered for clearing by DCOs to determine whether such swaps should be required to be cleared. The Commission is cognizant that in enacting the Dodd-Frank Act, Congress excluded from the definition of a swap any agreement, contract, or transaction wherein the counterparty is a Federal Reserve Bank, the Federal Government, or a Federal agency that is expressly backed by the full faith and credit of the United States. In so doing, Congress determined that swaps with the Federal Reserve Banks, the Federal Government, and Federal agencies are not subject to the Clearing Requirement. Under this final rule, the Commission is extending similar treatment for swap transactions with central banks and sovereign entities, as discussed above. With respect to certain bank holding companies, savings and loan holding companies, and CDFIs, the Commission believes that an exemption from the Clearing Requirement is similar to the regulatory treatment extended to swaps entered into with small banks, savings associations, farm credit institutions, and credit unions.

Under the final rules, counterparties entering into swaps with central banks, sovereign entities, IFIs, certain bank holding companies, savings and loan holding companies, and CDFIs will not have the protection afforded by central clearing through posting initial margin, daily variation margin payments, and other types of collateralization and risk mitigation associated with central clearing. The Commission, however, believes Congress would not have excluded the swaps entered into by the Federal Reserve Bank, the Federal Government, and Federal agencies from the definition of a swap if such transactions would pose a significant risk to market participants and the public.

As discussed above, the Commission believes that international comity supports an exemption for swaps entered into by central banks, sovereign entities, and IFIs and is an appropriate exercise of the Commission's authority under section 4(c) of the CEA. These institutions generally enter into a limited number of swaps in furtherance of their public interest missions. As such, while an exemption from the Clearing Requirement does result in reduced protection for counterparties, the Commission believes that the exemption for swaps with these entities does not pose a significant risk to market participants and the public.

Finally, like the small financial institutions listed in section 2(h)(7)(C)(ii) of the CEA, the Commission believes that certain bank holding companies, savings and loan holding companies, and CDFIs are likely to have limited swaps exposure, both in terms of value and number. As such, the Commission believes that the exemptions will have a minimal impact on market participants. In addition, counterparties to a swap entered into with a bank holding company, savings and loan holding company, or CDFI under these exemptions will have some degree of protection against default because the electing entity is required to indicate how it generally meets the financial obligations associated with its uncleared swaps.

The Commission also believes that the asset cap for bank holding companies and savings and loan holding companies whose transactions will be exempt from the Clearing Requirement, combined with the requirement that one of the counterparties to the swap adhere to the requirements of Commission regulation § 50.50(b) and (c), means the exemptions are not likely to have a negative impact on market participants or the public.

b. Efficiency, Competitiveness, and Financial Integrity of Swap 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 discussed above, these final amendments to part 50 are likely to lower the cost of using swaps, and in that sense, make trading more efficient. Another potential effect of the exemptions may be to increase liquidity in swap markets insofar as entering into swaps would be less costly. Any increase in trading would improve the competitiveness of swaps markets for all participants. However, because of the small number of swaps anticipated to fall under these exemptions, and the low notional value of such swaps executed by bank holding companies, savings and loan holding companies, and CDFIs, in particular, the Commission expects a minimal impact on the efficiency of the swap markets, and negligible impact on the financial integrity of the overall swaps market. The Commission notes that to the extent that these counterparties' swaps are currently not cleared because of reliance on the Commission's determination in the 2012 End-User Exception and DCR no-action letters, the practical impact of the exemptions on the efficiency, competitiveness, and financial integrity of the swap markets may be negligible.

c. Price Discovery

Section 15(a)(2)(C) of the CEA requires the Commission to evaluate the costs and benefits of its regulations in light of price discovery considerations. The Commission believes that these exemptions from the Clearing Requirement will not have a significant impact on price discovery. Typically, more liquidity supports greater price discovery as more participants enter the market and/or more trading occurs. To the extent that markets become more liquid, price discovery could improve. In regard to transparency of prices, swaps, whether cleared or uncleared, and regardless of the counterparty, are required by section 2(a)(13)(G) of the CEA to be reported to a swap data repository. These final rules do not alter any independent reporting obligations under parts 23 or 45. Accordingly, the price discovery function of the reporting requirement is unchanged.

In terms of price discovery through trade execution, the Commission notes that the swaps subject to these final rules would not typically be executed on an exchange. They also would not be subject to a trade execution requirement under section 2(h)(8) of the CEA.

d. Sound Risk Management Practices

Section 15(a)(2)(D) of the CEA requires the Commission to evaluate the costs and benefits of a regulation in light of sound risk management practices. The Commission believes that by eliminating the costs associated with clearing for central banks, sovereign entities, IFIs, bank holding companies, savings and loan holding companies, and IFIs, the Commission is facilitating the use of swaps by these entities. To the extent that these entities use swaps to hedge existing interest rate risk, the Commission believes the exemptions from the Clearing Requirement will

enable better risk management at a potentially lower cost. The Commission also notes that swaps entered into by certain bank holding companies, savings and loan holding companies, and CDFIs tend to have small notional amounts, and the entities enter into swaps infrequently. Therefore, the Commission does not believe that swaps with these entities pose risk to U.S. financial markets.

e. 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. As discussed above, the Commission believes that public interest and international comity support the exemption from the Clearing Requirement for swaps with central banks, sovereign entities, and IFIs. The Commission believes that the public interest mission of these entities will be served by lowering the cost of financing in support of their public interest missions. For the other entities, the Commission has not identified any public interest considerations relevant to this rulemaking beyond those already noted.

C. 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 anti-competitive means of achieving the objectives of the CEA, as well as the policies and purposes of the CEA, in issuing any order or adopting any Commission rule or regulation (including any exemption under section 4(c) or 4c(b)).[157] The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. The Commission did not identify anti-competitive effects of the Proposals. The Commission requested comment regarding its analysis about the possible anti-competitive effects of the proposed exemptions and whether there are specific public interests to be protected by the antitrust laws in this context.[158]

The Commission did not receive any comments. The Commission confirms its determination that these final rules establishing new exemptions from the Clearing Requirement under subpart D are not anti-competitive and have no anti-competitive effects. Given this determination, the Commission has not identified any less anti-competitive means of achieving the purposes of the CEA.

List of Subjects in 17 CFR Part 50

Business and industry, Clearing, Cooperatives, Reporting requirements, Swaps.

For the reasons discussed in the preamble, the Commodity Futures Trading Commission amends 17 CFR chapter I as follows:

PART 50—CLEARING REQUIREMENT AND RELATED RULES

■ 1. The authority citation for part 50 is revised to read as follows:

Authority: 7 U.S.C. 2(h), 6(c), and 7a–1, as amended by Pub. L. 111–203, 124 Stat. 1376.

■ 2. Revise subpart B heading to read as follows:

Subpart B—Clearing Requirement Compliance Schedule and Compliance Dates

■ 3. Add § 50.26 to read as follows:

§ 50.26 Swap clearing requirement compliance dates.

(a) *Compliance dates for interest rate swap classes.* The compliance dates for swaps that are required to be cleared under § 50.4(a) are specified in the following table.

TABLE 1 TO PARAGRAPH (a)

Swap asset class	Swap class subtype	Currency and floating rate index	Stated termination date range	Clearing requirement compliance date
Interest Rate Swap	Fixed-to-Floating	Euro (EUR) EURIBOR	28 days to 50 years	Category 1 entities March 11, 2013. All non-Category 2 entities June 10, 2013. Category 2 entities September 9, 2013.
Interest Rate Swap	Fixed-to-Floating	Sterling (GBP) LIBOR	28 days to 50 years	Category 1 entities March 11, 2013. All non-Category 2 entities June 10, 2013. Category 2 entities September 9, 2013.
Interest Rate Swap	Fixed-to-Floating	U.S. Dollar (USD) LIBOR.	28 days to 50 years	Category 1 entities March 11, 2013. All non-Category 2 entities June 10, 2013. Category 2 entities September 9, 2013.
Interest Rate Swap	Fixed-to-Floating	Yen (JPY) LIBOR	28 days to 50 years	Category 1 entities March 11, 2013. All non-Category 2 entities June 10, 2013. Category 2 entities September 9, 2013.
Interest Rate Swap	Fixed-to-Floating	Australian Dollar (AUD) BBSW.	28 days to 30 years	All entities December 13, 2016.
Interest Rate Swap	Fixed-to-Floating	Canadian Dollar (CAD) CDOR.	28 days to 30 years	All entities July 10, 2017.
Interest Rate Swap	Fixed-to-Floating	Hong Kong Dollar (HKD) HIBOR.	28 days to 10 years	All entities August 30, 2017.
Interest Rate Swap	Fixed-to-Floating	Mexican Peso (MXN) TIIE–BANXICO.	28 days to 21 years	All entities December 13, 2016.
Interest Rate Swap	Fixed-to-Floating	Norwegian Krone (NOK) NIBOR.	28 days to 10 years	All entities April 10, 2017.
Interest Rate Swap	Fixed-to-Floating	Polish Zloty (PLN) WIBOR.	28 days to 10 years	All entities April 10, 2017.
Interest Rate Swap	Fixed-to-Floating	Singapore Dollar (SGD) SOR–VWAP.	28 days to 10 years	All entities October 15, 2018.
Interest Rate Swap	Fixed-to-Floating	Swedish Krona (SEK) STIBOR.	28 days to 15 years	All entities April 10, 2017.

[157] Section 15(b) of the CEA.

[158] May 2020 Proposal, 85 FR at 27970; August 2018 Proposal, 83 FR at 44011.

TABLE 1 TO PARAGRAPH (a)—Continued

Swap asset class	Swap class subtype	Currency and floating rate index	Stated termination date range	Clearing requirement compliance date
Interest Rate Swap	Fixed-to-Floating	Swiss Franc (CHF) LIBOR.	28 days to 30 years	All entities October 15, 2018.
Interest Rate Swap	Basis	Euro (EUR) EURIBOR	28 days to 50 years	Category 1 entities March 11, 2013. All non-Category 2 entities June 10, 2013. Category 2 entities September 9, 2013.
Interest Rate Swap	Basis	Sterling (GBP) LIBOR	28 days to 50 years	Category 1 entities March 11, 2013. All non-Category 2 entities June 10, 2013. Category 2 entities September 9, 2013.
Interest Rate Swap	Basis	U.S. Dollar (USD) LIBOR.	28 days to 50 years	Category 1 entities March 11, 2013. All non-Category 2 entities June 10, 2013. Category 2 entities September 9, 2013.
Interest Rate Swap	Basis	Yen (JPY) LIBOR	28 days to 30 years	Category 1 entities March 11, 2013. All non-Category 2 entities June 10, 2013. Category 2 entities September 9, 2013.
Interest Rate Swap	Basis	Australian Dollar (AUD) BBSW.	28 days to 30 years	All entities December 13, 2016.
Interest Rate Swap	Forward Rate Agreement.	Euro (EUR) EURIBOR	3 days to 3 years	Category 1 entities March 11, 2013. All non-Category 2 entities June 10, 2013. Category 2 entities September 9, 2013.
Interest Rate Swap	Forward Rate Agreement.	Sterling (GBP) LIBOR	3 days to 3 years	Category 1 entities March 11, 2013. All non-Category 2 entities June 10, 2013. Category 2 entities September 9, 2013.
Interest Rate Swap	Forward Rate Agreement.	U.S. Dollar (USD) LIBOR.	3 days to 3 years	Category 1 entities March 11, 2013. All non-Category 2 entities June 10, 2013. Category 2 entities September 9, 2013.
Interest Rate Swap	Forward Rate Agreement.	Yen (JPY) LIBOR	3 days to 3 years	Category 1 entities March 11, 2013. All non-Category 2 entities June 10, 2013. Category 2 entities September 9, 2013.
Interest Rate Swap	Forward Rate Agreement.	Polish Zloty (PLN) WIBOR.	3 days to 2 years	All entities April 10, 2017.
Interest Rate Swap	Forward Rate Agreement.	Norwegian Krone (NOK) NIBOR.	3 days to 2 years	All entities April 10, 2017.
Interest Rate Swap	Forward Rate Agreement.	Swedish Krona (SEK) STIBOR.	3 days to 3 years	All entities April 10, 2017.
Interest Rate Swap	Overnight Index Swap	Euro (EUR) EONIA	7 days to 2 years	Category 1 entities March 11, 2013. All non-Category 2 entities June 10, 2013. Category 2 entities September 9, 2013.
			2 years + 1 day to 3 years.	All entities December 13, 2016.
Interest Rate Swap	Overnight Index Swap	Sterling (GBP) SONIA	7 days to 2 years	Category 1 entities March 11, 2013. All non-Category 2 entities June 10, 2013. Category 2 entities September 9, 2013.
			2 years + 1 day to 3 years.	All entities December 13, 2016.
Interest Rate Swap	Overnight Index Swap	U.S. Dollar (USD) FedFunds.	7 days to 2 years	Category 1 entities March 11, 2013. All non-Category 2 entities June 10, 2013. Category 2 entities September 9, 2013.
			2 years + 1 day to 3 years.	All entities December 13, 2016.
Interest Rate Swap	Overnight Index Swap	Australian Dollar (AUD) AONIA–OIS.	7 days to 2 years	All entities December 13, 2016.
Interest Rate Swap	Overnight Index Swap	Canadian Dollar (CAD) CORRA–OIS.	7 days to 2 years	All entities July 10, 2017.

(b) *Compliance dates for credit default swap classes.* The compliance dates for swaps that are required to be cleared under § 50.4(b) are specified in the following table.

TABLE 2 TO PARAGRAPH (b)

Swap asset class	Swap class subtype	Indices	Tenor	Clearing requirement compliance date
Credit Default Swap	North American untranched CDS indices.	CDX.NA.IG	3Y, 5Y, 7Y, 10Y	Category 1 entities March 11, 2013. All non-Category 2 entities June 10, 2013. Category 2 entities September 9, 2013.
Credit Default Swap	North American untranched CDS indices.	CDX.NA.HY	5Y	Category 1 entities March 11, 2013. All non-Category 2 entities June 10, 2013. Category 2 entities September 9, 2013.

TABLE 2 TO PARAGRAPH (b)—Continued

Swap asset class	Swap class subtype	Indices	Tenor	Clearing requirement compliance date
Credit Default Swap ...	European untranched CSD indices.	iTraxx Europe	5Y, 10Y	Category 1 entities April 26, 2013. Category 2 entities July 25, 2013. All non-Category 2 entities October 23, 2013.
Credit Default Swap ...	European untranched CSD indices.	iTraxx Europe Crossover.	5Y	Category 1 entities April 26, 2013. Category 2 entities July 25, 2013. All non-Category 2 entities October 23, 2013.
Credit Default Swap ...	European untranched CSD indices.	iTraxx Europe HiVol ...	5Y	Category 1 entities April 26, 2013. Category 2 entities July 25, 2013. All non-Category 2 entities October 23, 2013.

■ 4. Revise subpart C heading to read as follows:

Subpart C—Exceptions and Exemptions from the Clearing Requirement

■ 5. In § 50.50, revise section heading and paragraph (b)(1)(iii)(A)(*2*) and remove paragraph (d) to read as follows:

§ 50.50 Non-financial end-user exception to the clearing requirement.

* * * * *

(b) * * *

(1) * * *

(iii) * * *

(A) * * *

(*2*) Exempt from the definition of ''financial entity'' as described in § 50.53;

* * * * *

■ 6. In § 50.51, revise section heading and paragraphs (a)(3)(i) and (ii) to read as follows:

§ 50.51 Cooperatives exempt from the clearing requirement.

* * * * *

(a) * * *

(3) * * *

(i) Exempt from the definition of ''financial entity'' pursuant to § 50.53; or

(ii) A cooperative formed under Federal or state law as a cooperative and each member thereof is either not a ''financial entity,'' as defined in section 2(h)(7)(C)(i) of the Act, or is exempt from the definition of ''financial entity'' pursuant to § 50.53.

* * * * *

■ 7. Revise § 50.52 heading to read as follows:

§ 50.52 Affiliated entities exempt from the clearing requirement.

■ 8. Add § 50.53 to read as follows:

§ 50.53 Banks, savings associations, farm credit system institutions, and credit unions exempt from the clearing requirement.

For purposes of section 2(h)(7)(A) of the Act, a person that is a ''financial entity'' solely because of section 2(h)(7)(C)(i)(VIII) shall be exempt from the definition of ''financial entity'' and is eligible to elect the exception to the clearing requirement under § 50.50, if such person:

(a) Is organized as a bank, as defined in section 3(a) of the Federal Deposit Insurance Act, the deposits of which are insured by the Federal Deposit Insurance Corporation; a savings association, as defined in section 3(b) of the Federal Deposit Insurance Act, the deposits of which are insured by the Federal Deposit Insurance Corporation; a farm credit system institution chartered under the Farm Credit Act of 1971; or an insured Federal credit union or State-chartered credit union under the Federal Credit Union Act; and

(b) Has total assets of $10,000,000,000 or less on the last day of such person's most recent fiscal year;

(c) Reports, or causes to be reported, the swap to a swap data repository pursuant to §§ 45.3 and 45.4 of this chapter, and reports, or causes to be reported, all information as provided in paragraph (b) of § 50.50 to a swap data repository; and

(d) Is using the swap to hedge or mitigate commercial risk as provided in paragraph (c) of § 50.50.

■ 9. Add subpart D to read as follows:

Subpart D—Swaps Not Subject to the Clearing Requirement

Sec.

50.75 Swaps entered into by central banks or sovereign entities.
50.76 Swaps entered into by international financial institutions.
50.77 Interest rate swaps entered into by community development financial institutions.
50.78 Swaps entered into by bank holding companies.
50.79 Swaps entered into by savings and loan holding companies.

§ 50.75 Swaps entered into by central banks or sovereign entities.

Swaps entered into by a central bank or sovereign entity shall be exempt from the clearing requirement of section 2(h)(1)(A) of the Act.

(a) For the purposes of this section, the term *central bank* means a reserve bank or monetary authority of a central government (including the Board of Governors of the Federal Reserve System or any of the Federal Reserve Banks) or the Bank for International Settlements.

(b) For the purposes of this section, the term *sovereign entity* means a central government (including the U.S. Government), or an agency, department, or ministry of a central government.

§ 50.76 Swaps entered into by international financial institutions.

(a) Swaps entered into by an international financial institution shall be exempt from the clearing requirement of section 2(h)(1)(A) of the Act.

(b) For purposes of this section, the term *international financial institution* means:

(1) African Development Bank;

(2) African Development Fund;

(3) Asian Development Bank;

(4) Banco Centroamericano de Integración Económica;

(5) Bank for Economic Cooperation and Development in the Middle East and North Africa;

(6) Caribbean Development Bank;

(7) Corporación Andina de Fomento;

(8) Council of Europe Development Bank;

(9) European Bank for Reconstruction and Development;

(10) European Investment Bank;

(11) European Investment Fund;

(12) European Stability Mechanism;

(13) Inter-American Development Bank;

(14) Inter-American Investment Corporation;

(15) International Bank for Reconstruction and Development;

(16) International Development Association;

(17) International Finance Corporation;

(18) International Monetary Fund;

(19) Islamic Development Bank;

(20) Multilateral Investment Guarantee Agency;

(21) Nordic Investment Bank;

(22) North American Development Bank; and

(23) Any other entity that provides financing for national or regional development in which the U.S. Government is a shareholder or contributing member.

§ 50.77 Interest rate swaps entered into by community development financial institutions.

(a) For the purposes of this section, the term *community development financial institution* means an entity that satisfies the definition in section 103(5) of the Community Development Banking and Financial Institutions Act of 1994, and is certified by the U.S. Department of the Treasury's Community Development Financial Institution Fund as meeting the requirements set forth in 12 CFR 1805.201(b).

(b) A swap entered into by a community development financial institution shall not be subject to the clearing requirement of section 2(h)(1)(A) of the Act and this part if:

(1) The swap is a U.S. dollar denominated interest rate swap in the fixed-to-floating class or the forward rate agreement class of swaps that would otherwise be subject to the clearing requirement under § 50.4(a);

(2) The total aggregate notional value of all swaps entered into by the community development financial institution during the 365 calendar days prior to the day of execution of the swap is less than or equal to $200,000,000;

(3) The swap is one of ten or fewer swap transactions that the community development financial institution enters into within a period of 365 calendar days;

(4) One of the counterparties to the swap reports the swap to a swap data repository pursuant to §§ 45.3 and 45.4 of this chapter, and reports all information as provided in paragraph (b) of § 50.50 to a swap data repository; and

(5) The swap is used to hedge or mitigate commercial risk as provided in paragraph (c) of § 50.50.

§ 50.78 Swaps entered into by bank holding companies.

(a) For purposes of this section, the term *bank holding company* means an entity that is organized as a bank holding company, as defined in section 2 of the Bank Holding Company Act of 1956.

(b) A swap entered into by a bank holding company shall not be subject to the clearing requirement of section 2(h)(1)(A) of the Act and this part if:

(1) The bank holding company has aggregated assets, including the assets of all of its subsidiaries, that do not exceed $10,000,000,000 according to the value of assets of each subsidiary on the last day of each subsidiary's most recent fiscal year;

(2) One of the counterparties to the swap reports the swap to a swap data repository pursuant to §§ 45.3 and 45.4 of this chapter, and reports all information as provided in paragraph (b) of § 50.50 to a swap data repository; and

(3) The swap is used to hedge or mitigate commercial risk as provided in paragraph (c) of § 50.50.

§ 50.79 Swaps entered into by savings and loan holding companies.

(a) For purposes of this section, the term *savings and loan holding company* means an entity that is organized as a savings and loan holding company, as defined in section 10 of the Home Owners' Loan Act of 1933.

(b) A swap entered into by a savings and loan holding company shall not be subject to the clearing requirement of section 2(h)(1)(A) of the Act and this part if:

(1) The savings and loan holding company has aggregated assets, including the assets of all of its subsidiaries, that do not exceed $10,000,000,000 according to the value of assets of each subsidiary on the last day of each subsidiary's most recent fiscal year;

(2) One of the counterparties to the swap reports the swap to a swap data repository pursuant to §§ 45.3 and 45.4 of this chapter, and reports all information as provided in paragraph (b) of § 50.50 to a swap data repository; and

(3) The swap is used to hedge or mitigate commercial risk as provided in paragraph (c) of § 50.50.

Issued in Washington, DC, on November 12, 2020, by the Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

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

Appendices to Swap Clearing Requirement Exemptions—Commission Voting Summary, Chairman's Statement, and Commissioners' Statements

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 Support of Chairman Heath P. Tarbert

I am pleased to support today's final rule amending the CFTC's Part 50 rules, which implement the swap clearing requirement of section 2(h)(1) of the Commodity Exchange Act (the Clearing Requirement). The final rule concurrently achieves two ends—it demonstrates the CFTC's evolving philosophy on comity and deference towards our international counterparts while alleviating unnecessary regulatory burdens on small domestic institutions that look nothing like Wall Street banks.

First, today's final rule creates new regulations 50.75 and 50.76, which codify existing exemptions from the Clearing Requirement for swaps entered into with certain central banks, sovereign entities, and international financial institutions. Just as we would not expect a foreign regulator to impose clearing requirements on the United States Treasury or the Federal Reserve for entering into swaps on behalf of our government, the CFTC will not impose similar requirements on other nations' finance ministries and central banks. The same is true for multilateral governmental institutions such as the World Bank Group and the International Monetary Fund. Mutual respect and a two-way-street must be the cornerstone of our international regulatory relations.

Second, the final rule establishes new regulations 50.77, 50.78, and 50.79, which exempt from the Clearing Requirement certain swaps entered into by small bank holding companies, savings and loan holding companies, and community development financial institutions. In addition, the final rule clarifies existing exemptions for banks, savings associations, farm credit systems, and credit unions with total assets of less than $10 billion. These entities are the engines of the real economy, providing financial support to American communities, businesses, and families. While exempting these entities from the Clearing Requirement makes sense in normal times, doing so is especially critical now. As we continue to manage the fallout of the COVID–19 (coronavirus) pandemic, it is particularly important that the CFTC advance our strategic goal of regulating the derivatives markets to promote the interests of all Americans.[1] Today's final rule is a step in that direction.

Appendix 3—Supporting Statement of Commissioner Brian D. Quintenz

I am pleased to support this final rule, which codifies existing relief from the

[1] CFTC Strategic Plan 2020–2024, at 6 (discussing Strategic Goal 2), *https://www.cftc.gov/media/3871/CFTC2020_2024StrategicPlan/download.*

Commission's requirement that certain commonly traded interest rate swaps and credit default swaps be cleared following their execution.[2] The new exemptions may be elected by several classes of counterparties that may enter into these swaps, namely: *Sovereign nations; central banks;* ''*international financial institutions*'' of which sovereign nations are members; *bank holding companies,* and *savings and loan holding companies,* whose assets total no more than $10 billion; and *community development financial institutions* recognized by the U.S. Treasury Department. Today's final rule notes that many of these entities have actually relied on existing relief, electing not to clear swaps that are generally subject to the clearing requirement. I strongly support the policy of international ''comity'' described in the final rule, recognizing that sovereign nations and their instrumentalities should generally not be subject to the Commission's regulations. I trust that by issuing this rule, the United States, the Federal Reserve, and other U.S. government instrumentalities will receive the same treatment in foreign jurisdictions.

Appendix 4—Statement of Commissioner Dan M. Berkovitz

I am voting for the final rule codifying certain limited exemptions from the swap clearing requirement that currently exist through Commission guidance or staff no action relief. The exemptions are consistent with longstanding Commission policies. Analysis of available historical data shows that the number and notional amount of swaps that would be exempted are relatively limited and not likely to materially impact systemic risk. Furthermore, the swaps exempted from clearing will be subject to uncleared swap margin requirements, if applicable, thereby mitigating the risks of not clearing these swaps.

The final rule codifies in rule text exemptions for swaps entered into by foreign central banks, sovereign entities at the national level, and certain international institutions that previously have been exempted from the clearing requirement through no action relief or guidance. In this regard, the final rule represents a proper exercise of international comity in recognition of the governmental nature and non-speculative purposes of these sovereign entities and international institutions.

The final rule also provides clearing exemptions for certain interest rate swaps of community development financial institutions, subject to a number of significant limits, and for swaps entered into by bank or savings and loan holding companies that have no more than $10 billion in consolidated assets. In each case, the exemption only applies if the swap is used to hedge or mitigate commercial risks. Congress provided in Commodity Exchange Act section 2(h)(7)(C) for an exclusion from the clearing requirement for banks and savings associations with less than $10 billion in assets to the extent determined by the Commission. It is appropriate to apply this exemption to the holding companies of these financial entities.

One commenter, Better Markets, expressed concern that the number of entities that will now have an exemption from the clearing requirement has grown over time, leading to the potential for greater risk, reduction in liquidity in cleared markets, and complexity in managing the exemptions. As described in the preamble to the final rule, swap data repository data indicates that over the past several years the number and scope of swaps entered into by these institutions that will be included within the exemptions has been relatively limited. Given this data, these concerns, today, do not outweigh the benefits of the final rule. However, the Commission should periodically review the SDR data to reassess whether the clearing requirement exemptions are cumulatively having a material impact on the extent of swap clearing given the intent of the Dodd-Frank Act. The Commission can then evaluate whether, on a going forward basis, any changes to the exemptions may be warranted.

I commend the staff of the Division of Clearing and Risk for this well developed and drafted final rule. The clarity and completeness of the final release helps establish a sound basis for the Commission to approve the final rule.

[FR Doc. 2020–25394 Filed 11–27–20; 8:45 am]

BILLING CODE 6351–01–P

[2] The swap clearing requirement is codified in part 50 of the Commission's regulations (17 CFR part 50).

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Part 591

Publication of Web General Licenses Issued Pursuant to the Venezuela Sanctions Regulations

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Publication of Web General Licenses.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing three Venezuela-related web general licenses in the **Federal Register**: General License 5C, which has been superseded, General License 5D, which has been superseded, and General License 5E, each of which was previously issued on OFAC's website.

DATES: General License 5E was issued on October 6, 2020 and the authorizations in it will be effective January 19, 2021.

FOR FURTHER INFORMATION CONTACT: OFAC: Assistant Director for Licensing, 202–622–2480; Assistant Director for Regulatory Affairs, 202–622–4855; or Assistant Director for Sanctions Compliance & Evaluation, 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

This document and additional information concerning OFAC are available on OFAC's website (*www.treasury.gov/ofac*).

Background

On March 8, 2015, the President, invoking the authority of, *inter alia,* the International Emergency Economic Powers Act (50 U.S.C. 1701–1706), issued Executive Order (E.O.) 13692 of March 8, 2015, ''Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela'' (80 FR 12747, March 11, 2015). In E.O. 13692, the President found that the situation in Venezuela, including the Government of Venezuela's erosion of human rights guarantees, persecution of political opponents, curtailment of press freedoms, use of violence and human rights violations and abuses in response to antigovernment protests, and arbitrary arrest and detention of antigovernment protestors, as well as the exacerbating presence of significant public corruption, constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States, and declared a national emergency to deal with that threat.

The President has issued six additional Executive Orders pursuant to the national emergency declared in E.O. 13692: E.O. 13808 of August 24, 2017, ''Imposing Additional Sanctions With Respect to the Situation in Venezuela'' (82 FR 41155, August 29, 2017); E.O. 13827 of March 19, 2018, ''Taking Additional Steps to Address the Situation in Venezuela'' (83 FR 12469, March 21, 2018); E.O. 13835 of May 21, 2018, ''Prohibiting Certain Additional Transactions With Respect to Venezuela'' (83 FR 24001, May 24, 2018); E.O. 13850 of November 1, 2018, ''Blocking Property of Additional Persons Contributing to the Situation in Venezuela'' (83 FR 55243, November 2, 2018); E.O. 13857 of January 25, 2019, ''Taking Additional Steps To Address the National Emergency With Respect to Venezuela'' (84 FR 509, January 30, 2019); and E.O. 13884 of August 5, 2019, ''Blocking Property of the Government of Venezuela'' (84 FR 38843, August 7, 2019).

OFAC, in consultation with the Department of State, issued Venezuela-related General License (GL) 5 on July 19, 2018, pursuant to E.O. 13835, to authorize certain transactions related to the Petróleos de Venezuela S.A. 2020 8.5 Percent Bond that were prohibited

by Subsection 1(a)(iii) of E.O. 13835. On October 24, 2019, OFAC issued GL 5A, which replaced and superseded GL 5. GL 5A delayed until January 22, 2020 the effectiveness of the authorization that was previously contained in GL 5. On January 17, 2020, OFAC issued GL 5B, which replaced and superseded GL 5A. GL 5B further delayed until April 22, 2020 the effectiveness of the authorization that was previously contained in GL 5. On April 10, 2020, OFAC issued GL 5C, which replaced and superseded GL 5B. GL 5C further delayed until July 22, 2020 the effectiveness of the authorization that was previously contained in GL 5. On July 15, 2020, OFAC issued GL 5D, which replaced and superseded GL 5C. GL 5D further delayed until October 20, 2020 the effectiveness of the authorization that was previously contained in GL 5. On October 6, 2020, OFAC issued GL 5E, which replaced and superseded GL 5D. GL 5E further delayed until January 19, 2021 the effectiveness of the authorization that was previously contained in GL 5. As a result, no transactions may be conducted pursuant to GL 5E until January 19, 2021. The texts of GL 5C, GL 5D, and GL 5E are provided below.

Office of Foreign Assets Control

Venezuela Sanctions Regulations 31 CFR part 591

General License No. 5C

Authorizing Certain Transactions Related to the Petróleos de Venezuela, S.A. 2020 8.5 Percent Bond on or After July 22, 2020

(a) Except as provided in paragraph (b) of this general license, on or after July 22, 2020, all transactions related to, the provision of financing for, and other dealings in the Petróleos de Venezuela, S.A. 2020 8.5 Percent Bond that would be prohibited by Subsection l(a)(iii) of Executive Order (E.O.) 13835 of May 21, 2018, as amended by E.O. 13857 of January 25, 2019, and incorporated into the Venezuela Sanctions Regulations, 31 CFR part 591 (the VSR), are authorized.

(b) This general license does not authorize any transactions or activities otherwise prohibited by the VSR, or any other part of 31 CFR chapter V.

(c) Effective April 10, 2020, General License No. 5B, dated January 21, 2020, is replaced and superseded in its entirety by this General License No. 5C.

Andrea Gacki
Director
Office of Foreign Assets Control
Dated: April 10, 2020

Office of Foreign Assets Control

Venezuela Sanctions Regulations 31 CFR part 591

General License No. 5D

Authorizing Certain Transactions Related to the Petróleos de Venezuela, S.A. 2020 8.5 Percent Bond on or After October 20, 2020

(a) Except as provided in paragraph (b) of this general license, on or after October 20, 2020, all transactions related to, the provision of financing for, and other dealings in the Petróleos de Venezuela, S.A. 2020 8.5 Percent Bond that would be prohibited by Subsection l(a)(iii) of Executive Order (E.O.) 13835 of May 21, 2018, as amended by E.O. 13857 of January 25, 2019, and incorporated into the Venezuela Sanctions Regulations, 31 CFR part 591 (the VSR), are authorized.

(b) This general license does not authorize any transactions or activities otherwise prohibited by the VSR, or any other part of 31 CFR chapter V.

(c) Effective July 15, 2020, General License No. 5C, dated April 10, 2020, is replaced and superseded in its entirety by this General License No. 5D.

Andrea Gacki
Director
Office of Foreign Assets Control
Dated: July 15, 2020

Office of Foreign Assets Control

Venezuela Sanctions Regulations 31 CFR part 591

General License No. 5E

Authorizing Certain Transactions Related to the Petróleos de Venezuela, S.A. 2020 8.5 Percent Bond on or After January 19, 2021

(a) Except as provided in paragraph (b) of this general license, on or after January 19, 2021, all transactions related to, the provision of financing for, and other dealings in the Petróleos de Venezuela, S.A. 2020 8.5 Percent Bond that would be prohibited by Subsection l(a)(iii) of Executive Order (E.O.) 13835 of May 21, 2018, as amended by E.O. 13857 of January 25, 2019, and incorporated into the Venezuela Sanctions Regulations, 31 CFR part 591 (the VSR), are authorized.

(b) This general license does not authorize any transactions or activities otherwise prohibited by the VSR, or any other part of 31 CFR chapter V.

(c) Effective October 6, 2020, General License No. 5D, dated July 15, 2020, is replaced and superseded in its entirety by this General License No. 5E.

Andrea Gacki
Director
Office of Foreign Assets Control
Dated: October 6, 2020

Dated: November 24, 2020.

Andrea Gacki,

Director, Office of Foreign Assets Control.

[FR Doc. 2020–26345 Filed 11–27–20; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–USCG–2020–0645]

RIN 1625–AA00

Safety Zone; Neuse River, New Bern, NC

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the navigable waters of the Neuse River in New Bern, North Carolina. This action is necessary to provide for the safety of life on these navigable water near New Bern, NC, during an aerobatic airshow on December 05, 2020. This rulemaking would prohibit persons and vessels from being in the safety zone unless authorized by the Captain of the Port (COTP) North Carolina or a designated representative.

DATES: This rule is effective December 5, 2020 from 4 p.m. through 5:30 p.m.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2020–0645 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 Chief Petty Officer Joshua O'Rourke, Waterways Management Division, U.S. Coast Guard Sector North Carolina, Wilmington, NC; telephone 910–772–2227, email *NCMarineevents@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

In August 2020, the UHF Development Group informed the Coast

Guard of their intention to plan an aerobatic airshow on the Neuse River in New Bern, North Carolina. The airshow will take place December 5, 2020, from 4 p.m. to 5:30 p.m. We are proposing to establish a temporary safety zone covering approximately one square mile of the Neuse River for the duration of the event. The Captain of the Port (COTP) North Carolina has determined that potential safety hazards associated with the aerobatic airshow would be a concern for anyone transiting this portion of the Neuse River during the show.

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 and contrary to public interest because immediate action is needed to protect persons and vessels from the hazards associated with this event on December 5, 2020.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231) The COTP North Carolina has determined that potential hazards associated with the New Bern Christmas Flotilla Airshow scheduled for 4 p.m. through 5:30 p.m. on December 5, 2020 is a safety concern for mariners during the time that aircraft perform aerobatic maneuvers directly above the Neuse River. This rule is necessary to protect safety of life from the potential hazards associated with the high-speed boat race.

IV. Discussion of Comments, Changes, and the Rule

This rule establishes a temporary safety zone on a portion of the Neuse River from December 5, 2020, from 4 p.m. to 5:30 p.m. The rule will be enforced for the duration of the event. The dates and times of enforcement will be broadcast locally over VHF–FM marine radio. The safety zone will include all navigable waters of the Neuse River in New Bern, North Carolina, inside an area starting from approximate positions: Latitude 35°06′32″ N, longitude 077°01′54″ W, then north to latitude 35°06′55″ N, longitude 077°02′04″ W, then east to latitude 35°07′06″ N, longitude 077°01′27″ W, then southeast to latitude 35°06′49″ N, longitude 077°01′12″ W, then south to latitude 35°06′08″ N, longitude 077°01′18″ W, then west to latitude 35°06′02″ N, longitude 077°01′57″ W, then north to the point of origin, for a total area of approximately 1 mile square. The airshow will consist of two separate performances and will last a total approximately 1.5 hours. The event will begin roughly 20 minutes before sunset and will last to approximately 30 minutes after sunset. All aircraft will remain at least 500 feet above the ground. Public spectators will be allowed to view the event from the waterway, however, for safety reasons, the aircraft will not perform if there are any vessels inside the safety zone. The duration of this safety zone is intended to protect participants and spectators on the navigable waters of the Neuse River during the airshow. Vessels may transit the area, so long as they remain outside the safety zone. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP North Carolina 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 size, location, and duration of the safety zone. Vessel traffic will not be allowed to enter or transit a portion of the Neuse River during the airshow from 4 p.m. through 5:30 p.m. December 5, 2020. The Coast Guard will transmit a Broadcast Notice to Mariners via VHF–FM marine channel 16 regarding the enforcement area. This rule allows vessels to request permission to pass through 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 safety zone may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone lasting 1.5 hours that will prohibit entry within a 1 square mile area of the Neuse River on December 5, 2020, from 4 p.m. to 5:30 p.m. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. 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.

■ 2. Add § 165.T05–0645 to read as follows:

§ 165.T05–0645 Safety Zone; Neuse River, Airshow, New Bern, NC.

(a) *Location.* The following area is a safety zone: All navigable waters of the Neuse River in New Bern, North Carolina, inside an area starting from approximate positions: Latitude 35°06′32″ N, longitude 077°01′54″ W, then north to latitude 35°06′55″ N, longitude 077°02′04″ W, then east to latitude 35°07′06″ N, longitude 077°01′27″ W, then southeast to latitude 35°06′49″ N, longitude 077°01′12″ W, then south to latitude 35°06′08″ N, longitude 077°01′18″ W, then west to latitude 35°06′02″ N, longitude 077°01′57″ W, then north to the point of origin, for a total area of approximately 1 mile square.

(b) *Definitions.* As used in this section—

Captain of the Port (COTP) means the Commander, Sector North Carolina.

Designated representative means a Coast Guard Patrol Commander, including a Coast Guard commissioned, warrant, or petty officer designated by the Captain of the Port North Carolina (COTP) for the enforcement of the safety zone.

(c) *Regulations.* (1) The general regulations governing safety zones in § 165.23 apply to the area described in paragraph (a) of this section.

(2) Entry into or remaining in this safety zone is prohibited unless authorized by the COTP North Carolina or the COTP North Carolina's designated representative. Unless permission to remain in the zone has been granted by the COTP North Carolina or the COTP North Carolina's designated representative, a vessel within this safety zone must immediately depart the zone when this section becomes effective.

(3) The Captain of the Port, North Carolina can be reached through the Coast Guard Sector North Carolina Command Duty Officer, Wilmington, North Carolina, at telephone number 910–343–3882.

(4) The Coast Guard and designated security vessels enforcing the safety zone can be contacted on VHF–FM marine band radio channel 13 (165.65 MHz) and channel 16 (156.8 MHz).

(d) *Enforcement.* The U.S. Coast Guard may be assisted in the patrol and enforcement of the safety zone by Federal, State, and local agencies.

(e) *Enforcement period.* This regulation will be enforced from 4 p.m. through 5:30 p.m. on December 5, 2020.

Dated: November 17, 2020.

Matthew J. Baer,

Captain, U. S. Coast Guard, Captain of the Port North Carolina.

[FR Doc. 2020–25688 Filed 11–27–20; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 4

RIN 2900–AP88

Schedule for Rating Disabilities: Musculoskeletal System and Muscle Injuries

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs (VA) Schedule for Rating Disabilities (''VASRD'' or ''rating schedule'') by revising the portion of the rating schedule that addresses the musculoskeletal system. The purpose of this revision is to ensure that this portion of the rating schedule uses current medical terminology and provides detailed and updated criteria for the evaluation of musculoskeletal disabilities.

DATES: This rule is effective February 7, 2021.

FOR FURTHER INFORMATION CONTACT: Gary Reynolds, M.D., Regulations Staff (211C), Compensation Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 461–9700. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: The National Defense Authorization Act of 2004, secs. 1501–07, Public Law 108–136, Stat. 1392, established the Veterans' Disability Benefits Commission (the ''Commission''). Section 1502 of Public Law 108–136 mandated the Commission to study

ways to improve the disability compensation system for military veterans. The Commission consulted with the Institute of Medicine (IOM) (now named the National Academy of Medicine) to review the medical aspects of current policies. In 2007, the IOM released its report titled ''A 21st Century System for Evaluating Veterans for Disability Benefits.'' (Micahel McGeary et al. eds. 2007).

The IOM report noted that the VA Rating Schedule for Disabilities was inadequate in areas because it contained obsolete information and did not sufficiently integrate current and accepted diagnostic procedures as well as the lack of current knowledge of the relationships between conditions and comorbidities. Following the release of the IOM report, VA created a musculoskeletal system workgroup to: (1) Improve and update the process that VA uses to assign levels of disability after it grants service connection; (2) improve the fairness in adjudicating disability benefits for service-connected veterans; and (3) invite public participation.

VA began rulemaking to remove obsolete diagnostic codes, modernize the names of selected diagnostic codes, revise descriptions and criteria, and add new diagnostic codes. VA published a proposed rule to revise the regulations involving the musculoskeletal system within VASRD on August 1, 2017 (82 FR 35719). Specifically, VA proposed to rename conditions to reflect current medicine, remove obsolete conditions, clarify ambiguities, and add conditions that previously did not have diagnostic codes. Interested persons were invited to submit comments on or before October 2, 2017. VA received comments from the National Organization of Veterans' Advocates, American Association of Nurse Practitioners, Paralyzed Veterans of America, and nine individuals. VA has made limited changes based on these comments, as discussed below.

General Terminology Changes

Two separate comments recommending specific terminology changes were received.

One commenter suggested incorporating terminology used by claimants or seen in service treatment records into the VASRD regulations. The commenter stated that field medics do not always incorporate medical terminology or use treatises when entering information in a servicemember's medical record. The commenter also noted that individual claimants may not have sufficient medical training to utilize specific technical terminology when claiming a given disability. A stated intent of the current update to the rating schedule, as stated in the preamble to the proposed rule, is to employ current medical terminology in order to clarify and standardize the disability criteria. Accordingly, VA relies on medical standards and treatises when updating terminology.

As to the effect of technical terminology in part 4 on a veteran attempting to claim disability, there is none. Claimants are not required to possess medical knowledge or expertise when describing a claimed condition; they are simply required to describe their disability and/or symptoms as they experience and observe them. *Brokowski* v. *Shinseki,* 23 Vet. App. 79, 86–87 (2009). Moreover, VA reviews medical records with the understanding that different examiners, at different times, will not describe the same disability in the same language; it is the responsibility of the rating specialist to interpret reports of examination in the light of the whole recorded history, reconciling the various reports into a consistent picture so that the current rating may accurately reflect the elements of disability present. 38 CFR 4.2. Accordingly, VA reviews the entire evidentiary record in light of the disability claimed, circumstances of military service, and all other applicable records to create a cohesive picture of the disability in question; it is not the responsibility of the claimant or a military medical provider to employ terminology that necessarily matches the VASRD. Thus, VA makes no changes related to this comment.

Another commenter suggested use of the phrases ''greater than or equal to'' and ''less than or equal to'' rather than ''limited to XX degrees or more'' or ''limited to XX degrees or less'' for criteria based on numerical range of motion measurements. While this comment was taken into consideration, VA notes the phrases ''limited to XX degrees or more'' or ''limited to XX degrees or less'' are consistent with medically-accepted language used in the VASRD for range of motion measurement and elsewhere, and are well-understood and applied by VA claims processors efficiently and accurately. Accordingly, VA makes no changes based on this comment.

Musculoskeletal Diagnostic Codes

I. Diagnostic Codes (DCs) 5002–5009

One commenter asked if there was a DC for infectious arthritis. While there is not a standalone DC for infectious arthritis, infectious arthritis may be evaluated under DCs 5004 through 5009, depending on the infection associated with the arthritic findings. VA makes no change based on this comment.

Another commenter requested that VA use the same non-exhaustive list of conditions listed in proposed DC 5002's Note (1) for other selected DCs (5054, 5055, and 5250–5255). The list of conditions in DC 5002 is being provided to further explain the change from this DC contemplating a specific condition to contemplating a category of conditions. The other DCs suggested by the commenter are unlike proposed DC 5002 because they employ criteria based on a specific procedure (DCs 5054 & 5055) or defined range of motion measurement (DCs 5250–5255). VA makes no changes based on this comment.

Lastly, a commenter expressed concern that the directive to ''assign the higher evaluation'' under DC 5002 could result in situations where an active disease process results in a lower evaluation than if the residuals of the disease itself were evaluated. The directive in proposed Note (3) for DC 5002 specifically addresses this concern. As indicated in the preamble to the proposed rule, the purpose of Note (3) is to prevent ratings for both residuals and active disease process at the same time; instead, the Note requires claims processors to assign the evaluation more advantageous to the claimant: An evaluation for active disease process OR an evaluation for the residual effects of the disease (including combined and/or bilateral factors, where applicable). Accordingly, VA makes no change based on this comment.

II. DCs 5010–5024

One commenter suggested that arthritis ratings under DC 5010 resulting from separate traumas should not receive a combined evaluation under 38 CFR 4.25. VA makes no changes based on this comment, as the evaluations under the VASRD are based on the average impairment in earnings due to disabilities resulting from military service; the specific incidents or causes during military service are generally immaterial to a rating. As a practical matter, attempting to categorize functional impairment by specific traumatic instances would prove ineffective and often impossible, as specific instances of trauma are not necessarily captured in the treatment record for an individual.

One commenter asked how DC 5011 would help evaluate a case of facial fractures, hearing loss, a collapsed sinus, eye injury and so forth. VA notes

that DC 5011 does not provide specific evaluation criteria; rather, it serves as a standalone diagnostic code to track instances of decompression illness (also known as generalized barotrauma or the bends). As noted in the preamble to the proposed rule, residual manifestations of decompression illness often involve other body systems; the proposed evaluation criteria specifically directs claims processors to evaluate residuals under the appropriate body system. Accordingly, specific residual injuries will be evaluated under the most appropriate diagnostic code in the VASRD, in accordance with the findings and disability present. VA makes no changes based on this comment.

Another commenter questioned what effect the changes to DCs 5010, 5013 and 5014 would have on determinations under 38 CFR 3.309. 38 CFR 3.309 identifies diseases subject to presumptive service connection where certain circumstances of military service are otherwise met. This section pertains to establishing service connection; it does not involve the evaluation of any specified disability. The current rulemaking has no impact on the provisions of section 3.309 and therefore VA makes no changes based on this comment.

Another commenter recommended using the phrase ''medically-directed therapy'' as opposed to ''prescribed therapeutic procedure'' in the Note to DC 5012. While this comment was taken into consideration, VA's selected term has a specific meaning and indicates a prescribed course of treatment, as determined by a qualified medical professional, as evidence of the severity of the disability and disease, in the professional opinion of the provider. ''Medically-directed'' does not have the same meaning as ''prescribed'' and its use here would leave open for interpretation therapies that are either suggested at a lower level of necessity or directed by someone who is not licensed/qualified to prescribe treatment for malignancies. VA makes no changes based on this comment.

One commenter suggested adding a Note to DC 5014 indicating that, if medical evidence does not specifically indicate or state there are no residuals, there is insufficient evidence to apply the provisions of DC 5014. VA appreciates this comment but notes that 38 CFR 4.2 specifically instructs claims processors to return examinations as inadequate for evaluation purposes if the examination report does not contain sufficient detail or if a diagnosis is not supported by the findings on examination. Accordingly, the suggested Note would be duplicative of current regulations and VA makes no change.

Also, a commenter suggested adding notes to indicate where hydrarthrosis, synovitis, and periostitis could be evaluated since VA proposed removing specific DCs for these conditions. As noted in the preamble to the proposed rule, hydrarthrosis and synovitis are signs of underlying conditions that are already captured within the evaluation criteria of other DCs. Likewise, periostitis is a non-specific inflammatory process caused by underlying conditions that can be rated in accordance with the primary diagnosis. VA sees no need to limit these signs to specific DCs; they will be evaluated with an underlying diagnosis. VA makes no changes based on this comment.

Finally, on further review, the sentence following DC 5024 is more aptly described as a Note to DCs 5013 through 5024. As such, the final rule recharacterizes it as a Note and removes as unnecessary the proposed limitation that gout only be evaluated under DC 5003.

III. DCs 5051–5056 (Introductory Notes)

One commenter requested clarification as to why joint resurfacing and total joint replacement qualify for 100 percent disability compensation during the convalescent period, but partial joint replacement does not. VA recognizes that partial joint replacement (more accurately referred to as subtotal joint replacement) may result in disability in a manner similar to joint resurfacing and/or total joint replacement. However, VA currently lacks sufficient data to determine that partial joint replacement warrants a temporary post-surgical rating in lieu of a rating based on the effects of the underlying disability. To that end, VA will consider adding criteria specific to subtotal joint replacement in a future rulemaking, once sufficient evidence is received and reviewed to provide adequate evaluation criteria.

One commenter asked if revision procedures were eligible for the same compensation as the original procedures. While this comment was asked about hip replacement, it could be applied to all of the prosthetic replacement DCs. If the original complete prosthetic component is replaced, or, in addition to replacement of the original component, additional components are installed, then the revision procedure should be evaluated in the same manner as the initial procedure. In other words, if the revision fully replaces the original total prosthetic joint replacement, VA treats the complete revision procedure in the same manner as the initial total joint replacement. To that end, in this final rule, VA has recharacterized the proposed note at the beginning of the ''Prosthetic Implants and Resurfacing'' subsection as Note (1) and added a Note (2) that directs claim processors to only evaluate revision procedures in the same manner as the original procedure if the revision completely replaces the original components.

For organization and clarity, VA has also moved three other notes to the beginning of the ''Prosthetic Implants and Resurfacing'' subsection and added a clarifying instruction. Specifically, the note immediately following DC 5111 has been moved to the beginning of the subsection and redesignated as Note (3). DC 5053's note and DC 5056's Note (1), which were identical, have been moved and redesignated as Note (4). An instruction that clarifies when the 100 percent evaluation period begins and ends for DCs 5054 and 5055 is provided as Note (5). And Note (2) under DC 5056 has been moved and redesignated as Note (6).

IV. DCs 5054 and 5055

Multiple comments were received for DCs 5054 and 5055. Generalized objections included two commenters who shared their personal histories involving revision procedures/surgeries on their hips as the underlying basis for their objections. Two commenters also expressed reservations with the reduction in the convalescent period for these DCs because of non-sedentary or physically demanding occupations, as well as additional service-connected disabilities that potentially complicate the evaluation. In regard to using personal experiences to justify any objection to the proposed changes, VA notes that 38 U.S.C. 1155 (the statute that governs implementation of the ratings schedule) provides that ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civilian occupations. Accordingly, VA formulates the VASRD based on average impairments in civil occupations, not isolated personal experiences or the demands of specific occupations. In addition, the reduction in convalescent periods is based on average recovery times, as noted in the proposed rulemaking and sources cited therein. There are provisions to address exceptional individual circumstances on a case-by-case basis that fall outside the scope of this rulemaking. No changes are made based on those comments.

Another commenter disputed the study cited in the preamble to the proposed rule. The commenter used a quotation from the authors characterizing the methodological quality as moderate to low and comparisons of rates and speeds of return to work being hampered by large variations in patient selection and measurement methods. VA disagrees that the limitations identified by the commenter should invalidate the justification to reduce the convalescent period from 12 months to 4 months for hip and knee replacements. There are multiple studies within the medical literature which demonstrate sufficient functional recovery well short of 12 months. The study cited in the proposed rule focused upon a specific outcome (return to work without restriction), rather than completion of the associated rehabilitation program. VA convalescence rates are awarded at the 100 percent level—which, in accordance with the criteria throughout 38 CFR part 4, equates to a complete inability to work. Following the convalescent period, VA assigns a non-convalescent evaluation based on residual functional impairment, the purpose of which is to assess residual disability and compensate for average earnings loss based on said residual disability.

One commenter proposed that a reduction in benefits for these DCs occur only after mandatory examination. Post-convalescence reductions for these conditions occur without a mandatory examination, due to the common nature of these medical procedures as well as the expected outcome and residuals, as supported by medical evidence cited in the preamble to the proposed rule. As stated in 38 CFR 4.1, the percentage ratings represent as far as can practicably be determined the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupations. VA acknowledges that there may be individual circumstances which require additional consideration due to worse-than-expected residuals or the factual need for additional convalescence. In these circumstances, a claimant may submit a claim with pertinent treatment records to support an increased evaluation for residuals or additional convalescence, all without requiring a mandatory examination. VA makes no changes based on this comment.

Another commenter proposed to extend the convalescent period whenever a revision procedure is performed. While a revision procedure may require additional time in the hospital following the procedure, this time typically amounts to a few days. Additionally, while the recovery may be potentially slower following a revision, VA is currently unaware of published medical literature which quantifies this recovery in a manner sufficient to identify a unique and/or extended period of convalescence for purposes of the VASRD. Should such evidence exist at a future date, VA will review it and consider revisions to the criteria as necessary. At this time, however, VA makes no changes based on this comment.

One commenter disagreed with the proposed reduction in the convalescent period because (1) there was little to no public support for such a reduction and (2) the studies used to support the reduction were not specific to veterans. The language in 38 U.S.C. 1155 specifically contemplates a schedule of ratings based on the average impairment in earnings from civil occupations, with revisions from time to time in accordance with experience. If a particular disability's effect on earnings capacity measurably changes (usually through a combination of improved medical management and job market changes), VA complies with its statutory authority by revising the criteria contained in the VASRD to ensure evaluations are consistent with available data. VA is unaware of any study pertinent to the disabilities at issue that quantifies a different impact of a specific disability or disabilities on the general population comparative to the veteran population. Should such information become available, VA will review it along with all other available scientific, medical, and economic data available to ensure the VASRD provides the most accurate and adequate evaluations. At this time, however, VA makes no revisions based on these comments.

One commenter offered an alternative schema to VA's proposal for DC 5054. This commenter recommended a separate DC be created for hip resurfacing. The commenter provided multiple sources to justify a minimum evaluation within the criteria for this alternative schema (citing multiple sources which compared resurfacing to prosthetic replacement). The commenter also criticized VA's proposed revision for DC 5054, asserting it was contradictory to government and industry standards. The commenter asserted that the purpose and advantage of hip resurfacing is bone preservation, not improved range of motion or activity. Finally, the commenter stated that VA should evaluate resurfacing and total arthroplasty under separate DCs.

VA makes no changes based on these comments for several reasons. First, VA disagrees with the statement that a minimum evaluation for hip resurfacing post convalescence similar to total arthroplasty is required. As noted in the preamble to the proposed rule, joint resurfacing preserves more of the original anatomy of the joint, leading to greater functional potential, and ultimately less occupational disability or impairment in earnings capacity compared to a total arthroplasty. Also, the sources cited by the commenter refer to the hip resurfacing procedure itself, the unique complications associated with resurfacing, and how it compares to total arthroplasty. While relevant in individual cases, potential complications in and of themselves do not consistently predict either residual occupational disability or average impairment in earnings capacity in a manner consistent with VA's authority to maintain and revise the VASRD. Additionally, as stated previously in response to similar comments, should individual complications arise, VA has the means to address these unique situations on a case-by-case basis either through additional convalescence or increased evaluations. With regard to the comment that VA's proposed revision is contrary to government and industry standards, VA notes that the commenter did not provide resources which establish either government or industry standards for the evaluation of resurfacing or residual disability in light of occupational impairment or earnings loss, and VA is unaware of an official government or industry standard upon which to base any changes to the proposed rule.

However, to further clarify VA's intent to provide a minimum evaluation following only total joint replacement, VA has added language to the Note following final DCs 5054 and 5055 clarifying that the minimum evaluation does not apply to resurfacing. Regarding the comment that range of motion as a residual for hip resurfacing would not be addressed under other DCs, VA notes that the (proposed and now final) rule directs the rater to use DCs 5250 through 5255 to evaluate such residuals. DCs 5251, 5252, and 5253 address decreased range of motion of the hip joint as a potential residual. Additionally, VA notes that the commenter's reference to ''bone preservation'' is consistent with VA's explanation in the preamble of the proposed rule (noting that resurfacing ''preserves more of the original anatomy''). In any event, the intent of the VASRD is to assess and evaluate

residual disability and occupational impairment. Currently, VA is unaware of medical or economic data to support an evaluation for hip resurfacing based on the quantity of bone preserved. Additionally, VA notes that a single DC for both resurfacing and prosthetic component replacement is more appropriate than having separate DCs, as the symptoms leading up to and resulting from both procedures are similar and predictable (loss of weight bearing capability, muscle strength/endurance, and range of motion due to complications such as component loosening, infection, etc.).

V. DCs 5120–5173

One commenter stated that the rating for disarticulation of the shoulder in DC 5120 may conflict with the rules for rating the shoulder muscles and ankylosed joints. VA notes that a disarticulation at the shoulder joint removes all the joints along with their associated muscles of the upper extremity. Thus, there would be no muscles or joints remaining, and therefore no evaluation based on ankylosis of the joint could be assigned.

Another commenter asked why VA removed prompts from certain DCs directing claims processors to consider eligibility for special monthly compensation (SMC). The removal of the prompts from DCs in the proposed rule was an unintentional error. Accordingly, VA has re-inserted the prompts to consider SMC for all applicable DCs.

One commenter questioned both the need and the basis for the proposed changes to DC 5170. The commenter disagreed with VA's proposed criteria modification to include different amputation degrees within one DC and argued that at least two different DCs was a more appropriate approach. As noted in the preamble to the proposed rule, VA is adding this terminology to incorporate a residual which causes a similar disability to the one captured by current DC 5170. Furthermore, the amputation levels captured in the (proposed and now final) DC cause similar effects on occupational disability and impairment of earnings capacity. By grouping conditions and injuries with similar functional impairment together, VA provides accurate and adequate evaluations that reflect actual functional impairment while also providing more efficient and timely delivery of benefits.

VI. DCs 5235–5243

One commenter requested that VA include more medical diagnoses synonymous with intervertebral disc syndrome (IVDS) and arthritis because, in the commenter's view, claims processors are inconsistent with acknowledging other similar conditions/diagnoses that are not specifically labeled as IVDS, arthritis, or degenerative joint disease (DJD). VA's original intent was to classify disability associated with IVDS under DC 5243 and all other intervertebral disc disabilities under DC 5242. To clarify that issue, VA has added such an instruction to final DC 5243.

VII. DC 5244

For newly proposed DC 5244, two commenters had questions, and one commenter offered to provide training assistance to claims processors learning how to evaluate this newly proposed DC. The issue of training is beyond the scope of this rulemaking and therefore VA does not respond. One commenter stated that using the term ''paraplegia'' was problematic because it lumped a number of disabilities together and because paraplegia has a legal meaning. Specifically, the commenter questioned if paraplegia under DC 5244 also applies to paraplegia caused by amyotrophic lateral sclerosis (ALS) or multiple sclerosis (MS) and whether anal and bladder sphincter control impairment is necessary for assigning paraplegia under this DC, as is required to qualify for SMC under 38 CFR 3.350(e)(2), which is titled *Paraplegia.* The other commenter asked if incomplete paralysis is compensable. First, VA intended DC 5244 to rate paralysis resulting from trauma, as indicated in the title. It is separate and distinct from paralysis caused by either ALS or MS, which are neurological diseases and are rated using the appropriate neurological DC hyphenated with DC 5110 (loss of use of both feet). Second, although paraplegia is the title of § 3.350(e)(2), that provision provides requirements for SMC; paraplegia awarded under DC 5244 does not require impairment of anal and bladder sphincter control. Third, with regard to the comment on incomplete versus complete paralysis, VA has provided a note in this final rule that, if traumatic paralysis does not cause loss of use of both hands or both feet, it is incomplete paralysis and must be rated using the appropriate diagnostic code (*e.g.,* 38 CFR 4.124a, Diseases of the Peripheral Nerves).

VIII. DCs 5255 and 5257

One commenter concurred with the proposed changes to DC 5255. VA thanks the commenter for the input. Other commenters (1) asked if patellofemoral pain syndrome (PFPS) was included in DC 5255; (2) asked what would happen to DCs 5258 and 5259, given the proposed changes to DC 5257; and (3) recommended that claims processors be provided additional guidance for evaluating malunion under DC 5255. First, PFPS is a symptom that may result from patellar instability, but is a less appropriate fit for DC 5255, which contains criteria requiring fractures or malunions. Second, VA intends no changes to DCs 5258 or 5259, as they involve different components of the knee; accordingly, the changes to DC 5257 have no impact on DCs 5258 and 5259. Lastly, VA will provide non-regulatory guidance and training to claims processors for evaluating malunion under DC 5255.

Four additional commenters had concerns with and suggested alternatives to the proposed criteria of DC 5257. The first commenter expressed concern that the term ''physician prescribed'' excludes nurse practitioners, though such prescriptions are well within their scope of practice. VA agrees, and has substituted ''medical provider'' in place of ''physician'' to indicate that such instructions are intended to include qualified medical providers such as nurse practicioners.

The second commenter argued that (1) there is subjectivity with measuring translation; and (2) operative intervention should not be the basis for distinguishing a 30 percent evaluation from a 20 percent evaluation. After review, VA agrees that using translation can add an unintended amount of subjectivity to the evaluation criteria. To that end, VA has revised the proposed criteria to remove the reference to translation, and, instead, will use the elements of ligament status, instability, and need for assistive devices/bracing. A 10 percent evaluation will be granted if a sprained, incompletely torn ligament, or completely torn ligament (whether repaired, unrepaired, or failed repair) causes persistent instability but does not require a prescription for either bracing or an assistive device for ambulation. A 20 percent evaluation will be granted under one of two circumstances: (a) In the presence of a sprained, incompletely torn ligament, or repaired completely torn ligament that causes persistent instability and a medical provider prescribes a brace and/or assistive device; or, (b) in the presence of an unrepaired completely torn ligament or completely torn ligament with failed repair that causes persistent instability and requires a prescription for either a brace or an assistive device for ambulation. A 30 percent evaluation will be granted for an unrepaired completely torn ligament or completely torn ligament with failed

repair that requires a prescription for both a brace and an assistive device for ambulation. As to the original comment, this final rule considers both operative intervention and prescriptions as a basis for distinguishing the 30 percent and 20 percent evaluations. As a result of these changes, proposed Note (1), providing measurements of joint translation, has been withdrawn.

The third commenter felt that VA gave no explanation for the new criteria, that the criteria should include assistive devices and/or bracing whether prescribed by a provider or not, and that the criteria requiring both an assistive device and bracing was too restrictive. In the preamble to the proposed rule, VA provided a full explanation for the evaluation criteria for knee instability, citing multiple peer-reviewed medical sources which further support the criteria used. Regarding the requirement for provider-prescribed bracing, braces and other assistive devices are commonly and readily available for purchase without prescription; the use of such devices, without a prescription, does not always demonstrate the presence of a knee disability impairing earning capacity. A qualified medical professional's prescription, however, provides objective evidence of the instability. Accordingly, for purposes of assessing the severity of knee instability, this (proposed and final) rule considers bracing in its evaluation criteria only when the brace or assistive device is prescribed by a provider. Moreover, to the extent the commenter believes that requiring bracing *and* an assistive device is too restrictive, this final rule provides a 20% rating where only one of the two has been prescribed.

The fourth commenter asserted that the proposed changes to DC 5257 (1) will result in compensation that is either completely detached from functional loss or not commensurate with the functional loss being evaluated; (2) completely ignore functional loss and misplace emphasis on physical abnormalities and recommended treatment; and (3) did not consider knee instability caused by conditions other than ligament damage.

VA appreciates the comment, but disagrees with the commenter's first assertion. Per 38 U.S.C. 1155, the schedule and its ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations. VA compensates for functional loss that results in an impairment of earning capacity. The criteria for DC 5257, as indicated in the preamble to the proposed rule, incorporate both functional loss elements (assistive devices & bracing), as well as diagnostic elements (sprain, incomplete ligament tear, complete ligament tear). These criteria, which rely upon published sources reflecting current medical standards, serve as accurate proxies for functional loss of the magnitude that negatively impacts earnings. Furthermore, the proposed (and now final) criteria are easily observed and measured. Additionally, given the progressive manner of the criteria, VA provides compensation commensurate with the severity of the disability.

As to the commenter's second assertion that the proposed criteria base evaluations on recommended treatment, that is not the case. The proposed (and now final) criteria compensate for residual disability after specific treatment interventions are prescribed, not on the prescribed treatment itself, as well as observable and measurable factors to create a more complete assessment for evaluation purposes.

Third, with regards to the causes for knee instability other than ligament damage, VA intended the evaluation for patellar instability to be limited to the patellofemoral complex only. Thus, this final rule clarifies the proposed criteria and requires a diagnosed condition involving the patellofemoral complex for a patellar instability evaluation. A history of surgical repair (or the lack thereof) and the prescriptions for the instability dictate whether that evaluation will be 10, 20, or 30 percent (consistent with the format for recurrent subluxation evaluations).

Given this revision, VA has added a note (Note (1)) explaining that the patellofemoral complex consists of the quadriceps tendon, patella (knee cap), and patellar tendon. Proposed Note (2), despite technical edits, still provides that certain surgical procedures do not qualify as surgical repair under the patellar instability provisions of this DC.

In further response to the commenter's contention, we note that knee instability resulting from muscle failure can be evaluated under DC 5313 or DC 5314. Furthermore, with regards to knee instability and specific occupations, which the commenter also raised, compensation is based on the average of impairment in earning capacity for civil occupations, not the severity of disability encountered in selected occupations. Lastly, the language alternatively proposed by the commenter, which stems from a 2003 VA proposal, does not accommodate patellar instability, a shortcoming VA is unwilling to accept. VA notes that the 2003 proposal was withdrawn specifically to address concerns and issues with the rulemaking and to develop a new proposal at a later date. 69 FR 22757. Therefore, VA makes no revisions based on this commenter's input.

IX. DC 5262

Unrelated to any particular comment, VA has revised the language of DC 5262 in this final rule to provide clarity on the specific criteria distinguishing the 30, 20, and 10 percent ratings for shin splints. Moreover, VA has decided not to adopt a rule that would require imaging evidence for a compensable rating; as the preamble to the proposed rule noted, shin splints are typically diagnosed—and can be properly assessed—by history and physical examination. M. Winters et al., ''Medial tibial stress syndrome can be diagnosed reliably using history and physical examination,'' 52(19) Br. J. Sports Med.1267–72 (2018).

As to the comments, one commenter asked two questions: (1) Is there ever a scenario where shin splints and fractured tibia/fibula do not have overlapping symptoms, and (2) Is a distal fracture rated as an ankle disability and shin splints as a knee disability? Whether or not symptoms from shin splints and a certain fracture may or may not overlap is a medical question for medical examiners in individual cases. Therefore, VA will not speculate on the answer to the first question here. In regard to the second question, VA's intent is that a tibia/fibula malunion be rated as either an ankle or knee disability. Beyond malunion, however, uncomplicated tibia/fibula fractures should still be rated under DC 5262.

X. DCs 5278–5285

Three commenters provided input for the proposed changes to these codes. Besides the commenters who concurred, one commenter disagreed with the criteria for proposed DC 5285, contending that veterans who are not surgical candidates are punished by the proposed 20 and 30 percent criteria. To address those veterans who would potentially benefit from surgical intervention, but who are not surgical candidates, VA is adding a Note (2) to DC 5285 indicating that a veteran who is recommended surgical intervention for plantar fasciitis but is not a surgical candidate would be eligible for either the 20 or 30 percent evaluation levels. The Note proposed in the proposed rule is recharacterized as Note (1). VA has also revised the wording of DC 5285 for clarity.

Muscle Injuries

One commenter concurred with proposed DC 5330. VA thanks the commenter for the input.

Miscellaneous Issues

I. General Support for Rulemaking

Several commenters expressed support for particular revisions, as well as the rulemaking in general. Many of these comments, which were received from individuals as well as organizations in the veteran community, expressed appreciation for VA's action in updating the rating schedule for musculoskeletal disabilities. VA appreciates the time and effort expended by these commenters in reviewing the proposed rule and in submitting comments, as well as their support for this rulemaking.

II. Public Access

One commenter requested public access to the information developed by the musculoskeletal system workgroup. In the preamble to the proposed rule, VA explained that the workgroup, comprised of subject matter experts from VA, the Department of Defense, and medical academia, held two public forums in August 2010 and June 2012, discussing possible revisions to the musculoskeletal regulations. A transcript of this public forum and all related materials are on file and available for public inspection in the Office of Regulation Policy and Management. (Contact information for that office is noted in the **ADDRESSES** section of the proposed rule. 82 FR at 35719.)

VA emphasizes that the workgroup did not participate in the deliberative rulemaking process; the workgroup discussed the general topic of the VASRD body system and provided feedback on the areas that were subject to advances since the last major revision of the body system. To this end, where changes to the scientific and/or medical nature of a given condition were made in the proposed rule, VA cited the published, publicly available source for these changes. Not only did this provide the public with access to the source for a given proposed change, it also confirmed that VA relied upon peer-reviewed scientific and medical information to support a given change. While similar information may have been presented by a workgroup member, VA relied upon the published document(s) as the primary source for a change and included such sources in the administrative record for this rulemaking. VA did not propose scientific and/or medical changes to the VASRD in the absence of publicly available, peer-reviewed sources.

Accordingly, references in the proposed rule to the workgroup serve as an explanatory background and introduction to the VASRD rewrite project; the changes made by this rulemaking are not a reflection of the workgroup or any workgroup member. All changes based on scientific and/or medical information are a reflection of cited, published materials which are available to the public. VA has made deliberative materials available (via citation in the rulemaking) and is providing access to materials from the public forum for public inspection at the Office of Regulation Policy and Management.

III. Technical Corrections

On review, the current rating schedule refers evaluations of inactive tuberculosis of the bones and joints (DC 5001) to 38 CFR 4.88b; however, § 4.88b was redesignated to § 4.88c in 1994. Therefore, the final rule simply corrects this reference.

In addition, the final rule revises the subheading for DCs 5051 to 5056 to ''Prosthetic Implants and Resurfacing,'' which the proposed rule noted in its regulatory text, but not in its preamble.

Also, DCs 5054 and 5055 have been reorganized to provide clarity to the applicability of the evaluation criteria. The 100 percent evaluation applies to both resurfacing and replacements. However, the 90, 70, 50, and 30 percent evaluations apply only to replacements. Therefore, the subheading referencing ''replacement'' in these DCs was relocated to the most appropriate location.

Lastly, VA made non-substantive edits to the parenthetical of DC 5242 and the proposed language for recurrent subluxation or instability under DC 5257.

IV. Other Comments Unrelated to or Outside the Scope of This Rulemaking

VA received comments dealing with issues not directly related to proposed amendments to the rating schedule for musculoskeletal disabilities. One commenter suggested adding specified conditions to the list of presumptive disabilities for Former Prisoners of War (FPOW). Similarly, one commenter expressed concern over the impact of this rulemaking on the provisions for presumptive service connection for FPOWs in 38 CFR 3.309. Another commenter noted that the changes would assist in providing necessary treatment for the listed disabilities.

VA does not respond to these comments because they are either unrelated to this rulemaking or beyond its scope.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This final rule will not affect any small entities. The impact of this rulemaking results in cost savings to the VA's compensation and pension appropriations. There are no small entities involved, associated have an affilitation with VA's compensation and pension appropriations. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Executive Orders 12866, 13563, and 13771

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is an economically significant regulatory action under Executive Order 12866.

VA's impact analysis can be found as a supporting document at *www.regulations.gov,* usually within 48 hours after the rulemaking document is published. Additionally, a copy of this rulemaking and its impact analysis are available on VA's website at *www.va.gov/orpm/,* by following the link for VA Regulations Published from FY 2004 Through Fiscal Year to Date. This rule is not subject to the requirements of E.O. 13771 because this rule results in no more than *de minimis* costs.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any

one year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

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

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program numbers and titles for this rule are 64.013, Veterans Prosthetic Appliances; 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.109, Veterans Compensation for Service-Connected Disability; and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

Congressional Review Act

This regulatory action is a major rule under the Congressional Review Act, 5 U.S.C. 801–808, because it may result in an annual effect on the economy of $100 million or more. In accordance with 5 U.S.C. 801(a)(1), VA will submit to the Comptroller General and to Congress a copy of this regulatory action and VA's Regulatory Impact Analysis.

List of Subjects in 38 CFR Part 4

Disability benefits, Pensions, Veterans.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Pamela Powers, Chief of Staff, Department of Veterans Affairs, approved this document on April 1, 2020, for publication.

Dated: November 13, 2020.

Jeffrey M. Martin,

Assistant Director, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

For the reasons set out in the preamble, VA amends 38 CFR part 4, subpart B, as follows:

PART 4—SCHEDULE FOR RATING DISABILITIES

Subpart B—Disability Ratings

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

Authority: 38 U.S.C. 1155, unless otherwise noted.

■ 2. Amend § 4.71a by:

■ a. Revising diagnostic codes 5001, 5002, 5003, 5009–5015, 5018, 5020, 5022, 5023, 5024, 5054, 5055, 5120, 5160, 5170, 5201, 5202, 5242, 5243, 5255, 5257, 5262, and 5271;

■ b. Removing the notes following diagnostic codes 5053 and 5056 and the note at the end of the table entitled ''Prosthetic Implants and Resurfacing'';

■ c. Adding notes following diagnostic code 5024;

■ d. Revising the heading ''Prosthetic Implants'' to read ''Prosthetic Implants and Resurfacing'' and adding notes 1 through 6 to it; and

■ e. Adding the diagnostic code 5244 to the table entitled ''The Spine'' and the diagnostic code 5285 to the table entitled ''The Foot''.

The revisions and additions read as follows:

§ 4.71a Schedule of ratings—musculoskeletal system.

ACUTE, SUBACUTE, OR CHRONIC DISEASES

	Rating
* * * * * * *	
5001 Bones and joints, tuberculosis of, active or inactive:	
Active	100
Inactive: See §§ 4.88c and 4.89.	
5002 Multi-joint arthritis (except post-traumatic and gout), 2 or more joints, as an active process:	
With constitutional manifestations associated with active joint involvement, totally incapacitating	100
Less than criteria for 100% but with weight loss and anemia productive of severe impairment of health or severely incapacitating exacerbations occurring 4 or more times a year or a lesser number over prolonged periods	60
Symptom combinations productive of definite impairment of health objectively supported by examination findings or incapacitating exacerbations occurring 3 or more times a year	40
One or two exacerbations a year in a well-established diagnosis	20
Note (1): Examples of conditions rated using this diagnostic code include, but are not limited to, rheumatoid arthritis, psoriatic arthritis, and spondyloarthropathies.	
Note (2): For chronic residuals, rate under diagnostic code 5003.	
Note (3): The ratings for the active process will not be combined with the residual ratings for limitation of motion, ankylosis, or diagnostic code 5003. Instead, assign the higher evaluation.	
5003 Degenerative arthritis, other than post-traumatic:	
* * * * * * *	
5009 Other specified forms of arthropathy (excluding gout).	
Note (1): Other specified forms of arthropathy include, but are not limited to, Charcot neuropathic, hypertrophic, crystalline, and other autoimmune arthropathies.	
Note (2): With the types of arthritis, diagnostic codes 5004 through 5009, rate the acute phase under diagnostic code 5002; rate any chronic residuals under diagnostic code 5003.	
5010 Post-traumatic arthritis: Rate as limitation of motion, dislocation, or other specified instability under the affected joint. If there are 2 or more joints affected, each rating shall be combined in accordance with § 4.25.	
5011 Decompression illness: Rate manifestations under the appropriate diagnostic code within the affected body system, such as arthritis for musculoskeletal residuals; auditory system for vestibular residuals; respiratory system for pulmonary barotrauma residuals; and neurologic system for cerebrovascular accident residuals.	
5012 Bones, neoplasm, malignant, primary or secondary	100
Note: The 100 percent rating will be continued for 1 year following the cessation of surgical, X-ray, antineoplastic chemotherapy or other prescribed therapeutic procedure. If there has been no local recurrence or metastases, rate based on residuals.	
5013 Osteoporosis, residuals of.	

ACUTE, SUBACUTE, OR CHRONIC DISEASES—Continued

	Rating
5014 Osteomalacia, residuals of.	
5015 Bones, neoplasm, benign.	
* * * * * * *	
5018 [Removed]	
* * * * * * *	
5020 [Removed]	
5022 [Removed]	
5023 Heterotopic ossification.	
5024 Tenosynovitis, tendinitis, tendinosis or tendinopathy.	
Note to DCs 5013 through 5024: Evaluate the diseases under diagnostic codes 5013 through 5024 as degenerative arthritis, based on limitation of motion of affected parts.	
* * * * * * *	

PROSTHETIC IMPLANTS AND RESURFACING

	Rating	
	Major	Minor
Note (1): When an evaluation is assigned for joint resurfacing or the prosthetic replacement of a joint under diagnostic codes 5051–5056, an additional rating under § 4.71a may not also be assigned for that joint, unless otherwise directed.		
Note (2): Only evaluate a revision procedure in the same manner as the original procedure under diagnostic codes 5051–5056 if all the original components are replaced.		
Note (3): The term ''prosthetic replacement'' in diagnostic codes 5051–5053 and 5055–5056 means a total replacement of the named joint. However, in DC 5054, ''prosthetic replacement'' means a total replacement of the head of the femur or of the acetabulum.		
Note (4): The 100 percent rating for 1 year following implantation of prosthesis will commence after initial grant of the 1-month total rating assigned under § 4.30 following hospital discharge.		
Note (5): The 100 percent rating for 4 months following implantation of prosthesis or resurfacing under DCs 5054 and 5055 will commence after initial grant of the 1-month total rating assigned under § 4.30 following hospital discharge.		
Note (6): Special monthly compensation is assignable during the 100 percent rating period the earliest date permanent use of crutches is established.		
* * * * * * *		
5054 Hip, resurfacing or replacement (prosthesis):		
For 4 months following implantation of prosthesis or resurfacing		100
Prosthetic replacement of the head of the femur or of the acetabulum:		
Following implantation of prosthesis with painful motion or weakness such as to require the use of crutches		[1] 90
Markedly severe residual weakness, pain or limitation of motion following implantation of prosthesis		70
Moderately severe residuals of weakness, pain or limitation of motion		50
Minimum evaluation, total replacement only		30
Note: At the conclusion of the 100 percent evaluation period, evaluate resurfacing under diagnostic codes 5250 through 5255; there is no minimum evaluation for resurfacing.		
5055 Knee, resurfacing or replacement (prosthesis):		
For 4 months following implantation of prosthesis or resurfacing		100
Prosthetic replacement of knee joint:		
With chronic residuals consisting of severe painful motion or weakness in the affected extremity		60
With intermediate degrees of residual weakness, pain or limitation of motion rate by analogy to diagnostic codes 5256, 5261, or 5262.		
Minimum evaluation, total replacement only		30
Note: At the conclusion of the 100 percent evaluation period, evaluate resurfacing under diagnostic codes 5256 through 5262; there is no minimum evaluation for resurfacing.		
* * * * * * *		

AMPUTATIONS: UPPER EXTREMITY

	Rating	
	Major	Minor
Arm, amputation of:		
5120 Complete amputation, upper extremity:		
Forequarter amputation (involving complete removal of the humerus along with any portion of the scapula, clavicle, and/or ribs)	[1] 100	[1] 100

AMPUTATIONS: UPPER EXTREMITY—Continued

	Rating	
	Major	Minor
Disarticulation (involving complete removal of the humerus only)	[1] 90	[1] 90
* * * * * * *		

AMPUTATIONS: LOWER EXTREMITY

	Rating
Thigh, amputation of:	
5160 Complete amputation, lower extremity:	
Trans-pelvic amputation (involving complete removal of the femur and intrinsic pelvic musculature along with any portion of the pelvic bones)	[2] 100
Disarticulation (involving complete removal of the femur and intrinsic pelvic musculature only)	[2] 90
Note: Separately evaluate residuals involving other body systems (*e.g.,* bowel impairment, bladder impairment) under the appropriate diagnostic code.	
* * * * * * *	
5170 Toes, all, amputation of, without metatarsal loss or transmetatarsal, amputation of, with up to half of metatarsal loss	30
* * * * * * *	

THE SHOULDER AND ARM

	Rating	
	Major	Minor
* * * * * * *		
5201 Arm, limitation of motion of:		
Flexion and/or abduction limited to 25° from side	40	30
Midway between side and shoulder level (flexion and/or abduction limited to 45°)	30	20
At shoulder level (flexion and/or abduction limited to 90°)	20	20
5202 Humerus, other impairment of:		
Loss of head of (flail shoulder)	80	70
Nonunion of (false flail joint)	60	50
Fibrous union of	50	40
Recurrent dislocation of at scapulohumeral joint:		
With frequent episodes and guarding of all arm movements	30	20
With infrequent episodes and guarding of movement only at shoulder level (flexion and/or abduction at 90°)	20	20
Malunion of:		
Marked deformity	30	20
Moderate deformity	20	20
* * * * * * *		

THE SPINE

	Rating
General Rating Formula for Diseases and Injuries of the Spine	
* * * * * * *	
5242 Degenerative arthritis, degenerative disc disease other than intervertebral disc syndrome (also, see either DC 5003 or 5010)	
5243 Intervertebral disc syndrome: Assign this diagnostic code only when there is disc herniation with compression and/or irritation of the adjacent nerve root; assign diagnostic code 5242 for all other disc diagnoses.	
* * * * * * *	
5244 Traumatic paralysis, complete:	
Paraplegia: Rate under diagnostic code 5110.	
Quadriplegia: Rate separately under diagnostic codes 5109 and 5110 and combine evaluations in accordance with § 4.25.	
Note: If traumatic paralysis does not cause loss of use of both hands or both feet, it is incomplete paralysis. Evaluate residuals of incomplete traumatic paralysis under the appropriate diagnostic code (*e.g.,* § 4.124a, Diseases of the Peripheral Nerves).	

THE SPINE—Continued

	Rating
* * * * * * *	

THE HIP AND THIGH

	Rating
* * * * * * *	
5255 Femur, impairment of:	
Fracture of shaft or anatomical neck of:	
With nonunion, with loose motion (spiral or oblique fracture)	80
With nonunion, without loose motion, weight bearing preserved with aid of brace	60
Fracture of surgical neck of, with false joint	60
Malunion of:	
Evaluate under diagnostic codes 5256, 5257, 5260, or 5261 for the knee, or 5250–5254 for the hip, whichever results in the highest evaluation.	
* * * * * * *	

THE KNEE AND LEG

	Rating
* * * * * * *	
5257 Knee, other impairment of:	
Recurrent subluxation or instability:	
Unrepaired or failed repair of complete ligament tear causing persistent instability, and a medical provider prescribes both an assistive device (*e.g.,* cane(s), crutch(es), walker) and bracing for ambulation	30
One of the following:	
(a) Sprain, incomplete ligament tear, or repaired complete ligament tear causing persistent instability, and a medical provider prescribes a brace and/or assistive device (*e.g.,* cane(s), crutch(es), walker) for ambulation.	
(b) Unrepaired or failed repair of complete ligament tear causing persistent instability, and a medical provider prescribes either an assistive device (*e.g.,* cane(s), crutch(es), walker) or bracing for ambulation	20
Sprain, incomplete ligament tear, or complete ligament tear (repaired, unrepaired, or failed repair) causing persistent instability, without a prescription from a medical provider for an assistive device (*e.g.,* cane(s), crutch(es), walker) or bracing for ambulation	10
Patellar instability:	
A diagnosed condition involving the patellofemoral complex with recurrent instability after surgical repair that requires a prescription by a medical provider for a brace and either a cane or a walker	30
A diagnosed condition involving the patellofemoral complex with recurrent instability after surgical repair that requires a prescription by a medical provider for one of the following: A brace, cane, or walker	20
A diagnosed condition involving the patellofemoral complex with recurrent instability (with or without history of surgical repair) that does not require a prescription from a medical provider for a brace, cane, or walker	10
Note (1): For patellar instability, the patellofemoral complex consists of the quadriceps tendon, the patella, and the patellar tendon.	
Note (2): A surgical procedure that does not involve repair of one or more patellofemoral components that contribute to the underlying instability shall not qualify as surgical repair for patellar instability (including, but not limited to, arthroscopy to remove loose bodies and joint aspiration).	
* * * * * * *	
5262 Tibia and fibula, impairment of:	
Nonunion of, with loose motion, requiring brace	40
Malunion of:	
Evaluate under diagnostic codes 5256, 5257, 5260, or 5261 for the knee, or 5270 or 5271 for the ankle, whichever results in the highest evaluation.	
Medial tibial stress syndrome (MTSS), or shin splints:	
Requiring treatment for no less than 12 consecutive months, and unresponsive to surgery and either shoe orthotics or other conservative treatment, both lower extremities	30
Requiring treatment for no less than 12 consecutive months, and unresponsive to surgery and either shoe orthotics or other conservative treatment, one lower extremity	20
Requiring treatment for no less than 12 consecutive months, and unresponsive to either shoe orthotics or other conservative treatment, one or both lower extremities	10
Treatment less than 12 consecutive months, one or both lower extremities	0
* * * * * * *	

THE ANKLE

	Rating
* * * * * * *	
5271 Ankle, limited motion of:	
Marked (less than 5 degrees dorsiflexion or less than 10 degrees plantar flexion)	20
Moderate (less than 15 degrees dorsiflexion or less than 30 degrees plantar flexion)	10
* * * * * * *	

THE FOOT

	Rating
* * * * * * *	
5285 Plantar fasciitis:	
No relief from both non-surgical and surgical treatment, bilateral	30
No relief from both non-surgical and surgical treatment, unilateral	20
Otherwise, unilateral or bilateral	10
Note (1): With actual loss of use of the foot, rate 40 percent.	
Note (2): If a veteran has been recommended for surgical intervention, but is not a surgical candidate, evaluate under the 20 percent or 30 percent criteria, whichever is applicable.	

THE SKULL

	Rating
* * * * * * *	

(Authority: 38 U.S.C. 1155)

* * * * *

■ 3. Amend § 4.73 by:

■ a. Designating the introductory note as Note (1) and revising it;

■ b. Adding introductory note (2); and

■ c. Adding add diagnostic codes 5330 and 5331 to the table entitled ''Miscellaneous''.

The revising and additions read as follows:

§ 4.73 Schedule of ratings—muscle injuries.

Note (1): When evaluating any claim involving muscle injuries resulting in loss of use of any extremity or loss of use of both buttocks (diagnostic code 5317, Muscle Group XVII), refer to § 3.350 of this chapter to determine whether the veteran may be entitled to special monthly compensation.

Note (2): Ratings of slight, moderate, moderately severe, or severe for diagnostic codes 5301 through 5323 will be determined based upon the criteria contained in § 4.56.

* * * * *

MISCELLANEOUS

	Rating
* * * * * * *	
5330 Rhabdomyolysis, residuals of:	
Rate each affected muscle group separately and combine in accordance with § 4.25.	
Note: Separately evaluate any chronic renal complications within the appropriate body system.	
5331 Compartment syndrome:	
Rate each affected muscle group separately and combine in accordance with § 4.25.	

* * * * *

■ 4. Amend appendix A to part 4 as follows:

■ a. In § 4.71a, revise diagnostic codes 5001, 5002, 5003, 5012, 5024, 5051, 5052, 5053, 5054, 5055, 5056, 5243, 5255, and 5257;

■ b. In § 4.71a, remove the diagnostic code 5235–5243;

■ c. In § 4.71a, add in numerical order diagnostic codes 5009, 5010, 5011, 5013, 5014, 5015, 5018, 5020, 5022, 5023, 5120, 5160, 5170, 5201, 5202, 5235, 5236, 5237, 5238, 5239, 5240, 5241, 5242, 5244, 5262, 5271, and 5285; and

■ d. In § 4.73, add an introduction note and diagnostic codes 5330 and 5331.

The revisions and additions read as follows:

Appendix A to Part 4—Table of Amendments and Effective Dates Since 1946

Sec.	Diagnostic code No.	
* *	* * * * *	
4.71a	5001	Evaluation March 11, 1969; criterion February 7, 2021.
	5002	Evaluation March 1, 1963; title, criteria, note February 7, 2021.
	5003	Added July 6, 1950; title February 7, 2021.
* *	* * * * *	
	5009	Title, evaluation, note February 7, 2021.
	5010	Title, criteria February 7, 2021.
	5011	Title, criteria February 7, 2021.
	5012	Criterion March 10, 1976; title, note February 7, 2021.
	5013	Title February 7, 2021.
	5014	Title February 7, 2021.
	5015	Title February 7, 2021.
	5018	Removed February 7, 2021.
	5020	Removed November 30, 2020.
	5022	Removed February 7, 2021.
	5023	Title February 7, 2021.
	5024	Criterion March 1, 1963; title, criteria February 7, 2021.
* *	* * * * *	
	5051	Added September 22, 1978; note February 7, 2021.
	5052	Added September 22, 1978; note February 7, 2021.
	5053	Added September 22, 1978; note February 7, 2021.
	5054	Added September 22, 1978; title, criterion, and note February 7, 2021.
	5055	Added September 22, 1978; title, criterion, and note February 7, 2021.
	5056	Added September 22, 1978; note February 7, 2021.
* *	* * * * *	
	5120	Title, criterion February 7, 2021.
	5160	Title, criterion, note February 7, 2021.
* *	* * * * *	
	5170	Title February 7, 2021.
* *	* * * * *	
	5201	Criterion February 7, 2021.
	5202	Criterion February 7, 2021.
* *	* * * * *	
	5235	Replaces 5285–5295 September 26, 2003.
	5236	Replaces 5285–5295 September 26, 2003.
	5237	Replaces 5285–5295 September 26, 2003.
	5238	Replaces 5285–5295 September 26, 2003.
	5239	Replaces 5285–5295 September 26, 2003.
	5240	Replaces 5285–5295 September 26, 2003.
	5241	Replaces 5285–5295 September 26, 2003.
	5242	Replaces 5285–5295 September 26, 2003; Title February 7, 2021.
	5243	Replaces 5285–5295 September 26, 2003; Criterion September 26, 2003; Title February 7, 2021.
	5244	Added February 7, 2021.
* *	* * * * *	
	5255	Criterion July 6, 1950; criterion February 7, 2021.
* *	* * * * *	
	5257	Evaluation July 6, 1950; criterion and note February 7, 2021.
* *	* * * * *	
	5262	Criterion February 7, 2021.
* *	* * * * *	
	5271	Criterion February 7, 2021.
* *	* * * * *	
	5285	Added February 7, 2021.
* *	* * * * *	
4.73		Introduction **Note** criterion July 3, 1997; second **Note** added February 7, 2021.
* *	* * * * *	
	5330	Added February 7, 2021.
	5331	Added February 7, 2021.

Sec.	Diagnostic code No.
* * * * * * *	

■ 5. Amend appendix B to part 4 as follows:

■ a. Revise diagnostic codes 5002, 5003, 5009, 5010, 5011, 5012, 5013, 5014, 5015, 5018, 5020, 5022, 5023, 5024, 5054, 5055, 5120, 5160, 5170, and 5242; and

■ b. Add diagnostic codes 5244, 5285, 5330, and 5331;

The revisions and additions read as follows:

Appendix B to Part 4—Numerical Index of Disabilities

Diagnostic code No.	
The Musculoskeletal System Acute, Subacute, or Chronic Diseases	
* * * * * * *	
5002	Multi-joint arthritis (except post-traumatic and gout), 2 or more joints, as an active process.
5003	Degenerative arthritis, other than post-traumatic.
* * * * * * *	
5009	Other specified forms of arthropathy (excluding gout).
5010	Post-traumatic arthritis.
5011	Decompression illness.
5012	Bones, neoplasm, malignant, primary or secondary.
5013	Osteoporosis, residuals of.
5014	Osteomalacia, residuals of.
5015	Bones, neoplasm, benign.
* * * * * * *	
5018	[Removed]
* * * * * * *	
5020	[Removed]
* * * * * * *	
5022	[Removed]
5023	Heterotopic ossification.
5024	Tenosynovitis, tendinitis, tendinosis or tendinopathy.
* * * * * * *	
5054	Hip, resurfacing or replacement (prosthesis).
5055	Knee, resurfacing or replacement (prosthesis).
* * * * * * *	
Amputations: Upper Extremity	
Arm, amputation of:	
5120	Complete amputation, upper extremity.
* * * * * * *	
Amputations: Lower Extremity	
Thigh, amputation of:	
5160	Complete amputation, lower extremity.
* * * * * * *	
5170	Toes, all, amputation of, without metatarsal loss or transmetatarsal, amputation of, with up to half of metatarsal loss.
* * * * * * *	
Spine	
* * * * * * *	
5242	Degenerative arthritis, degenerative disc disease other than intervertebral disc syndrome (also, see either DC 5003 or 5010).
* * * * * * *	
5244	Traumatic paralysis, complete.

Diagnostic code No.	
* * * * * * *	
The Foot	
* * * * * * *	
5285	Plantar fasciitis.
* * * * * * *	
MUSCLE INJURIES	
* * * * * * *	
Miscellaneous	
* * * * * * *	
5330	Rhabdomyolysis, residuals of.
5331	Compartment syndrome.
* * * * * * *	

■ 6. Amend appendix C to part 4 as follows:

■ a. Revising the entries for ''Amputation'' and ''Arthritis'';

■ b. Adding in alphabetical order an entry for ''Arthropathy'';

■ c. Revising the entry for ''Bones'';

■ d. Adding in alphabetical order entries for ''compartment syndrome'', ''decompression illness'', and ''heterotopic ossification'';

■ e. Revising the entry for ''Hip'';

■ f. Removing entries for ''Hydrarthrosis, intermittent'', and ''Myositis ossificans''

■ g. Revising entries for ''Osteomalacia'', ''Osteoporosis, with joint manifestations'', and ''Paralysis'';

■ h. Removing entry for ''Periostitis'';

■ i. Adding in alphabetical order an entry for ''Plantar fasciitis'';

■ j. Revising entry for ''Prosthetic implants'';

■ k. Adding in alphabetical order entries for ''Rhabdomyolysis, residuals of'' and ''Spine: Degenerative arthritis, degenerative disc disease other than intervertebral disc syndrome'';

■ l. Removing entry for ''Synovitis''; and

■ m. Revising entry for ''Tenosynovitis''

The revisions and additions read as follows:

Appendix C to Part 4—Alphabetical Index of Disabilities

	Diagnostic code No.
* * * * * * *	
Amputation:	
Arm:	
Complete amputation, upper extremity	5120
Above insertion of deltoid	5121
Below insertion of deltoid	5122
Digits, five of one hand	5126
Digits, four of one hand:	
Thumb, index, long and ring	5127
Thumb, index, long and little	5128
Thumb, index, ring and little	5129
Thumb, long, ring and little	5130
Index, long, ring and little	5131
Digits, three of one hand:.	
Thumb, index and long	5132
Thumb, index and ring	5133
Thumb, index and little	5134
Thumb, long and ring	5135
Thumb, long and little	5136
Thumb, ring and little	5137
Index, long and ring	5138
Index, long and little	5139
Index, ring and little	5140
Long, ring and little	5141
Digits, two of one hand:	
Thumb and index	5142
Thumb and long	5143
Thumb and ring	5144
Thumb and little	5145
Index and long	5146

	Diagnostic code No.
Index and ring	5147
Index and little	5148
Long and ring	5149
Long and little	5150
Ring and little	5151
Single finger:	
Thumb	5152
Index finger	5153
Long finger	5154
Ring finger	5155
Little finger	5156
Forearm:	
Above insertion of pronator teres	5123
Below insertion of pronator teres	5124
Leg:	
With defective stump	5163
Not improvable by prosthesis controlled by natural knee action	5164
At lower level, permitting prosthesis	5165
Forefoot, proximal to metatarsal bones	5166
Toes, all, amputation of, without metatarsal loss or transmetatarsal, amputation of, with up to half of metatarsal loss	5170
Toe, great	5171
Toe, other than great, with removal metatarsal head	5172
Toes, three or more, without metatarsal involvement	5173
Thigh:	
Complete amputation, lower extremity	5160
Upper third	5161
Middle or lower thirds	5162
* * * * * * *	
Arthritis:	
Degenerative, other than post-traumatic	5003
Gonorrheal	5004
Other specified forms (excluding gout)	5009
Pneumococcic	5005
Post-traumatic	5010
Multi-joint (except post-traumatic and gout)	5002
Streptococcic	5008
Syphilitic	5007
Typhoid	5006
Arthropathy	5009
* * * * * * *	
Bones:	
Neoplasm, benign	5015
Neoplasm, malignant, primary or secondary	5012
Shortening of the lower extremity	5275
* * * * * * *	
Compartment syndrome	5331
* * * * * * *	
Decompression illness	5011
* * * * * * *	
Heterotopic ossification	5023
Hip:	
Flail joint	5254
* * * * * * *	
Osteomalacia, residuals of	5014
* * * * * * *	
Osteoporosis, residuals of	5013
* * * * * * *	
Paralysis:	
Accommodation	6030
Agitans	8004
Complete, traumatic	5244
* * * * * * *	
Plantar fasciitis	5285

	Diagnostic code No.
* * * * * * *	
Prosthetic implants:	5056
Ankle replacement	5052
Elbow replacement	5054
Hip, resurfacing or replacement.	
Knee, resurfacing or replacement	5055
Shoulder replacement	5051
Wrist replacement	5053
* * * * * * *	
Rhabdomyolysis, residuals of	5330
* * * * * * *	
Spine:	
Degenerative arthritis, degenerative disc disease other than intervertebral disc syndrome	5242
* * * * * * *	
Tenosynovitis, tendinitis, tendinosis or tendinopathy	5024
* * * * * * *	

[FR Doc. 2020–25450 Filed 11–27–20; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1 and 90

[WP Docket No. 07–100; FCC 20–137; FRS 17146]

4.9 GHz Band

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In March 2018, the Federal Communications Commission (Commission) released a Sixth Further Notice of Proposed Rulemaking (Sixth FNPRM) seeking comment on ways to stimulate expanded use of and investment in the 4.9 GHz (4940–4990 MHz) band, including allowing licensees the flexibility to engage in spectrum leasing and broadening existing eligibility requirements. On September 8, 2020, the Public Safety and Homeland Security Bureau and the Wireless Telecommunications Bureau issued a Public Notice freezing the 4.9 GHz band to stabilize it while the Commission considered changes to the 4.9 GHz band rules (Freeze Public Notice). In this document, the Commission adopts rules permitting one statewide 4.9 GHz band licensee per state, the State Lessor, to lease some or all of its spectrum rights to third parties—including commercial and public safety users—in those states that the Commission has not identified as a diverter of 911 fees. The Report and Order does not limit or modify the rights of any incumbent public safety licensees. The new rules also eliminate the requirement that leased spectrum must be used to support public safety but requires lessees to adhere to the informal coordination requirements applicable to the band.

DATES: Effective December 30, 2020, except for § 90.1217, which is delayed. We will publish a document in the **Federal Register** announcing the effective date.

ADDRESSES: Federal Communications Commission, 45 L St. NE SW, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Jonathan Markman of the Wireless Telecommunications Bureau, Mobility Division, at (202) 418–7090 or *Jonathan.Markman@fcc.gov.* For information regarding the PRA information collection requirements contained in this PRA, contact Cathy Williams, Office of Managing Director, at (202) 418–2918 or *Cathy.Williams@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order* in WP Docket No. 07–100, FCC 20–137 adopted September 30, 2020 and released October 02, 2020. The full text of the *Report and Order,* including all Appendices, is available by downloading the text from the Commission's website at *https://www.fcc.gov/document/fcc-expands-access-and-investment-49-ghz-band-0.* Alternative formats are available for people with disabilities (braille, large print, electronic files, audio format), by sending an email to *FCC504@fcc.gov* or calling the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

The Commission will send a copy of this *Report* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' Accordingly, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) concerning the possible impact of the rule changes contained in this *Report and Order* on small entities. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Sixth Further Notice of Proposed Rulemaking* (*Sixth FNPRM*) released in March 2018 in this proceeding (83 FR 20011, May 7, 2018). The Commission sought written public comment on the proposals in the *Sixth FNPRM,* including comments on the IRFA. No comments were filed addressing the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

Paperwork Reduction Act

The requirements in § 90.1217 constitute new or modified collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. They will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and

other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, the Commission notes that, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the Commission previously sought, but did not receive, specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees. The Commission describes impacts that might affect small businesses, which includes more businesses with fewer than 25 employees, in the Final Regulatory Flexibility Analysis.

Congressional Review Act

The Commission has determined and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs, that this rule is non-major under the Congressional Review Act, 5 U.S.C. 804(2). The Commission will send a copy of the *Sixth Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

Synopsis

I. Introduction

1. Nearly two decades ago, the Commission designated 50 megahertz of spectrum at 4.9 GHz (4940–4990 MHz) for use in support of public safety. Over the past 18 years, the Commission, working with public safety entities and associations, has endeavored to increase investment in, and maximize use of, the band. These efforts notwithstanding, the 4.9 GHz band remains underused outside of major metropolitan areas, with stakeholders citing high equipment costs and limited availability of broadband equipment, among several barriers to its use. In this document, we begin to break down these barriers and expand access to the band by providing states the opportunity to lease 4.9 GHz band spectrum to commercial entities, critical infrastructure industry, including electric utilities, and other stakeholders.

2. Under our new framework, statewide incumbent licensees will be empowered with the authority to make decisions on how best to maximize the value and use of their spectrum based on market forces. States can continue to use the spectrum for their own public safety network operations; they can enter into one or more commercial arrangements for commercial deployment of public-safety communications services; they can lease the spectrum to a commercial service provider for deployment of mobile or fixed wireless internet service, private land mobile radio service or critical infrastructure connectivity; or they can pursue a combination of any of these scenarios (or any other arrangement that is allowed for pursuant to the service rules for the band and our *Secondary Markets* rules (69 FR 77521, Dec. 27, 2004)). The rule changes we adopt here will reverse the effects of the 4.9 GHz band's antiquated licensing framework that have led to its underuse.

3. Prior to the amendments in this document, access to the 4.9 GHz band was restricted to certain entities and use of the spectrum was limited to public safety purposes. Licensees also operate pursuant to a complicated sharing framework; there is no exclusive use of the band. This *Sixth Report and Order* allows states to enter into lease agreements voluntarily with other users (whether public safety or non-public safety) for access to the 4.9 GHz band in their territory. We place no restriction on the type of entity to which a state can lease or the type of services that the lessee can provide. This approach, especially when combined with the potential changes to licensing and coordination contemplated in the accompanying *Seventh FNPRM,* published elsewhere in this issue of the **Federal Register**, seeks to empower states to determine the best use of the 4.9 GHz band for their citizens, by enabling them to balance the needs of public safety and the benefits that can come from non-public safety use. We anticipate that this framework will facilitate more robust investment in this band across the entire country and drive down equipment costs, to the benefit of public safety and non-public safety entities seeking to deploy.

4. In the accompanying *Seventh FNPRM,* we propose a new state-based licensing regime for public safety operations in the 4.9 GHz band. We seek comment on a centralized structure of state oversight and coordination of public safety operations in the band, to work alongside the leasing regime we adopt in this document. We also seek comment on ways to maximize opportunities for leasing and otherwise encourage more robust use of this band.

II. Background

5. Under our rules, to be eligible for a 4.9 GHz license, an entity must provide public safety services as defined under our part 90 rules. This includes state and local government entities, as well as nongovernmental organizations (NGOs) that operate their systems solely to transmit communications essential to the provision of services having the sole or principal purpose of protecting the safety of life, health or property. Licensees are also permitted to enter into sharing agreements with ineligible entities for use of this spectrum, but operations must be in support of public safety. 4.9 GHz licenses authorize operation on any channel over the entire 50 megahertz of the band and are issued for the geographic area encompassing the legal jurisdiction of the licensee. A key component of the 4.9 GHz band is that licenses are granted for shared use only and provide no exclusive rights. As a result, licenses often overlap: There may be one or more geographic area license covering a given location and licensed on the same spectrum, as well as fixed-site licenses. For example, a common scenario might involve a statewide license held by the state police, a county-wide license held by the sheriff's department, and fixed-site licenses operating in the same area by various public safety entities. Our 4.9 GHz rules do not specify a formal coordination requirement. Rather, licensees informally cooperate with one another to ensure that their operations do not cause interference with one another, and to resolve interference if it occurs. Public safety entities can also be licensed for fixed point-to-point and point-to-multipoint operations within their jurisdictions.

6. Nearly all licenses in this band contain a condition, consistent with our rules, specifying that operation is permitted only within the jurisdiction of the licensee, or that of the entity supporting the application of an NGO, regardless of the area specified on the license (which, due to legacy Universal Licensing System limitations, in some cases is depicted as larger than the relevant jurisdiction). A licensee has the authority to operate base stations and mobile units (including portables and handheld units) and/or temporary (one year or less) fixed stations anywhere within its authorized area.

7. Licensees are also permitted to operate base stations with mobile units and temporary fixed stations outside their authorized area with the permission of the other jurisdiction in which they will operate. Permanent fixed point-to-point and point-to-multipoint stations must be licensed individually on a site-by-site basis. Permanent fixed stations that connect base and mobile stations that are used to deliver broadband, or that are part of a public safety network using spectrum designated for broadband use, are

accorded ''primary'' status under the rules.

8. There are 3,578 licenses currently issued in the band. This includes 142 statewide area licenses, 1,160 countywide area licenses, and 2,276 other licenses, either for geographic area licenses or other types (such as for a group of counties, a city, or parts of one or more cities) or for fixed sites. Most of the United States and U.S. territories are covered by at least one statewide license. In some states, multiple state entities hold statewide licenses. Operations, particularly fixed communications and connectivity, are used to facilitate video streaming, communications system backhaul, and data connections for advanced devices. Emerging uses of the band include robotics and airborne operations, as well as Internet of Things uses.

9. In March 2018, the Commission released the *Sixth FNPRM,* in which it sought comment on ways to stimulate expanded use of, and investment in, the 4.9 GHz band. The Commission noted that ''[a]lthough nearly 90,000 public safety entities are eligible under our rules to obtain licenses in the band, there were only 2,442 licenses in use in 2012 and only 3,174 licenses in use nearly six years later in 2018.'' With no more than 3.5% of potential licensees using the band, the Commission remained concerned that, as originally stated in 2012, the band has ''fallen short of its potential.'' Over two years later, the 4.9 GHz band continues to be underused. There are currently only 3,578 licenses issued, and in many instances the same licensee holds multiple licenses in its jurisdiction based on the 4.9 GHz licensing structure requiring geographic area licensees to obtain individual licenses for permanent fixed sites. Accordingly, there are currently only 2,094 individual licensees, whereas the number of eligible public safety entities as of the 2017 census is 90,075. Various commenters agree that the 4.9 GHz band remains underused. As one commenter noted, the lack of widespread use of the band ''stands in stark contrast to other spectrum bands in which usage is increasing exponentially and the Commission is working at breakneck speed to provide access to support existing broadband services and provide opportunities for new services and applications.''

10. In the *Sixth FNPRM,* the Commission sought comment on a number of proposed rule changes and several options to increase use of this spectrum. These included allowing licensees additional flexibility to engage in spectrum leasing, as well as broadening of eligibility requirements for licensees, changes to technical rules governing the band, and proposals from NPSTC and APCO seeking revisions to the band's coordination requirements and band plan. The Commission received comments from across several industries, which broadly support increased use of the band while also preserving public safety access.

11. On September 8, 2020, the Public Safety and Homeland Security Bureau and the Wireless Telecommunications Bureau (the Bureaus) issued a freeze of the 4.9 GHz band to stabilize the band while we consider changes to the rules as part of this proceeding (*Freeze Public Notice*) (85 FR 63553, Oct. 8, 2020). Pursuant to the freeze, we will not accept applications for new or modified licenses, either geographic area licenses or individual fixed-site licenses.

III. Sixth Report and Order

12. In the *Sixth FNPRM,* the Commission anticipated that ''the benefits of allowing more efficient spectrum use through leasing can be realized at no cost to public safety.'' This Commission has consistently worked to ensure the efficient allocation and use of spectrum, especially critical mid-band spectrum. In this *Sixth Report and Order,* we revise a legacy framework and put the 4.9 GHz band, which has been underused for nearly 20 years, on a market-driven path. Our approach will allow public safety incumbents to retain access to the band while also providing incentives for more efficient use by empowering states to lease spectrum rights to commercial, critical infrastructure, and other users. The rules we adopt in this document give public safety licensees the agency to execute leasing arrangements when appropriate and beneficial to their citizens without requiring modification or cessation of current public safety operations in the band. We find that allowing state-based leasing under the framework adopted in this document serves the public interest.

A. Public Interest Benefits of Allowing 4.9 GHz Licensees To Lease Spectrum

13. We find that allowing leased access to the shared 4.9 GHz band for non-public safety operations will increase the efficient use of this spectrum and serve the public interest. We will permit one statewide 4.9 GHz band licensee in each state to lease some or all of its spectrum rights to third parties and, when leased, we eliminate the requirement that 4.9 GHz spectrum must be used to support public safety. This light-touch approach will allow each state the flexibility to negotiate mutually agreeable arrangements with third party lessees where it makes sense to do so, which we anticipate will increase use of and investment in the band. This approach also protects against harmful interference by leveraging the existing informal coordination process in the 4.9 GHz band and ensuring that leasing will be coordinated by a single state entity that is able to work with county and local public safety entities, as well as lessees, to avoid harmful interference.

14. Commenters support varying ways of allowing non-public safety access to the band. Commenters representing CII indicate that this spectrum is well-suited for complex operations, including smart grid applications and other communications networks upon which utilities and other CII entities rely. Providers of fixed wireless broadband service similarly argue that the spectrum holds promise for their operations, including point-to-multipoint connections. Equipment manufacturers and spectrum consultants also support non-public safety use of the band. Some parties contend that spectrum sharing can be achieved using dynamic access systems, similar to those used in the TV white spaces, Citizens Broadband Radio Service, or for unlicensed operations in the 6 GHz band (5950–7150 MHz). Commenters representing 4.9 GHz public safety users urge the Commission to ensure that current and future public safety operations have continued access to this band.

15. In the nearly two decades since, the Commission adopted restrictive leasing rules for public safety eligibles, the utility of this spectrum for flexible use has increased dramatically, and the public safety community still has not made full use of the entire band. In addition, some countries have considered, or are considering, allocating this band for 5G; successful international harmonization efforts could provide further advantages in the availability and price of equipment, thus potentially increasing its utility for flexible use. Given these developments, the public interest would be served by adopting a more flexible approach that permits leasing of the spectrum to non-public safety entities. We conclude, as suggested in the *Sixth FNPRM,* that ''the benefits of allowing more efficient spectrum use through leasing can be realized at no cost to public safety.'' We agree with commenters that allowing a ''secondary market for spectrum in this band . . . [will] augment the Commission's efforts to intensify use of the band'' and ''provide for creativity in use cases.''

16. We determine that allowing leasing of shared 4.9 GHz spectrum by a single state government entity per state best serves the public interest by encouraging greater use of the band and allowing each state to determine the correct balance between public safety and non-public safety access, thereby avoiding disruptions to public safety operations. We expect that this action ultimately will decrease deployment barriers and encourage *greater* public safety use of the band, alongside non-public safety uses, by driving down the price of equipment and facilitating innovative cost-sharing arrangements between public safety licensees and non-public safety lessees. The potential revenue streams from leasing may also increase the ability of states to invest in equipment for this band. While we seek to maximize leasing opportunities, we find that the unique nature of this band and the realities of a shared spectrum environment necessitate more centralized control of non-public safety spectrum access. We believe that allowing leasing through a single statewide entity in each state provides the flexibility to determine the most appropriate use of its spectrum rights to meet the state's communications needs, while ensuring that access to this shared band is controlled and responsibly managed. This approach both promotes more efficient spectrum use and encourages greater spectrum access.

17. Some commenters raise concerns about spectrum leasing, including general concerns about Commission action forcing public safety to share the 4.9 GHz band or transferring spectrum and decreasing the availability of public safety spectrum, leasing to non-public-safety entities, and more specific concerns about states leasing at the expense of local public safety interests, inadequate interference protections for public safety, the relatively limited number of public safety licensees, and therefore potential lessors, in the band. These commenters point to the alleged complexity and logistical concerns involved in devising a spectrum leasing system in the 4.9 GHz band. Some commenters also suggest that public safety entities might engage in spectrum warehousing and ''arbitrage,'' whereby they would obtain or use their spectrum rights (received at no cost) to obtain leasing revenues.

18. We find that these concerns do not outweigh the public interest benefits of permitting leasing pursuant to the framework we adopt in this document. Although there are relatively few licensees in this band as compared to the overall number of public safety entities eligible to obtain a license, nearly all states have at least one statewide license, enabling leasing of nearly all available spectrum. And while a spectrum leasing framework involving shared spectrum may raise some complexities, so does every other proposed path to increase use of this band, and we believe that the framework we adopt in this document empowers states to find ways to enable public safety and non-public safety use of the band as best suits their particular needs. We emphasize that leasing is voluntary and allows state governments the flexibility to determine the appropriate use of this band in their respective jurisdictions, which may include new partnerships that could expand public safety access to the band. We expect this new flexibility will lead to new uses of 4.9 GHz spectrum and lower equipment costs for public safety. Also, the Commission is in no way redesignating or transferring 4.9 GHz spectrum for commercial use or requiring public safety to relinquish spectrum, thereby protecting existing public safety operations and investments. We anticipate that allowing non-public safety access through state-level leasing will also ensure continued cooperation amongst stakeholders, as public safety licensees today already are accustomed to coordinating shared spectrum use in their jurisdictions. Further, as the Commission noted in the *Sixth FNPRM,* statutory concerns regarding commercial use of public safety spectrum do not apply to the 4.9 GHz band, and no commenter raised statutory concerns regarding spectrum leasing proposed in the *Sixth FNPRM.*

19. In the original *Secondary Markets* proceeding, the Commission considered and rejected spectrum warehousing concerns as related to public safety entities, noting that leasing of unused spectrum in fact *diminishes* the risk of spectrum warehousing. We find that the current freeze on applications for new or modified licenses should discourage speculative behavior, and our framework, which only allows leasing by a single state entity per state, will also reduce incentives to hold or obtain licenses for purposes other than active deployment. Further, the new licensing and coordination/management regime proposed in the accompanying *Seventh FNPRM* would further streamline the licensing of this band and avoid incentives for licensees to engage in speculative behavior.

B. Leasing Opportunities for States

1. Spectrum Leasing by States

20. Under the framework we adopt in this document, one entity in each state (the State Lessor) will have the opportunity to lease voluntarily some or all of its 4.9 GHz band spectrum rights to third parties for fixed or mobile use, including for non-public safety operations. Leasing by other 4.9 GHz band licensees, including by state entities other than the State Lessor, county or local entities, or nongovernmental organizations that operate in support of public safety, will not be permitted. The State Lessor and lessee(s) will have the flexibility to structure their lease arrangements, within the boundaries of our Secondary Markets rules, to protect ongoing and future public safety operations while allowing for more flexible use of the band. We recognize that State Lessors and lessees are best positioned to negotiate appropriate leasing arrangements to meet their operational needs, and the needs of their states, and we impose minimal restrictions on those agreements.

a. Allowing Leasing by State Lessors

21. We amend part 90, subpart Y, of our rules to permit the statewide licensee selected as the State Lessor to voluntarily lease 4.9 GHz band spectrum rights under our part 1 leasing rules to any entity that is otherwise eligible to be a spectrum lessee for fixed or mobile use, including to commercial entities and others with non-public safety operations, thus opening the band to flexible new uses. The State Lessor is also free to lease to public safety entities. Some commenters urge the Commission to provide for continued exclusive public safety community use of 4.9 GHz spectrum to be managed through the First Responders Network Authority (FirstNet); wireless providers other than AT&T (which operates FirstNet) urge the Commission to reject such an approach. We decline to assign the 4.9 GHz band to FirstNet—which would deprive states (as well as public safety entities within that state) any choice in how the band is used. We find, however, that the leasing framework we adopt in this document is not inconsistent with 4.9 GHz spectrum being used by FirstNet as a lessee; a State Lessor has the flexibility to enter into a variety of leasing arrangements, including leasing to commercial entities that have the option of providing services to public safety or non-public safety entities. As discussed below, the State Lessor also will no longer be subject to the public safety use

restriction contained in our rules. Through this action, the State Lessor will be permitted to lease spectrum rights in all, or any portion, of that state. It may divide these rights on a geographic, spectral, or temporal basis, and it may also lease spectrum rights associated with its permanent fixed sites, including those with primary status under our rules.

22. State Lessors may enter into agreements with lessees to share equipment or other deployment costs provided that they comply with all relevant license provisions. We encourage parties to also consider alternative coordination methods to prevent harmful interference between lessees and public safety licensees that allow for robust shared use of the band. For example, parties might consider spectrum leases that rely on dynamic sharing mechanisms, which permit operational access based on automated databases that identify protected operations. In the *Seventh FNPRM,* we seek comment on ways the Commission can encourage and facilitate this type of sharing.

b. Leasing Limited to States the Do Not Divert 911 Fees at This Time

23. The Commission originally designated the 4.9 GHz band for public safety use to ''ensure that agencies involved in the protection of life and property possess the communications resources needed to successfully carry out their mission.'' As the history of this proceeding well demonstrates, access to spectrum is not the sole determinant of whether public safety entities can obtain necessary communications services. Another issue that has challenged public safety entities is 911 fee diversion. The Commission is required to provide an annual report to Congress on state 911 fee collection and use that identifies which states have improperly diverted 911 fees. While identifying states that divert 911 fees in these reports has arguably helped discourage the practice, this step alone has failed to eliminate it. In the recently adopted *Fee Diversion NOI,* we found that between 2012 and 2018, American states and jurisdictions have diverted over $1.275 billion in fees collected for 911 and Enhanced 911 services to non-911 purposes. As noted in the *Fee Diversion NOI,* ''[t]his diversion of funding directly undermines the public safety communications system.'' The Commission seeks specific comment in the *Fee Diversion NOI* on ''regulatory steps the Commission could take to discourage fee diversion, such as . . . conditioning state and local eligibility for FCC licenses, programs, or other benefits on the absence of fee diversion.''

24. In this document, we expand access to the 4.9 GHz band by affording to certain eligible states the benefit of leasing spectrum rights, which we anticipate could provide substantial additional state revenues. However, we find it in the public interest to only extend this benefit to states that use 911 fees collected from consumers for their intended purpose at this time. Specifically, we will only permit states that are not identified in the Commission's December 2019 911 Fee Report as diverting 911 fees for non-911 purposes to lease spectrum rights to non-public safety or public safety entities. We take this action, in conjunction with our more in depth consideration of this issue in the *Fee Diversion NOI,* as an affirmative step toward addressing this long standing problem and in recognition that states that have a history of appropriately using 911 fees are more likely to respect the rights of public safety incumbents in the 4.9 GHz band. We defer consideration to the *Seventh FNPRM* on whether to extend the 4.9 GHz band leasing framework to states that divert 911 fees. A state that either believes it was incorrectly identified in the 2019 Fee Report as diverting fees, or that has taken subsequent remedial action, may petition the Public Safety and Homeland Security Bureau to demonstrate, with supporting documentation, that relief is justified, and we direct the Bureau to expedite action on any such petition.

c. Selection of the State Lessor

25. In order to centralize leasing functions and facilitate coordination of spectrum use, we require a state seeking to benefit from our voluntary secondary markets opportunities to select a single state entity that is a statewide 4.9 GHz band licensee to act as the State Lessor. Where a state has a single statewide license, we will treat that licensee as the default State Lessor. A default State Lessor may, in its discretion, assign its license to another statewide entity if that entity is deemed a more appropriate State Lessor; the assignment application must include a designation letter from the governor (or his or her designee) akin to that required by § 90.529 of our rules certifying that the assignee is the entity the state has selected to be the State Lessor.

26. If a state has multiple statewide licenses held by state entities and voluntarily seeks to lease, the state must select one of those entities as the State Lessor. A statewide licensee not selected as State Lessor may continue to operate pursuant to its authorization but will not be permitted to lease spectrum rights. As part of any lease arrangement with a lessee, a State Lessor must submit to the Commission FCC Form 608 accompanied by evidence that it has been selected as State Lessor. Such evidence shall consist of a copy of the written agreement signed by each of the state's multiple statewide licensees indicating the selection of the State Lessor. If states with multiple statewide licensees are unable to reach such an agreement, we will accept in the alternative (as an attachment to FCC Form 608) a gubernatorial letter designating a certain state entity licensee as the State Lessor. To reduce administrative and regulatory burdens, we find it unnecessary to mandate a Commission pre-approval process for a state entity seeking State Lessor status prior to actually engaging in lease arrangements. We anticipate that, under this market-based approach, a prospective lessee engaged in negotiations with a prospective State Lessor will seek assurances that the requisite State Lessor documentation (either a multi-licensee agreement or a gubernatorial letter) has been executed prior to submission of an FCC Form 608 seeking Commission approval of, or provide notice to the Commission of, a specific lease arrangement, as applicable. Pursuant to our state-based approach to expanding secondary markets opportunities in the 4.9 GHz band, leasing will not be permitted in those states that have no statewide licensee.

d. Application of the Secondary Markets Framework to State Lessors

27. The Commission's *Secondary Markets* framework provides for a variety of leasing vehicles, any of which the State Lessor and its lessee(s) will be free to enter into depending on which best accommodates the needs of their state. This includes *de facto* transfer spectrum leasing arrangements, where the licensee retains *de jure* control of the license while *de facto control* of the leased spectrum is transferred to the spectrum lessee; and spectrum manager leasing arrangements, where the lessee is permitted to use the spectrum, but the licensee retains both *de jure* and *de facto* control. In determining the appropriate leasing vehicle, we expect a State Lessor to evaluate its ability as lessor to comply with state law requirements related to leasing activities. The State Lessor should only enter into lease arrangements that it is legally and organizationally equipped to implement.

28. Consistent with our *Secondary Markets* rules, State Lessors entering into spectrum lease agreements must comply with our existing part 1 leasing rules, including: Filing an FCC Form 608, either seeking prior Commission approval to enter into the lease (for a de facto transfer spectrum lease) or providing notice of the lease (for spectrum manager leases); Complying with the requirements associated with the chosen type of leasing agreement, including the level of control required to be maintained by the State Lessor for either a de facto transfer spectrum lease or a spectrum manager lease; Fulfilling all obligations associated with compliance with the Communications Act and Commission rules associated with the original license; Complying with our rules on assignments and transfers of control for spectrum leasing arrangements in the 4.9 GHz band; and Ensuring that spectrum leasing arrangements include all required contractual provisions.

29. We also note that certain licensees have a waiver of the prohibition on aeronautical use in the 4.9 GHz band. If a State Lessor has been granted a waiver of the § 90.1205(c) aeronautical prohibition, that right is not transferable to a lessee. A lessee seeking to engage in aeronautical mobile operations must submit a request for waiver accompanied by a sufficient technical justification and an exhibit demonstrating the State Lessor's support for the waiver.

2. Rights and Responsibilities of Lessees

30. To increase flexibility and encourage more efficient use of the 4.9 GHz band, lessees of 4.9 GHz band spectrum will not be subject to the requirement that they use the spectrum in support of public safety and may engage in flexible use fixed or mobile operations.

31. Lessees will be permitted to conduct any type of operation, including commercial, CII, or those in support of public safety. Lessees of a geographic area will be permitted to construct base stations and engage in mobile operations, and to construct temporary fixed sites within the lease area as permitted by the lease agreement as if they were a 4.9 GHz band licensee. They will not, however, have the authority to add stations/sites that are required to be individually licensed by our rules. These include permanent fixed sites and base stations that must be individually licensed due to their location. In the event a lessee's operations require individual site licensing under § 90.1207, the State Lessor will be required to file for a license and then lease the licensed site to the lessee.

32. The informal coordination requirements of § 90.1209(b) will apply to lessees in the same way as licensees. Accordingly, lessees have the obligation to cooperate with other operators in and around their area of operations in the selection and use of channels in order to reduce interference and make the most efficient use of the band in the same manner as licensees. Our rules require cooperation in the resolution of harmful interference to the mutual satisfaction of operators, including lessees, and they also preserve the authority of the Commission to impose operational restrictions to resolve interference. Lessees also must adjust operations to prevent, or resolve, interference to any fixed links with primary status.

33. Lessees, like a State Lessor, will be required to comply with all relevant provisions of our *Secondary Markets* rules, including, for example, our subleasing rules if the lease agreement permits such subleasing. They also will be required to comply with any other requirements applicable to their operations, such as those under part 9 of our rules, whereby commercial mobile radio service (CMRS) providers and other relevant entities remain responsible for compliance with 9–1–1 and Enhanced 9–1–1 obligations, if applicable.

3. 4.9 GHz Incumber Licensee Rights

34. We clarify that the adoption of the *Sixth Report and Order* does not modify the rights of an incumbent 4.9 GHz band licensee other than a licensee selected to be a State Lessor. An incumbent is a 4.9 GHz licensee with an active license as reflected in ULS as of the adoption of the *Freeze Public Notice,* or a 4.9 GHz licensee granted an authorization pursuant to a waiver of, or modification of, the freeze. An incumbent licensee, whether a public safety agency or a nongovernmental organization, may continue to operate existing system(s) or make additional deployments pursuant to the terms of its license, consistent with our rules and the *Freeze Public Notice.* Incumbents must work with lessees to prevent and resolve harmful interference through cooperation in the same way they do today with other 4.9 GHz licensees, and a State Lessor and its lessee(s) also must work with incumbents to prevent and resolve harmful interference. The Commission retains the authority to impose operational conditions as needed in the event this cooperation fails to resolve interference concerns, whether between licensees, licensees and lessees, or lessees themselves.

C. Elimination of the Public Safety Use Restrictions for State Lessors

35. This action expands access to the 4.9 GHz band through a revised leasing framework. To further increase flexibility in the use of valuable spectrum and to incentivize secondary markets activity in this band, we revise our rules to eliminate the requirement that a State Lessor licensee only use its 4.9 GHz band spectrum for public safety purposes. In the *Sixth FNPRM,* the Commission sought comment on a range of potential approaches to expanding use of the band in addition to leasing. For example, if critical infrastructure industries were permitted access as 4.9 GHz licensees, the Commission sought comment on whether they should be required to provide public safety services or be able to use the spectrum for any purpose. Noting that 4.9 GHz spectrum has been underutilized, the Commission specifically sought comment on redesignating the 4.9 GHz band, wholly or partially, to support commercial wireless use. The Commission asked whether the public interest would be ''best served if this spectrum could be used for commercial applications, such as 5G . . .'' and how to divide the band between public safety and commercial use if only a portion of the band were to be redesignated. The Commission also sought comment on ''any other alternatives to support commercial wireless use of the 4.9 GHz band.''

36. We believe that modifying a State Lessor's rights to permit non-public safety use is an alternative approach that promotes efficient spectrum use, incentivizes leasing activity, and is consistent with our action in this document allowing a State Lessor to lease spectrum for non-public safety purposes. Permitting a State Lessor to engage in non-public safety uses will more fully empower each state to determine the highest and best use for the 4.9 GHz band in its jurisdiction and to consider a wider range of spectrum use options that best accommodate its citizens' communications needs, whether through its own operations or through those of third party lessees. A State Lessor will also have the flexibility to determine whether to only conduct public safety operations under its license, or not allow non-public safety use through leasing. We anticipate, however, that centralized state-based control of non-public safety use will incentivize secondary markets activity and encourage greater spectrum use, and we explore a more expanded state-

based model for the 4.9 GHz band in the accompanying *Seventh FNPRM.* We clarify that State Lessors that opt to operate as a CMRS provider will be regulated as such and will be subject to all relevant rules applicable to that type of service, including part 9 of our rules, regarding responsibility for compliance with 9–1–1 and Enhanced 9–1–1 obligations. Further, in the event that a 4.9 GHz band licensee other than a State Lessor seeks the flexibility to engage in non-public safety operations, it will be required to lease the necessary spectrum rights from the State Lessor in its jurisdiction.

D. Authority To Allow Flexible-Use and Leasing in the 4.9 GHz Band

37. Section 301 of the Communications Act, as amended, requires grant of a license to authorize use of radio transmissions, but specifies that a grant shall not be construed to create ''any right beyond the terms, conditions, and periods of the license.'' Under our current 4.9 GHz band rules, all operations in the band must be in support of public safety. Under the new 4.9 GHz band leasing regime we adopt in this document, we eliminate this restriction for a State Lessor and for that entity's lessee(s). The terms and conditions for that 4.9 GHz licensee's authorization, based on the revised rules, will now include the right to engage in operations other than those in support of public safety and to lease to entities that are not required to conduct or support public safety operations. We find that permitting more flexible spectrum use in the underused 4.9 GHz band is consistent with our broad authority to license spectrum rights under the Communications Act and to define the terms of spectrum licenses by prescribing the circumstances in which certain uses are permitted or prohibited, both by licensees and by lessees.

E. Alternative Approaches From the Sixth FNPRM

38. We determine that allowing spectrum leasing to non-public safety entities through negotiated agreements between a State Lessor and lessees has potential to significantly increase efficient use of the 4.9 GHz band in the near term, compared with alternative approaches upon which the Commission sought comment. In the *Sixth FNPRM,* we sought comment not only on spectrum leasing, but also on several alternative approaches to stimulate expanded use of, and investment in, the band. These included: (i) The expansion of licensee eligibility; (ii) a two-tiered sharing structure; (iii) a revised band plan, including reserving certain channels for aeronautical mobile and robotic use; (iv) more formal coordination requirements and regional planning coordinator (RPC) plans; and (v) new technical rules. We find that the proposed alternative approaches are less likely to increase the efficient use of spectrum in the band as compared with the approach we adopt in this *Sixth Report and Order.* The adopted approach effectively protects public safety interests while allowing state public safety entities to control commercial access. We defer consideration of certain other proposals explored in the *Sixth FNPRM* that are not precluded by expanded leasing, including whether to permit aeronautical and robotic use, to the accompanying *Seventh FNPRM.*

39. *Expanding Eligibility to CII.* We decline to expand eligibility for obtaining licenses in the band to include CII entities or to restrict lessee eligibility to CII entities. Limiting non-public safety use to one industry, or otherwise restricting non-public safety eligibility, would both significantly reduce opportunities to expand investment in the band. This approach would be contrary to the Commission's longstanding policy of promoting flexible licensing to ensure the most efficient use of spectrum. Such a limitation also would be contrary to our statutory mandates to promote economic opportunity and competition, and the efficient and intensive use of electromagnetic spectrum. We agree with commenters who contend that CII has a demonstrated need for increased access to reliable broadband services to promote smart grid technologies and fast, secure communications networks, and we address this need by removing the requirement that 4.9 GHz spectrum must be used for public safety support operations as it applies to lessees. We fully encourage CII and other non-public safety and commercial entities to pursue 4.9 GHz secondary market opportunities through the framework we establish in this document.

40. *Redesignation of the Band.* The Commission sought comment in the *Sixth FNPRM* on whether to redesignate the 4.9 GHz band, wholly or partially, for commercial use, on a licensed or unlicensed basis. We decline to adopt this change because it would provide less protection for public safety use than would our decision to provide for expanded spectrum access through the secondary market while retaining public safety operations in the band. Given the interest in this band by both commercial and non-commercial users, we believe that our leasing framework achieves the right balance between commercial and non-commercial access; with minimal disruption to existing public safety operations in the band; it permits states, working in coordination with their public safety entities, to determine in the first instance the amount of spectrum needed for those public safety operations. While several commenters note the continued need for spectrum to support public safety operations, most commenters recognize the need to allow non-public safety operations in the band to maximize use of this spectrum. At the same time, commenters overwhelmingly oppose giving non-public safety entities access by redesignating the band for commercial use.

41. *Two-tiered Sharing on a Secondary Basis.* The *Sixth FNPRM* sought comment on two-tiered sharing as an alternative approach for increasing use of the 4.9 GHz band. Under two-tiered sharing, ''Tier 1 would consist of primary licensees in the band (including all incumbent users), while Tier 2 would allow other non-public safety users to access the band on a secondary basis, with safeguards to ensure priority and interference protection for Tier 1 operations.'' The majority of commenters, citing technical barriers to adequately protecting public safety operations, oppose two-tiered sharing. Commenters that support two-tiered sharing stated that it would ''encourage a more robust market for equipment and greater innovation, while protecting primary public safety users from harmful interference.'' We find, however, that a state-based leasing framework we adopt in this document more effectively achieves the twin goals of making valuable mid-band spectrum available for flexible use and continuing to support public safety operations. Although we adopt leasing in the 4.9 GHz band rather than two-tiered sharing, we seek comment in the accompanying *Seventh FNPRM* on future use of dynamic sharing in this band and how such systems can further promote the adopted leasing regime.

42. *Coordination and Regional Planning.* In the *Sixth FNPRM,* the Commission proposed to require certified frequency coordination for licensing in the 4.9 GHz band. The Commission also sought comment on expanding the data contained in the Universal Licensing System to include more information than site licensing in order to facilitate this coordination. In addition, the Commission also sought comment on ways to increase the flexibility of Regional Planning Committees in facilitating use of the 4.9 GHz band.

43. The frequency coordination proposal described in the *Sixth FNPRM*

is no longer relevant under the new leasing regime, which will allow licensees to continue to coordinate amongst themselves, and with new lessees, to ensure the most efficient use of the band and to mitigate harmful interference. We note that, while the record supports these proposals generally, stakeholders did not address the specific need for reliance on frequency coordinators, increased data, or Regional Planning Committees under a leasing framework.

44. Given the secondary market approach we adopt in this document, we decline to mandate use of frequency coordinators in the 4.9 GHz band application process, modify the rules regarding regional plans, or otherwise require additional filings with the Commission regarding the type and quantity of 4.9 GHz band deployments. We do, however, seek comment in the accompanying *Seventh FNPRM* on ways to encourage cross-jurisdictional coordination of 4.9 GHz band spectrum leasing, particularly in the context of the model for a State Band Manager to coordinate public safety operations alongside lessee operations on which we seek comment. As part of this proposal, we also seek comment on alternate means of maintaining easily accessible records of deployments as the nature of licensing in the 4.9 GHz band evolves.

45. *Technical Rule Changes.* In the *Sixth FNPRM,* the Commission proposed or sought comment on a series of changes to our technical rules intended to facilitate sharing between public safety licensees, including: (1) Modifying the channelization plan and bandwidth aggregation rules; (2) designating particular channels for aeronautical mobile and robotic use; (3) adopting technical standards for equipment; (4) rules governing the use of point-to-multipoint systems; and (5) power limits and polarization requirements on point-to-point systems. Commenters disagreed on these technical changes. Some commenters noted that the potential changes conflicted in certain cases, and commenters differed on which changes offered the most promise for preventing interference and promoting greater use of the band. We decline to adopt these changes, as they have the potential to limit licensee and lessee flexibility in designing leasing arrangements best suited for their operations, and they could undermine the benefits of the state-based leasing regime for both public safety and non-public safety users of the band. We also find that these rule changes would not sufficiently increase use of the 4.9 GHz band or further our goal of encouraging robust secondary market activity. As stated, the leasing regime we adopt in this document provides states the flexibility, within the current technical rules, to reach voluntary agreements that will not only expand access to the band, but also provide for mutually adequate protections for State Lessors and their lessee(s).

46. *Public Safety Priority.* In the *Sixth FNPRM,* the Commission sought comment on how best to ensure that, if so desired, public safety entities would retain priority access to 4.9 GHz spectrum in a commercial leasing framework. The Commission also sought comment on whether non-public safety entities that lease spectrum capacity should have primary status because they entered into agreements with specific public safety licensees. We received no specific comments addressing this issue in the context of the leasing framework we adopt in this document, though one commenter expresses concern regarding a State Lessor making determinations as to the scope of public safety priority access. Through this action, we increase a state's flexibility to determine the scope of any operational needs, and we therefore decline to mandate public safety priority access to the band or provide primary status to non-public safety lessees. The leasing regime we adopt relies on coordination among licensees and lessees and permits each state to determine the extent to which priority access is a critical component of its vision for the band's use in its state; we empower each State Lessor to decide whether to include public safety priority provisions in any lease arrangement based on its judgment regarding the best use of the 4.9 GHz band. States will act on behalf of their subordinate public safety entities and may choose to require priority access protections, enforceable through contractual lease provisions, or they may determine that such priority is unnecessary for their state. State Lessors that are unable to come to satisfactory terms on this issue may decline to lease, without unnecessary Commission involvement.

F. Bureau Modification of Application Freeze

47. Pursuant to the Bureaus' September 8, 2020 freeze, no new or modified applications for 4.9 GHz band licenses are currently being accepted or processed. This includes applications to license permanent fixed sites (*i.e.,* those in place for one year or longer). In order to facilitate effective use of the band—both by public safety licensees and by non-public safety lessees—pending resolution of the issues raised below in the accompanying *Seventh FNPRM,* we direct the Bureaus to make modifications to the freeze by Public Notice, following the effective date of this *Sixth Report and Order,* to permit the acceptance and processing of certain applications. Specifically, we direct the Bureaus to modify the current freeze to permit the filing of applications for a statewide license from a single entity per state in a state that does not have a statewide licensee at the time of the freeze, provided that entity is also designated by the state as the State Lessor. Further, in order to not complicate the landscape of this band and reduce the flexibility that states have in determining the highest and best use of the spectrum, we direct the Bureaus to modify the current freeze to accept and process applications for permanent fixed site licenses only if filed by a State Lessor. If a public safety licensee other than a State Lessor seeks authority to construct and operate a new permanent fixed site, it may lease from a State Lessor provided that the State Lessor has a license for that facility.

IV. Final Regulatory Flexibility Analysis

A. Need for, and Objectives of, the Final Rules

48. The *Sixth Report & Order* continues the Commission efforts to expand access to mid-band spectrum by opening the band for flexible use via the secondary market while continuing to ensure access for public safety operations. The history of this band indicates that public safety operations do not require exclusive access to the entire 50 megahertz of spectrum and can safely share this band with other operations. The actions we take in this document allow one statewide licensee of the 4.9 GHz (4940–4990 MHz) band in each state (the State Lessor) to lease some or all of their spectrum rights to third parties that are otherwise eligible to be a spectrum lessee for fixed or mobile use, including to commercial entities, and eliminates the requirement that, when leased or used by the State Lessor, the spectrum must be used to support public safety. We only permit states that are not identified in the Commission's December 2019 911 Fee Report as diverting 911 fees for non-911 purposes to lease spectrum rights to non-public safety or public safety entities. We anticipate that unrestricted secondary market transactions and non-public safety use will encourage greater development of equipment for this band, driving down costs and making it easier for public safety and non-public

safety entities alike to deploy operations. Furthermore, making available mid-band spectrum for commercial use is critical in ensuring U.S. leadership in 5G and in helping to close the digital divide.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

49. There were no comments filed that specifically addressed the proposed rules and policies presented in the IRFA.

C. Response to Comments by Chief Counsel for Advocacy of the Small Business Administration

50. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.

51. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

52. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

53. *Small Business, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA's Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States which translates to 30.7 million businesses.

54. Next, the type of small entity described as a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' The Internal Revenue Service (IRS) uses a revenue benchmark of $50,000 or less to delineate its annual electronic filing requirements for small exempt organizations. Nationwide, for tax year 2018, there were approximately 571,709 small exempt organizations in the U.S. reporting revenues of $50,000 or less according to the registration and tax data for exempt organizations available from the IRS.

55. Finally, the small entity described as a ''small governmental jurisdiction'' is defined generally as ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' U.S. Census Bureau data from the 2017 Census of Governments indicate that there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number there were 36,931 general purpose governments (county, municipal and town or township) with populations of less than 50,000 and 12,040 special purpose governments—independent school districts with enrollment populations of less than 50,000. Accordingly, based on the 2017 U.S. Census of Governments data, we estimate that at least 48,971 entities fall into the category of ''small governmental jurisdictions.''

56. *Private Land Mobile Radio Licensees.* Private land mobile radio (PLMR) systems serve an essential role in a vast range of industrial, business, land transportation, and public safety activities. Companies of all sizes operating in all U.S. business categories use these radios. Because of the vast array of PLMR users, the Commission has not developed a small business size standard specifically applicable to PLMR users. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engaged in radiotelephone communications. The appropriate size standard for this category under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census Bureau data for 2012 shows that there were 967 firms that operated for the entire year. Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1,000 employees or more. Thus under this category and the associated size standard, the Commission estimates that the majority of PLMR licensees are small entities.

57. According to the Commission's records, a total of approximately 269,953 licenses comprise PLMR users. Of this number, there are a total of 3,578 PLMR licenses in the 4.9 GHz band. The Commission does not require PLMR licensees to disclose information about number of employees, and does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. The Commission however believes that a substantial number of PLMR licensees may be small entities despite the lack of specific information.

58. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: Transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment. The SBA has established a size standard for this industry of 1,250 employees or less. U.S. Census Bureau data for 2012 show that 841 establishments operated in this industry in that year. Of that number, 828 establishments operated with fewer than 1,000 employees, 7 establishments operated with between 1,000 and 2,499 employees and 6 establishments operated with 2,500 or more employees. Based on this data, we conclude that a majority of manufacturers in this industry are small.

59. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services. The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census Bureau data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms employed fewer than 1,000 employees and 12 firms employed of 1,000 employees or more. Thus under this

category and the associated size standard, the Commission estimates that the majority of Wireless Telecommunications Carriers (except Satellite) are small entities.

60. The Commission's own data—available in its Universal Licensing System—indicate that, as of August 31, 2018 there are 265 Cellular licensees that will be affected by our actions. The Commission does not know how many of these licensees are small, as the Commission does not collect that information for these types of entities. Similarly, according to internally developed Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services. Of this total, an estimated 261 have 1,500 or fewer employees, and 152 have more than 1,500 employees. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

61. *Frequency Coordinators.* Neither the Commission nor the SBA has developed a small business size standard specifically applicable to spectrum frequency coordinators. The closest applicable SBA category is Business Associations which comprises establishments primarily engaged in promoting the business interests of their members. The SBA has developed a small business size standard for ''Business Associations,'' which consists of all such firms with gross annual receipts of $8 million or less. For this category, U.S. Census Bureau data for 2012 shows that there were 14,996 firms that operated for the entire year. Of these firms, a total of 14,229 had gross annual receipts of less than $5 million and 396 firms had gross annual receipts of $5 million to $9,999,999.

62. There are 13 entities certified to perform frequency coordination functions under Part 90 of the Commission's rules. According to U. S. Census Bureau data approximately 95% of business associations have gross annual receipts of $8 million or less and would be classified as small entities. The Business Associations category is very broad however and does not include specific figures for firms that are engaged in frequency coordination. Thus, the Commission is unable to ascertain exactly how many of the frequency coordinators are classified as small entities under the SBA size standard. Therefore, for purposes of this FRFA under the associated SBA size standard, the Commission estimates that a majority of the 13 FCC-certified frequency coordinators are small.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

63. The new leasing opportunities created in the *Sixth Report & Order* will result in reporting, recordkeeping and compliance obligations for State Lessor licensees and lessees of 4.9 GHz band spectrum who elect to enter leasing arrangements for this spectrum. More specifically, a 4.9 GHz band State Lessor entering into leases will be required to file an FCC Form 608, either seeking prior Commission approval to enter into the lease for a *de facto* transfer spectrum lease or providing notice of the lease for spectrum manager leases. These requirements are consistent with existing Commission *Secondary Market* rules. Where a state has multiple statewide licenses held by state entities and voluntarily seeks to lease, the state must select one of the licensees as the State Lessor. As part of any lease arrangement with a lessee, a State Lessor must submit to the Commission FCC Form 608 accompanied by evidence that it has been selected as State Lessor. Such evidence shall consist of a copy of the written agreement signed by each of the state's multiple statewide licensees indicating the selection of the State Lessor. If states with multiple statewide licensees are unable to reach such an agreement, we will accept in the alternative (as an attachment to FCC Form 608) a gubernatorial letter designating a certain state entity licensee as the State Lessor.

64. State Lessors will be required to comply with our *Secondary Markets* rules, in particular our existing part 1 leasing rules associated with entering into spectrum lease agreements which includes fulfilling all obligations associated with compliance with the Communications Act and Commission rules associated with the original license; complying with our rules on assignments and transfers of control for spectrum leasing arrangements in the 4.9 GHz band; and ensuring that spectrum leasing arrangements meet all requirements as to contractual provisions. Similarly, lessees will be required to comply with all relevant provisions of our *Secondary Markets* rules, including, for example, our subleasing rules if the lease agreement permits such subleasing. Lessees will also be required to comply with any other requirements applicable to their operations, such as those under part 9 of our rules, whereby commercial mobile radio service (CMRS) providers and other relevant entities remain responsible for compliance with 9–1–1 and Enhanced 9–1–1 obligations, if applicable. Additionally, lessees will be subject to compliance with the informal coordination requirements of section 90.1209(b) in the same way as licensees.

65. The Commission does not believe the rules adopted in the *Sixth Report & Order* will require small entities to hire attorneys, engineers, consultants, or other professionals in order to comply with the rule changes. Similarly, although the Commission cannot quantify the cost of compliance with the rule changes discussed herein, we do not believe that the costs and/or administrative requirements associated with any of the adopted rule changes will unduly burden small entities. Our actions to permit leasing of 4.9 GHz band spectrum by a statewide licensee is the fastest and most efficient way to drive interest and investment in the band. Moreover, we expect the absence of restrictions on lessee eligibility will open the band to new commercial and other non-public safety operation uses. We anticipate that allowing spectrum leasing opportunities in this band will ultimately decrease deployment barriers—such as high equipment costs—for both public safety licensees as well as new lessees in the 4.9 GHz band.

F. Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

66. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for such small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.

67. The rules the Commission adopts should benefit small entities by giving them more options for gaining access to valuable wireless spectrum and increasing economic opportunity. Our actions to open the 4.9 GHz band to the secondary market to permit leasing by a statewide licensee and not to limit lessee eligibility will allow participating small entities to avoid operational costs that may have otherwise ensued had we not taken this approach. Moreover, our actions may drive down the costs of compatible equipment and facilitate

innovative cost-sharing arrangements between public safety licensees and non-public safety lessees both of which would benefit and minimize the economic impact for participating small entities. Similarly, small entities stand to benefit from our finding that limiting non-public safety use to one industry, or otherwise restricting non-public safety eligibility, would limit opportunities to grow significantly investment in the 4.9 GHz band. This determination is consistent with the Commission's longstanding policy of allowing flexible licensing to ensure the most efficient use of spectrum and our statutory mandates to promote economic opportunity and competition, and the efficient and intensive use of electromagnetic spectrum.

68. In the *Sixth FNPRM,* the Commission put forth a number of other proposals for consideration to stimulate expanded use of and investment in the 4.9 GHz band including: (i) A revised band plan, that included reserving certain channel for aeronautical mobile and robotic use; (ii) more formal coordination requirements; (iii) additional information collection and registration of the use of the band, that included new deployment reports and construction deadlines; (iv) new technical rules; and (v) additional regional planning. Given our decision to first permit broader use of the band through leasing, at this time we opted not to adopt any of these proposals and thereby minimize any additional economic impact on small entities that may have resulted from additional compliance requirements.

G. Report to Congress

69. The Commission will send a copy of the *Sixth Report & Order,* including this FRFA, in a report to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the *Sixth Report & Order,* including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Sixth Report & Order,* and FRFA (or summaries thereof) will also be published in the **Federal Register**.

V. Ordering Clauses

70. Accordingly, *it is ordered* that, pursuant to the authority found in sections 4(i), 302, 303(b), 303(f), 303(g), 303(r), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 302a, 303(b), 303(f), 303(g), 303(r), and 405, this *Sixth Report and Order is hereby adopted.*

71. *It is further ordered* that the rules and requirements adopted herein *will become effective* thirty (30) days after publication in the **Federal Register**, with the exception of § 90.1217. Section 90.1217 contains new or modified information collection requirements that require review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. The Commission directs the Wireless Telecommunications Bureau to announce the effective date of those information collections in a document published in the **Federal Register** after the Commission receives OMB approval, and directs the Wireless Telecommunications Bureau to cause § 90.1217 to be revised accordingly.

72. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *Sixth Report and Order,* including the Final Regulatory Flexibility Analysis and the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

73. *It is further ordered* that the Commission *shall send* a copy of this *Sixth Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Parts 1 and 90

Communications equipment, Organization and functions (Government agencies), Radio, Reporting and recordkeeping requirements, Telecommunications.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 1 and 90 to read as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. chs. 2, 5, 9, 13; 28 U.S.C. 2461, unless otherwise noted.

■ 2. Effective December 30, 2020, revise § 1.9001 to read as follows:

§ 1.9001 Purpose and scope.

(a) The purpose of this subpart is to implement policies and rules pertaining to spectrum leasing arrangements between licensees in the services identified in this subpart and spectrum lessees. This subpart also implements policies for private commons arrangements. The policies and rules in this subpart also implicate other Commission rule parts, including parts 1, 2, 20, 22, 24, 25, 27, 30, 80, 90, 95, and 101 of title 47, chapter I of the Code of Federal Regulations.

(b) Except as provided in paragraph (c) of this section, licensees holding exclusive use rights are permitted to engage in spectrum leasing whether their operations are characterized as commercial, common carrier, private, or non-common carrier.

(c) A State Lessor licensee (as defined in § 90.1217 of this chapter) in the shared 4940–4990 MHz band (see part 90, subpart Y, of this chapter) is permitted to lease some or all of the spectrum rights under its license, except that a state identified as diverting 911 fees in the Commission's December 2019 911 Fee Report sent to Congress pursuant to 47 U.S.C. 615a–1(f)(2) shall not be permitted to lease 4.9 GHz spectrum.

■ 3. Effective December 30, 2020, amend § 1.9005 by adding paragraph (oo) to read as follows:

§ 1.9005 Included services.

* * * * *

(oo) The 4940–4990 MHz band (part 90 of this chapter).

■ 4. Effective December 30, 2020, revise § 1.9048 to read as follows:

§ 1.9048 Special provisions relating to spectrum leasing arrangements involving licensees in the Public Safety Radio Services.

(a) Licensees in the Public Safety Radio Services (see part 90, subpart B, and § 90.311(a)(1)(i) of this chapter) may enter into spectrum leasing arrangements with other public safety entities eligible for such a license authorization as well as with entities providing communications in support of public safety operations (see § 90.523(b) of this chapter).

(b) In addition to spectrum leasing arrangements permitted under paragraph (a) of this section, a State Lessor (as defined in § 90.1217 of this chapter) in the 4940–4990 MHz band (see part 90, subpart Y, of this chapter) may enter into spectrum leasing arrangements with any entity eligible under this part to be a spectrum lessee, except that a state identified as diverting 911 fees in the Commission's December 2019 911 Fee Report sent to Congress pursuant to 47 U.S.C. 615a–1(f)(2) shall not be permitted to lease 4.9 GHz spectrum.

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

■ 5. The authority citation for part 90 continues to read as follows:

Authority: 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7), 1401–1473.

■ 6. Effective December 30, 2020, revise § 90.1203 to read as follows:

§ 90.1203 Eligibility.

(a) Entities providing public safety services (as defined in § 90.523) are eligible to hold a Commission license for systems operating in the 4940–4990 MHz band. All of the requirements and conditions set forth in § 90.523 also govern authorizations in the 4940–4990 MHz band.

(b) 4.9 GHz band licensees may enter into sharing agreements or other arrangements for use of the spectrum with entities that do not meet the eligibility requirements in this section. However, all applications in the band are limited to operations in support of public safety, except as provided in paragraph (c) of this section.

(c) Operations conducted pursuant to a license held by a State Lessor (as defined in § 90.1217), whether conducted by the State Lessor or its lessee(s), are not limited to operations in support of public safety. For purposes of subpart X of part 1 of this chapter, such lessees shall be deemed eligible and qualified as a licensee, notwithstanding paragraph (a) of this section.

■ 7. Delayed indefinitely, add § 90.1217 to read as follows:

§ 90.1217 State Lessor.

(a) The State Lessor shall have the authority to lease some or all of its 4.9 GHz band spectrum usage rights, including geographic areas licenses or permanent fixed sites individually licensed under § 90.1207, pursuant to subpart X of part 1 of this chapter, to any entity eligible to be a spectrum licensee under subpart X of part 1.

(b) In each state (as defined in § 90.7) one state entity holding a statewide license may be selected as a State Lessor.

(1) In states where there is only one state entity holding a statewide license, that licensee will be deemed the State Lessor.

(2) In states where there are multiple state entities holding a statewide license, one must be selected as the State Lessor if seeking to lease 4.9 GHz band spectrum use rights. This selection must be demonstrated through the inclusion of a letter, signed by all state entities holding a statewide license in that state, affirming the selection of a State Lessor for that state, in any application to the Commission that requires demonstration of State Lessor Status, including FCC Form 608. If states with multiple state entities holding a statewide license are unable to reach an agreement affirming a State Lessor selection, the Commission will accept in the alternative a letter, signed by the elected chief executive (Governor) of that state, or his or her designee, affirming the selection of a State Lessor for that state.

(c) The State Lessor may assign its license to another state entity eligible for a statewide license.

(1) Any assignment application must be accompanied by a letter, signed by the elected chief executive (Governor) of that state, or his or her designee, affirming the selection of the assignee as the State Lessor for that state.

(2) Any assignment of the State Lessor's license must include all permanent fixed site authorizations obtained while a State Lessor. A licensee selected as the State Lessor may only assign its entire license and may not partition or disaggregate its license.

[FR Doc. 2020–23506 Filed 11–27–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 79

[MB Docket No. 11–43; FCC 20–155; FRS 17215]

Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission expands its video description requirements by phasing them in for an additional 10 designated market areas (DMAs) each year for the next four years. This action is based on a finding that the costs of expanding the video description regulations to DMAs 61 through 100 are reasonable for program owners, providers, and distributors. In addition, the Commission modernizes the terminology in its rules to use the more common and widely understood term ''audio description'' rather than ''video description.'' Finally, the Commission adopts its proposal to delete from the rules outdated references to compliance deadlines that have passed.

DATES: Effective December 30, 2020.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Diana Sokolow, *Diana.Sokolow@fcc.gov,* of the Policy Division, Media Bureau, (202) 418–2120.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, FCC 20–155, adopted and released on October 27, 2020. This document will be available via ECFS at *https://www.fcc.gov/ecfs/.* Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat. Alternative formats are available for people with disabilities (braille, large print, electronic files, audio format), by sending an email to *fcc504@fcc.gov* or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Synopsis

1. In this Report and Order, we take the unopposed action of expanding our video description requirements by phasing them in for an additional 10 designated market areas (DMAs) each year for the next four years. Consistent with the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA),[1] we find that the costs of expanding the video description regulations to DMAs 61 through 100 are reasonable for program owners, providers, and distributors. Our action in this document will help ensure that a greater number of individuals who are blind or visually impaired can be connected, informed, and entertained by television programming. In addition, we modernize the terminology in part 79 of the Commission's rules to use the more common and widely understood term ''audio description'' rather than ''video description.''[2] Finally, we adopt our proposal to delete from the rules outdated references to compliance deadlines that have passed.

[1] Specifically, pursuant to the ''continuing Commission authority'' provision of the CVAA, the Commission has authority ''to phase in the video description regulations for up to an additional 10 [DMAs] each year (I) if the costs of implementing the video description regulations to program owners, providers, and distributors in those additional markets are reasonable, as determined by the Commission; and (II) except that the Commission may grant waivers to entities in specific [DMAs] where it deems appropriate.''

[2] Throughout the remainder of this document, we will use the term ''audio description'' instead of ''video description.''

2. Audio description [3] makes video programming [4] more accessible to individuals who are blind or visually impaired through ''[t]he insertion of audio narrated descriptions of a television program's key visual elements into natural pauses between the program's dialogue.'' [5] To access audio description, consumers generally switch from the main program audio to the secondary audio stream on which audio description is typically provided. In 2011, pursuant to section 202 of the CVAA, the Commission adopted rules requiring certain television broadcast stations and multichannel video programming distributors (MVPDs) to provide audio description for a portion of the video programming that they offer to consumers on television.

3. Specifically, the audio description rules currently require commercial television broadcast stations that are affiliated with one of the top four commercial television broadcast networks (ABC, CBS, Fox, and NBC) and are located in the top 60 television markets to provide 50 hours of audio-described programming per calendar quarter during prime time or on children's programming, as well as an additional 37.5 hours of audio-described programming per calendar quarter at any time between 6 a.m. and midnight.[6] In addition, MVPD systems that serve 50,000 or more subscribers must provide 50 hours of audio description per calendar quarter during prime time or on children's programming, as well as an additional 37.5 hours of audio description per calendar quarter at any time between 6 a.m. and midnight, on each of the top five national nonbroadcast networks that they carry on those systems.[7] The top five nonbroadcast networks currently subject to the audio description requirements are USA Network, HGTV, TBS, Discovery, and History.[8]

4. The CVAA required the Commission to submit two reports to Congress related to audio description. In the First Report, submitted to Congress in June 2014, the Bureau found that ''[t]he availability of [audio] description on television programming has provided substantial benefits for individuals who are blind or visually impaired, and the industry appears to have largely complied with their responsibilities under the Commission's 2011 rules.'' The Bureau also found, however, that ''consumers report the need for increased availability of and easier access to [audio]-described programming, both on television and online.''

5. In the Second Report, submitted to Congress in October 2019, the CVAA required the Commission to assess, among other topics, ''the potential costs to program owners, providers, and distributors in [DMAs] outside of the top 60 of creating [audio-described] programming'' and ''the need for additional described programming in [DMAs] outside the top 60.'' The Second Report stated that commenters did not offer ''detailed or conclusive information'' as to the costs of such an expansion or a station's ability to bear those costs. It thus deferred issuing a determination regarding whether any costs associated with the expansion would be reasonable, explaining that, ''[s]hould the Commission seek to expand the [audio] description requirements to DMAs outside the top 60, it will need to utilize the information contained in this Second Report, and any further information available to it at the time, to determine that 'the costs of implementing the [audio] description regulations to program owners, providers, and distributors in those additional markets are reasonable.' '' [9]

6. The CVAA provides the Commission with authority ''to phase in the [audio] description regulations for up to an additional 10 [DMAs] each year (I) if the costs of implementing the [audio] description regulations to program owners, providers, and distributors in those additional markets are reasonable, as determined by the Commission; and (II) except that the Commission may grant waivers to entities in specific [DMAs] where it deems appropriate.'' Accordingly, in April 2020, in accordance with the CVAA, the Commission proposed to expand its audio description regulations to an additional 10 DMAs per year for four years, thus covering DMAs 61 through 100, and it invited comment on whether the costs of such an expansion would be reasonable.[10] The Commission also sought to refresh the record on its 2016 proposal to revise its rules to use the newer and more commonly used term ''audio description,'' rather than ''video description.'' Finally, the Commission proposed to delete outdated references in the audio description rules to compliance deadlines that had passed. The *2020 Audio Description Notice of Proposed Rulemaking (NPRM)* (85 FR 30917, May 21, 2020) elicited 11 comments and two replies, all of which supported the Commission's proposals, including the expansion of audio description requirements to an additional 10 DMAs per year for four years until DMAs 61 through 100 are covered.

7. *Expanding the Number of Markets Subject to Audio Description Requirements.* We adopt our proposal to phase in the audio description requirements for an additional 10 DMAs each year for four years, beginning on the later of January 1, 2021, or the effective date of this Order. Commenters unanimously support the expansion of the Commission's audio description rules to additional markets. As stated, the CVAA provides the Commission with authority for this phase-in, ''based upon the findings, conclusions, and recommendations contained in the [Second Report],'' ''(I) if the costs of implementing the [audio] description

[3] We note that although the CVAA uses the term ''video description'' in this context, the Commission has long considered the terms ''video description'' and ''audio description'' to be synonymous.

[4] ''Video programming'' refers to programming provided by, or generally considered comparable to programming provided by, a television broadcast station but does not include consumer-generated media.

[5] 47 CFR 79.3(a)(3).

[6] The rules also require ''[t]elevision broadcast stations that are affiliated or otherwise associated with any television network [to] pass through [audio] description when the network provides [audio] description and the broadcast station has the technical capability necessary to pass through the [audio] description, unless it is using the technology used to provide [audio] description for another purpose related to the programming that would conflict with providing the [audio] description.'' 47 CFR 79.3(b)(3).

[7] For purposes of the audio description rules, the top five national nonbroadcast networks include only those that reach 50 percent or more of MVPD households and have at least 50 hours per quarter of prime-time programming that is not live or near-live or otherwise exempt under the audio description rules. The list of the top five networks is updated every three years based on changes in ratings and was last updated on July 1, 2018 (remaining in effect until June 30, 2021). The rules also require MVPD systems of any size to pass through audio description provided by a broadcast station or nonbroadcast network, if the channel on which the MVPD distributes the station or programming has the technical capability necessary to do so and if that technology is not being used for another purpose related to the programming.

[8] On October 7, 2019, the Media Bureau (Bureau) released an order that granted a limited waiver of the audio description rules with respect to USA Network for the remainder of the current ratings period ending on June 30, 2021, but it declined to grant a safe harbor from the audio description requirements for other similarly situated, top five nonbroadcast networks. As a condition of the waiver, USA Network must air at least 1,000 hours of described programming each quarter without regard to the number of repeats and must describe at least 75 percent of any newly produced, non-live programming that is aired between 6:00 a.m. and midnight per quarter.

[9] Second Report (quoting 47 U.S.C. 613(f)(4)(C)(iv)(I)).

[10] The Commission also proposed that in 2023, ''the Commission will determine whether to continue expanding to an additional 10 DMAs per year, with any further expansion to be undertaken only following a future determination of the reasonableness of the associated costs.''

regulations to program owners, providers, and distributors in those additional markets are reasonable, as determined by the Commission; and (II) except that the Commission may grant waivers to entities in specific [DMAs] where it deems appropriate.''

8. The record confirms our conclusion that the costs of implementing the audio description regulations in markets 61 through 100 are reasonable. The costs of adding description to television programming have held steady since 2017, indicating that the costs are at a level the Commission previously deemed ''minimal.'' Covered broadcasters already are required to have the equipment and infrastructure necessary to deliver a secondary audio stream for purposes of the emergency information requirements, without exception for technical capability or market size. As NAB acknowledges, stations in compliance with the requirement to deliver audible emergency information via the secondary audio stream ''should be able to provide audio description without significant additional cost.'' [11] Further, network affiliates in all DMAs are already required to pass through the audio description they receive via a network feed, which will mitigate any costs associated with the rule expansion.[12] For all of these reasons, we conclude that the costs of expanding the audio description regulations to DMAs 61 through 100 are reasonable. To the extent a broadcaster finds itself in an unusual situation that makes the costs of compliance unreasonable, it may avail itself of the exemption procedures discussed below.[13] However, based on our expertise and the record compiled in this proceeding, we expect such instances to be exceedingly rare.

9. The significant benefits of expanding the audio description requirements to DMAs 61 through 100, when weighed against the minimal costs, further support expansion to these markets. Consumers desire an expansion of the audio description requirements outside the top 60 DMAs, and consumers who are blind or visually impaired and live in those markets will benefit from the increased video programming accessibility that the expansion will provide. In addition, the record indicates that consumers who are not blind or visually impaired and live in those markets also would benefit from the expansion, such as consumers with other sensory or cognitive impairments, individuals learning the language, and those who listen to video programming while multitasking. Commenters contend that the importance of access to news and entertainment programming during the current COVID–19 pandemic provides further evidence of the need for the expansion. Although commenters did not provide specific data on the amount of audio-described programming currently available in DMAs 61 through 100, as compared to the amount that would be available if the Commission were to expand the audio description requirements to such DMAs, it is clear that any expansion of described programming in these additional markets will benefit consumers.[14]

10. We therefore expand the audio description requirements to DMAs 61 through 70 as of the later of January 1, 2021, or the effective date of this Order.[15] This approach is necessary to ensure that the first compliance deadline does not occur prior to the Order's effective date. The Commission's audio description rules will extend to DMAs 71 to 80 on January 1, 2022, DMAs 81 to 90 on January 1, 2023, and DMAs 91 to 100 on January 1, 2024.[16]

11. We also adopt our proposal to base the extension to additional DMAs on an updated Nielsen determination of market rankings. The only commenter that addressed this issue, American Council of the Blind (ACB), supports the proposal, explaining that it ''will help ensure that the greatest number of consumers can access audio-described programming.'' We find that using updated Nielsen data will facilitate the efficient roll out of audio description obligations to more television households. Our approach is consistent with the Commission's prior expansion of the rules from the top 25 markets to the top 60 markets. The audio description rules currently apply to stations ''licensed to a community located in the top 60 DMAs, as determined by The Nielsen Company as of January 1, 2015.'' The revised rules, as set forth in the Final Rules below, will apply to the relevant DMAs ''as determined by The Nielsen Company as of January 1, 2020.'' The updated figures will apply to determine the top 60 DMAs, as well as the phase-in for DMAs

[11] We note that the Commission asked in the *2020 Audio Description NPRM* whether we should account for the current coronavirus pandemic in evaluating the reasonableness of costs of expanding audio description requirements to markets 61 through 100. No commenters except NAB addressed this issue. Although NAB initially noted that concerns about costs to broadcasters are potentially exacerbated by the pandemic, it subsequently indicated, as described above, that the compliance costs were feasible.

[12] In addition, the First Report concluded that the costs of complying with the audio description requirements were consistent with industry's expectations at the time the rules were adopted and had not impeded industry's ability to comply, and the record for the Second Report did not alter that conclusion. The *2020 Audio Description NPRM* sought comment on several additional issues related to analyzing the costs, including information on the differing costs faced by network affiliates that receive programming via a network feed as compared to other network affiliates; whether there are any network affiliates in any DMA that do not receive programming via a network feed; whether network affiliated stations in markets 61 through 100 would be able to satisfy the audio description requirements entirely by using the programming they receive via a network feed; and whether there are differing costs incurred by stations owned by large station group owners as compared to smaller station group owners or single stations. Commenters did not address these issues. Nonetheless, as explained herein, we believe the record provides sufficient information to determine, as required under the CVAA, that the costs of implementing the audio description regulations to program owners, providers, and distributors in the additional markets are ''reasonable.''

[13] Although the Commission requested additional information regarding specific costs that broadcasters in DMAs 61 through 100 might face as a result of the proposed expansion, commenters generally did not provide detailed information on costs. Nor did they provide any information that undermines our conclusion regarding the reasonableness of costs.

[14] Nielsen data from 2020 indicate that expanding the audio description requirements to DMAs 61–70 on January 1, 2021, would cover more than an additional 4.22 million households, with more than an additional 3.63 million households covered by expanding to DMAs 71–80, more than an additional 3.25 million households covered by expanding to DMAs 81–90, and more than an additional 2.86 million households covered by expanding to DMAs 91–100. In total, expanding the video description rules from the top 60 DMAs to the top 100 DMAs would increase the share of TV households covered by these rules from 74 percent to 87 percent of TV households. *See* MediaTracks Communications, Nielsen DMA Rankings 2020, available at *https://mediatracks.com/resources/nielsen-dma-rankings-2020/* (last visited Aug. 21, 2020).

[15] The *2020 Audio Description NPRM* proposed to expand the requirements to DMAs 61 through 70 as of January 1, 2021, to provide entities with sufficient time for compliance. While NAB initially requested that the expansion commence on October 1, 2021 for DMAs 61 through 70, it subsequently withdrew the request, indicating that it ''share[s] the FCC's goal of ensuring access to video programming'' and will ''support stations who are unable to meet the deadline on a case-by-case basis'' rather than pursuing a blanket delay.

[16] We recognize that there will be less time between the adoption of the instant Order and the compliance deadline than there was when the Commission reinstated the audio description rules in 2011. However, we expect that less time should be needed to comply with the extension, given that covered broadcasters are already required to have the equipment and infrastructure necessary to deliver a secondary audio stream for purposes of the emergency information requirements. We note that no commenter has demonstrated that there would not be sufficient time to comply with audio description requirements in these additional DMAs. In any event, to the extent any broadcaster finds that it is unable to comply with the deadline, it may file an economic burden exemption petition in accordance with the processes found in section 79.3(d) or seek a waiver under section 1.3. We expect that stations in DMAs 71 through 100 will not need relief from the applicable compliance deadline since they should be aware of that deadline well in advance.

61 through 100. In the *2020 Audio Description NPRM,* we sought comment on the appropriate compliance deadline for stations in a DMA that was not in the top 60 markets as of January 1, 2015, but is in the top 60 markets as of January 1, 2020. Commenters did not address this issue. We expect any such station to come into compliance with the audio description rules by the compliance deadline for DMAs 61 through 70.[17]

12. We affirm our tentative conclusion in the *2020 Audio Description NPRM* that ''[§§] 79.3(d) and 1.3 provide a sufficient mechanism for entities seeking relief from any expansion of the [audio] description rules to additional DMAs.'' Specifically, § 79.3 of the Commission's rules will continue to govern any petitions for exemption due to economic burden, and § 1.3 will continue to govern waivers of the Commission's rules generally. The only commenter that addressed this issue, ACB, supports the proposal to use § 79.3(d) to govern any petitions for exemption due to economic burden, and explains further that this should apply ''rather than adopting any other governing authority over petitions for exemption, such as section 1.3 of its rules, which allows for exemptions simply by a showing of 'good cause.' '' [18] Section 79.3(d) permits covered entities to petition the Commission for a full or partial exemption from the audio description requirements upon a showing that they are economically burdensome.[19] The CVAA also provides that if an expansion of the audio description rules to additional DMAs occurs, ''the Commission may grant waivers to entities in specific [DMAs] where it deems appropriate.'' Although § 79.3(d) will apply to instances in which an entity seeks to demonstrate that the extension to additional DMAs is economically burdensome, we recognize that the CVAA specifically references *waivers* as a means of relief, which differs from the *exemptions* available under § 79.3(d). Accordingly, to the extent a broadcaster subject to the extension believes it needs relief due to some reason other than economic burden, it may seek a waiver under § 1.3.

13. Finally, we adopt our proposal to revisit expansion beyond the top 100 DMAs at a later date. Specifically, in 2023, the Commission will determine whether to continue expanding our audio description requirements to an additional 10 DMAs per year. Any further expansion will be undertaken only following a future determination of the reasonableness of the associated costs. Although some commenters request that the Commission include DMAs beyond the top 100 in the extension at this time, we find that consideration of the reasonableness of the costs for the smallest markets at the appropriate time will best enable us to consider the unique circumstances that may be applicable to them. Additionally, in 2023, we will have the additional benefit of having implemented the extension to DMAs beyond the top 60 and will be able to consider any additional information gleaned from that practical experience.[20]

14. *Modernizing Terminology.* We adopt our proposal to make a non-substantive amendment to the rules to substitute the term ''audio description'' for the term ''video description'' for purposes of part 79. Commenters nearly universally support this terminology change.[21] The term ''audio description'' is used by other Federal agencies, in television and movie listings, and by the Worldwide Web Consortium. We are concerned that the Commission's use of an inconsistent term, ''video description,'' may be confusing both for consumers and industry. In 2019, both ACB and the Commission's Disability Advisory Committee advocated for the use of the term ''audio description,'' which ACB and NAB had proposed to the Commission as early as 2011.

15. Since the Commission's definition of video description already references both ''video description'' and ''audio description,'' modernizing the terminology as discussed herein does not change the substance of any regulations.[22] Although the underlying statute uses the term ''video description,'' we reiterate our statement in the *2020 Audio Description NPRM* that we have authority to update our terminology as part of our ''continuing authority'' to regulate audio description. Modernizing our terminology to use the more common and widely understood phrase ''audio description'' is consistent with other instances in which agencies have made non-substantive modifications to regulations to reflect newer terminology, even if the pertinent statute itself may not have been amended. Accordingly, we revise our rules as reflected in the Final Rules below to use the term ''audio description'' rather than ''video description.''

16. *Technical Update to the Rules.* Finally, we adopt our proposal to delete from the audio description rules the outdated references in § 79.3(b)(1) and (4) to the compliance deadlines of July

[17] We note that there is only a single market that was in the top 60 DMAs as of January 1, 2015, and is not in the top 60 DMAs as of January 1, 2020 (Little Rock-Pine Bluff, which moved from number 56 to number 62), and there is only a single market that was not in the top 60 DMAs as of January 1, 2015, and is in the top 60 DMAs as of January 1, 2020 (Ft. Myers-Naples, which moved from number 62 to number 53). Thus, Little Rock-Pine Bluff is currently subject to the audio description requirements because it was in the top 60 DMAs as of January 1, 2015, and it will remain subject to those requirements as the rules covering DMAs 61 through 70 go into effect. Ft. Myers-Naples is not currently subject to the requirements since it was in DMA 62 as of January 1, 2015, but it is now in DMA 53 and will become subject to the requirements as of the later of January 1, 2021, or the effective date of this Order, which is also when the rules extend to DMAs 61 through 70. Stations in the Ft. Myers-Naples DMA thus would have been subject to the same compliance deadline, even if we did not utilize updated Nielsen data, since they were previously in DMA 62.

[18] Although it does not provide specific information about the number of affected stations or costs, NAB generally asserts that stations in DMAs 61 through 100 may have smaller viewership and advertising revenues as compared to those in larger markets, compliance costs may be more burdensome for some stations in smaller markets to accommodate, and these costs may be arising in the middle of stations' budget cycle. As explained above, however, NAB concedes that stations in compliance with the requirement to deliver audible emergency information via the secondary audio stream already should be able to provide audio description without significant compliance costs.

[19] The term ''economically burdensome'' means imposing significant difficulty or expense, and the Commission considers the following factors in determining whether the requirements for audio description would be economically burdensome: (i) The nature and cost of providing audio description of the programming; (ii) the impact on the operation of the video programming provider; (iii) the financial resources of the video programming provider; and (iv) the type of operations of the video programming provider. In addition, the Commission considers any other factors the petitioner deems relevant to the determination and any available alternative that might constitute a reasonable substitute for the audio description requirements, and it evaluates economic burden with regard to the individual outlet. In the First Report, the Bureau stated its belief ''that the ability to seek an exemption on the basis of economic burden should alleviate the potential for undue cost burdens on covered entities, particularly when the rules go into effect for broadcast stations in television markets ranked 26 through 60 in 2015.''

[20] We note that commenters raise additional issues that are outside the scope of this Order and thus not addressed here. Such proposals include those related to the availability of audio description online and in movie theaters, the accessibility of audio description, and the threshold for cable audio description requirements.

[21] In addition, NAB indicates that it does not object to this terminology change. Only a single consumer whose position was included in the appendix to the ACB Comments indicates that ''video description'' is a more accurate term because the video is what is being described. We remain persuaded that the Commission should use the more commonly accepted term, ''audio description,'' which is logical given that the description is provided via audio.

[22] Consistent with our proposal, because the current definition in the Commission's rules treats the terms ''video description'' and ''audio description'' as synonymous, we will retain the statutory term ''video description'' in the definition while using the more commonly understood term ''audio description'' elsewhere in the rule.

1, 2015, and July 1, 2018, which have passed. No commenter addressed this issue, and we find that it is an appropriate update to our rules to reflect the passage of time.

17. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) relating to the Report and Order. In summary, the Report and Order expands the video description requirements by phasing them in for an additional 10 designated market areas (DMAs) each year for the next four years. In addition, the Order modernizes the terminology in part 79 of the Commission's rules to use the more common and widely understood term ''audio description'' rather than ''video description.'' Finally, it adopts the Commission's proposal to delete from the rules outdated references to compliance deadlines that have passed. The action is authorized pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010, Public Law 111–260, 124 Stat. 2751, and section 713 of the Communications Act of 1934, as amended, 47 U.S.C. 613. The types of small entities that may be affected by the action fall within the following categories: Television Broadcasting, Wired Telecommunications Carriers, Cable and Other Subscription Programming, Cable Television Distribution Services, Cable Companies and Systems (Rate Regulation Standard), Cable System Operators (Telecommunications Act Standard), and Direct Broadcast Satellite (DBS) Service.

18. The projected reporting, recordkeeping, and other compliance requirements include phasing in the audio description requirements for an additional 10 DMAs each year for four years, beginning on the later of January 1, 2021 or the effective date of the Order. The extension to additional DMAs will be based on an updated Nielsen determination, with the revised rules applying to the relevant DMAs as determined by the Nielsen company as of January 1, 2020. The order also makes two changes that will not have any impact on small entities or others. First, it revises the Commission's rules to substitute the term ''audio description'' for the term ''video description'' for purposes of part 79. Second, it deletes outdated references in § 79.3(b)(1) and (4) to compliance deadlines that have passed. The SBA did not file comments.

19. In considering the impact on small entities, the Commission emphasizes that the extension of the audio description requirements to DMAs 61 through 100 is based on a cost-benefit analysis. Specifically, the Commission concludes that the costs of implementing the audio description regulations in markets 61 through 100 are reasonable. In addition, the Commission states that the significant benefits of expanding the audio description requirements to DMAs 61 through 100, when weighed against the minimal costs, further support expansion to these markets.

20. Further, the Commission has adopted certain proposals that will ease burdens on broadcasters that are small entities, as well as other broadcasters. First, to the extent any station in DMAs 61 through 100 finds that it is unable to comply with the expansion due to economic burden, it may file a petition for an exemption due to economic burden in accordance with § 79.3(d). Stations may also seek a waiver under section 1.3. Additionally, although the Commission has authority to extend the audio description requirements to 10 additional DMAs per year until all DMAs are covered, it has only extended the requirements to DMAs 61 through 100 at this time. In 2023, the Commission will determine whether to continue expanding its audio description requirements to an additional 10 DMAs per year. This approach will ensure that any further expansion is undertaken only following a future determination of the reasonableness of the associated costs outside DMA 100. The Commission finds that consideration of the reasonableness of the costs for the smallest markets at the appropriate time will best enable it to consider the unique circumstances that may be applicable to them. Additionally, in 2023, the Commission will have the additional benefit of having implemented the extension to DMAs beyond the top 60 and will be able to consider any additional information gleaned from that practical experience.

21. *Paperwork Reduction Act.* The Report and Order does not contain new or revised information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3501–3520).[23] In addition, therefore, it does not contain any new or modified ''information collection burden for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

22. *Ordering Clauses.* Accordingly, *it is ordered* that, pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010, Public Law 111–260, 124 Stat. 2751, and the authority contained in Section 713 of the Communications Act of 1934, as amended, 47 U.S.C. 613, this Report and Order *is hereby adopted*.

23. *It is further ordered* that part 79 of the Commission's rules, 47 CFR part 79, *is amended* as set forth in the Final Rules below, and such rule amendments shall be effective thirty (30) days after the date of publication in the **Federal Register**.

24. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

25. *It is further ordered* that the Commission *shall send* a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 79

Communications equipment, Television broadcasters.

Federal Communications Commission.

Marlene Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 79 as follows:

PART 79—ACCESSIBILITY OF VIDEO PROGRAMMING

■ 1. The authority citation for part 79 continues to read as follows:

Authority: 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, 310, 330, 544a, 613, 617.

■ 2. Amend § 79.2 by revising paragraph (b)(5) to read as follows:

§ 79.2 Accessibility of programming providing emergency information.

* * * * *

(b) * * *

(5) Video programming distributors and video programming providers must ensure that aural emergency information provided in accordance with paragraph (b)(2)(ii) of this section supersedes all

[23] The Commission will file a non-substantive modification to the information collection that contains § 79.3 (OMB 3060–1148), and to the information collection that contains §§ 79.105 and 79.106 (OMB 3060–0967), to indicate the change in terminology from ''video description'' to ''audio description.'' The non-substantive modification for OMB 3060–1148 also will clarify that the audio description requirements have been extended to DMAs 61 through 100.

other programming on the secondary audio stream, including audio description, foreign language translation, or duplication of the main audio stream, with each entity responsible only for its own actions or omissions in this regard.

* * * * *

■ 3. Amend § 79.3 by revising the section heading and paragraphs (a)(3), (b) introductory text, (b)(1), (3), and (4), (b)(5)(i) through (ii), (c)(2) and (3), (c)(4)(i) and (ii), (c)(5), (d)(1), (d)(2) introductory text, (d)(2)(i), (d)(3), (10), and (11), (e)(1) introductory text, and (e)(3)(i) and (ii) to read as follows:

§ 79.3 Audio description of video programming.

(a) * * *

(3) *Audio description/video description.* The insertion of audio narrated descriptions of a television program's key visual elements into natural pauses between the program's dialogue.

* * * * *

(b) *Audio description requirements.* The following video programming distributors must provide programming with audio description as follows:

(1) Commercial television broadcast stations that are affiliated with one of the top four commercial television broadcast networks (ABC, CBS, Fox, and NBC), and that are licensed to a community located in the top 60 DMAs, as determined by The Nielsen Company as of January 1, 2020, must provide 50 hours of audio description per calendar quarter, either during prime time or on children's programming, and 37.5 additional hours of audio description per calendar quarter between 6 a.m. and 11:59 p.m. local time, on each programming stream on which they carry one of the top four commercial television broadcast networks. If a previously unaffiliated station in one of these markets becomes affiliated with one of these networks, it must begin compliance with these requirements no later than three months after the affiliation agreement is finalized. On January 1, 2021, and on January 1 each year thereafter until January 1, 2024, the requirements of this paragraph (b)(1) shall extend to the next 10 largest DMAs as determined by The Nielsen Company as of January 1, 2020, as follows: On January 1, 2021, the requirements shall extend to DMAs 61 through 70; on January 1, 2022, the requirements shall extend to DMAs 71 through 80; on January 1, 2023, the requirements shall extend to DMAs 81 through 90; and on January 1, 2024, the requirements shall extend to DMAs 91 through 100;

* * * * *

(3) Television broadcast stations that are affiliated or otherwise associated with any television network must pass through audio description when the network provides audio description and the broadcast station has the technical capability necessary to pass through the audio description, unless it is using the technology used to provide audio description for another purpose related to the programming that would conflict with providing the audio description;

(4) Multichannel video programming distributor (MVPD) systems that serve 50,000 or more subscribers must provide 50 hours of audio description per calendar quarter during prime time or children's programming, and 37.5 additional hours of audio description per calendar quarter between 6 a.m. and 11:59 p.m. local time, on each channel on which they carry one of the top five national nonbroadcast networks, as defined by an average of the national audience share during prime time of nonbroadcast networks that reach 50 percent or more of MVPD households and have at least 50 hours per quarter of prime time programming that is not live or near-live or otherwise exempt under this part. Initially, the top five networks are those determined by The Nielsen Company, for the time period October 2009–September 2010, and will update at three year intervals. The first update will be July 1, 2015, based on the ratings for the time period October 2013–September 2014; the second will be July 1, 2018, based on the ratings for the time period October 2016–September 2017; and so on; and

(5) * * *

(i) Must pass through audio description on each broadcast station they carry, when the broadcast station provides audio description, and the channel on which the MVPD distributes the programming of the broadcast station has the technical capability necessary to pass through the audio description, unless it is using the technology used to provide audio description for another purpose related to the programming that would conflict with providing the audio description; and

(ii) Must pass through audio description on each nonbroadcast network they carry, when the network provides audio description, and the channel on which the MVPD distributes the programming of the network has the technical capability necessary to pass through the audio description, unless it is using the technology used to provide audio description for another purpose related to the programming that would conflict with providing the audio description.

(c) * * *

(2) In order to meet its quarterly requirement, a broadcaster or MVPD may count each program it airs with audio description no more than a total of two times on each channel on which it airs the program. A broadcaster or MVPD may count the second airing in the same or any one subsequent quarter. A broadcaster may only count programs aired on its primary broadcasting stream towards its quarterly requirement. A broadcaster carrying one of the top four commercial television broadcast networks on a secondary stream may count programs aired on that stream toward its quarterly requirement for that network only.

(3) Once a commercial television broadcast station as defined under paragraph (b)(1) of this section has aired a particular program with audio description, it is required to include audio description with all subsequent airings of that program on that same broadcast station, unless it is using the technology used to provide audio description for another purpose related to the programming that would conflict with providing the audio description.

(4) * * *

(i) Has aired a particular program with audio description on a broadcast station it carries, it is required to include audio description with all subsequent airings of that program on that same broadcast station, unless it is using the technology used to provide audio description for another purpose related to the programming that would conflict with providing the audio description; or

(ii) Has aired a particular program with audio description on a nonbroadcast network it carries, it is required to include audio description with all subsequent airings of that program on that same nonbroadcast network, unless it is using the technology used to provide audio description for another purpose related to the programming that would conflict with providing the audio description.

(5) In evaluating whether a video programming distributor has complied with the requirement to provide video programming with audio description, the Commission will consider showings that any lack of audio description was de minimis and reasonable under the circumstances.

(d) * * *

(1) A video programming provider may petition the Commission for a full or partial exemption from the audio description requirements of this section,

which the Commission may grant upon a finding that the requirements would be economically burdensome.

(2) The petitioner must support a petition for exemption with sufficient evidence to demonstrate that compliance with the requirements to provide programming with audio description would be economically burdensome. The term ''economically burdensome'' means imposing significant difficulty or expense. The Commission will consider the following factors when determining whether the requirements for audio description would be economically burdensome:

(i) The nature and cost of providing audio description of the programming;

* * * * *

(3) In addition to the factors in paragraph (d)(2) of this section, the petitioner must describe any other factors it deems relevant to the Commission's final determination and any available alternative that might constitute a reasonable substitute for the audio description requirements. The Commission will evaluate economic burden with regard to the individual outlet.

* * * * *

(10) The Commission may deny or approve, in whole or in part, a petition for an economic burden exemption from the audio description requirements.

(11) During the pendency of an economic burden determination, the Commission will consider the video programming subject to the request for exemption as exempt from the audio description requirements.

(e) * * *

(1) A complainant may file a complaint concerning an alleged violation of the audio description requirements of this section by transmitting it to the Consumer and Governmental Affairs Bureau at the Commission by any reasonable means, such as letter, facsimile transmission, telephone (voice/TRS/TTY), email, audio-cassette recording, and Braille, or some other method that would best accommodate the complainant's disability. Complaints should be addressed to: Consumer and Governmental Affairs Bureau, located at the address of the FCC's main office indicated in 47 CFR 0.401(a). A complaint must include:

* * * * *

(3) * * *

(i) The Commission may rely on certifications from programming suppliers, including programming producers, programming owners, networks, syndicators and other distributors, to demonstrate compliance. The Commission will not hold the video programming distributor responsible for situations where a program source falsely certifies that programming that it delivered to the video programming distributor meets the audio description requirements of this section if the video programming distributor is unaware that the certification is false. Appropriate action may be taken with respect to deliberate falsifications.

(ii) If the Commission finds that a video programming distributor has violated the audio description requirements of this section, it may impose penalties, including a requirement that the video programming distributor deliver video programming containing audio description in excess of its requirements.

* * * * *

■ 4. Amend § 79.105 by revising the section heading and paragraphs (a)(1) and (b)(3)(i) to read as follows:

§ 79.105 Audio description and emergency information accessibility requirements for all apparatus.

(a) * * *

(1) The transmission and delivery of audio description services as required by § 79.3; and

* * * * *

(b) * * *

(3)(i) Apparatus that use a picture screen of less than 13 inches in size must comply with the provisions of this section only if doing so is achievable as defined in this section. Manufacturers of apparatus that use a picture screen of less than 13 inches in size may petition the Commission for a full or partial exemption from the audio description and emergency information requirements of this section pursuant to § 1.41 of this chapter, which the Commission may grant upon a finding that the requirements of this section are not achievable, or may assert that such apparatus is fully or partially exempt as a response to a complaint, which the Commission may dismiss upon a finding that the requirements of this section are not achievable.

* * * * *

■ 5. Amend § 79.106 by revising the section heading and paragraph (b) to read as follows:

§ 79.106 Audio description and emergency information accessibility requirements for recording devices.

* * * * *

(b) All apparatus subject to this section must enable the presentation or the pass through of the secondary audio stream, which will facilitate the provision of audio description signals and emergency information (as that term is defined in § 79.2) such that viewers are able to activate and de-activate the audio description as the video programming is played back on a picture screen of any size.

* * * * *

■ 6. Amend § 79.107 by revising paragraph (a)(4)(viii) to read as follows:

§ 79.107 User interfaces provided by digital apparatus.

(a) * * *

(4) * * *

(viii) *Configuration—audio description control.* Function that allows the user to enable or disable the output of audio description (*i.e.,* allows the user to change from the main audio to the secondary audio stream that contains audio description, and from the secondary audio stream back to the main audio).

* * * * *

■ 7. Amend § 79.108 by revising paragraph (a)(2)(vi) to read as follows:

§ 79.108 Video programming guides and menus provided by navigation devices.

(a) * * *

(2) * * *

(vi) *Configuration—audio description control.* Function that allows the user to enable or disable the output of audio description (*i.e.,* allows the user to change from the main audio to the secondary audio stream that contains audio description, and from the secondary audio stream back to the main audio).

* * * * *

■ 8. Amend § 79.109 by revising paragraph (a)(2) to read as follows:

§ 79.109 Activating accessibility features.

(a) * * *

(2) Manufacturers of digital apparatus designed to receive or play back video programming transmitted in digital format simultaneously with sound, including apparatus designed to receive or display video programming transmitted in digital format using internet protocol, with built-in audio description capability must ensure that audio description can be activated through a mechanism that is reasonably comparable to a button, key, or icon. Digital apparatus do not include navigation devices as defined in § 76.1200 of this chapter.

* * * * *

[FR Doc. 2020–24897 Filed 11–27–20; 8:45 am]

BILLING CODE 6712–01–P

GENERAL SERVICES ADMINISTRATION

48 CFR Part 532

[GSAR Case 2020–G521 Docket No. 2020–0017; Sequence No. 1]

RIN 3090–AK25

General Services Administration Acquisition Regulation; Remove Office of General Counsel Review for Final Payments; Withdrawal

AGENCY: Office of Acquisition Policy, General Services Administration (GSA).

ACTION: Direct final rule; withdrawal.

SUMMARY: On October 1, 2020, GSA published in the **Federal Register** a direct final rule entitled Remove Office of General Counsel Review for Final Payments. The rule revised internal agency approval procedures for processing a final payment for construction and building service contracts where, after 60 days, a contracting officer is unable to obtain a release of claims from a contractor. This action withdraws the rule because GSA received an adverse comment.

DATES: The direct final rule published at 85 FR 61871, October 1, 2020, is withdrawn effective November 30, 2020.

FOR FURTHER INFORMATION CONTACT: Mr. Bryon Boyer, GSA Acquisition Policy Division, at *gsarpolicy@gsa.gov,* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite GSAR Case 2020–G521.

SUPPLEMENTARY INFORMATION:

I. Background

On October 1, 2020, GSA published a direct final rule (85 FR 61871). The rule, to have become effective November 30, 2020, was intended to streamline the process for certain contract final payments. GSA stated in the direct final rule that if it received adverse comments, it would publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect.

As part of GSA's regulatory reform efforts, GSA determined that GSAR 532.905–70 should no longer require contracting officers to obtain approval of legal counsel before processing final payments for construction and building service contracts where, after 60 days, the contracting officers are unable to obtain releases of claims from contractors. Legal review is not a statutory requirement, and the decision to process final payments in such cases is a business decision, rather than a legal one.

The comment period for the direct final rule closed on November 2, 2020.

II. Discussion of Comment

GSA received two comments to the direct final rule from anonymous commenters. One of the comments was adverse to the direct final rule. The other comment was not applicable to the text or purpose of the direct final rule.

The adverse commenter expressed concern about the lack of analytical data regarding the administrative burden related to the legal review process. Further, the commenter suggested that decisions related to contracts are legal questions, not business decisions.

GSA does not agree with the adverse comment because, in the absence of a statutory requirement for the contracting officer to receive legal approval prior to processing the final payment, the authority to process any payment resides in the warranted contracting officer, except for the instant clause regarding final payments referenced in the clause at 532.905–70(c). GSA has determined that the clause at 532.905–70 no longer works in the best interest of the Government or contractors because, among other things: (i) Approval by legal counsel does not preclude the contracting officer from denying such payments, and (ii) approval by legal counsel does not insulate the Government from any potential liabilities should the contracting officer process the payment.

III. Reason for Withdrawal

In consideration of the comment to the direct final rule, GSA has determined that the rule should be withdrawn in its entirety. This will allow more time to further examine the issues raised and determine the best course of action.

Accordingly, GSA withdraws the rule published at 85 FR 61871 on October 1, 2020. However, withdrawal of this rule does not preclude GSA from issuing another rule on the subject matter in the future or committing the agency to any future course of action.

List of Subjects in 48 CFR Part 532

Government procurement.

Jeffrey A. Koses,

Senior Procurement Executive, Office of Acquisition Policy.

[FR Doc. 2020–26118 Filed 11–27–20; 8:45 am]

BILLING CODE 6820–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No.: 200428–0122]

RTID 0648–XA679

Fisheries of the Northeastern United States; Atlantic Herring Fishery; 2020 Directed Fishery Closure for Atlantic Herring Management Area 1B

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; directed fishery closure.

SUMMARY: NMFS is closing the directed fishery for Herring Management Area 1B. This closure is required because NMFS projects that 92 percent of the catch allotted to Management Area 1B has been caught. This action is intended to prevent overharvest of Atlantic herring in Management Area 1B, which would result in additional quota reductions next year.

DATES: Effective 00:01 hr local time, November 25, 2020, through 24:00 local time, December 31, 2020.

FOR FURTHER INFORMATION CONTACT: Lou Forristall, Fishery Management Specialist, (978) 281–9321.

SUPPLEMENTARY INFORMATION: The Regional Administrator for the Greater Atlantic Region monitors Atlantic herring fishery catch in each of the management areas based on vessel and dealer reports, state data, and other available information. Based on this information, the Regional Administrator projects that the Atlantic herring fleet will catch 92 percent of the Management Area 1B sub-Annual Catch Limit (ACL) by November 25, 2020. Therefore, as required by 50 CFR 648.201(a)(1)(i), effective 00:01 hr local time November 25, 2020, federally permitted vessels may not fish for, possess, transfer, receive, land, or sell more than 2,000 lb (907.2 kg) of Atlantic herring per trip or calendar day, in or from Management Area 1B, through December 31, 2020. Vessels that have entered port before 00:01 hr local time, November 25, 2020, may land or sell more than 2,000 lb (907.2 kg) of Atlantic herring from Area 1B from that trip. A vessel may transit through Area 1B with more than 2,000 lb (907.2 kg) of Atlantic herring on board, provided all herring was caught outside Area 1B and all fishing gear is stowed and not available for immediate use as defined by 50 CFR

648.2. All herring vessels must land in accordance with state landing restrictions.

Effective 00:01 hr local time, November 25, 2020, through 24:00 hr local time, December 31, 2020, federally permitted dealers may not purchase, possess, receive, sell, barter, trade or transfer more than 2,000 lb (907.2 kg) of Atlantic herring per trip or calendar day from Area 1B from a vessel issued and holding a valid Federal herring permit, unless it is from a trip landed by a vessel that entered port before 00:01 hr local time, November 25, 2020.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR 648.201(a)(1)(i), which was issued pursuant to section 304(b), and is exempt from review under Executive Order 12866.

NMFS finds good cause pursuant to 5 U.S.C. 553(b)(3)(B) to waive prior notice and the opportunity for public comment because it is unnecessary and would be contrary to the public interest and impracticable. NMFS also finds good cause to waive the 30-day delayed effectiveness in accordance with 5 U.S.C 553(d)(3). NMFS is required by Federal regulation to implement a 2,000-lb (907.2-kg) herring trip limit for Management Area 1B through December 31, 2020, when 92 percent of the area quota is projected to be harvested. The 2020 herring fishing year opened on January 1, 2020, and Management Area 1B opened to fishing on May 1, 2020. Data indicating the herring fleet will have landed at least 92 percent of the 2020 sub-ACL allocated to Management Area 1B recently became available. Catch in this fishery increases relative to the sub-ACL quickly, especially in this fishing year where annual catch limits are unusually low. If implementation of this closure is delayed to solicit prior public comment, the sub-ACL for Management Area 1B for this fishing year will likely be exceeded, undermining conservation objectives of the Fishery Management Plan. If sub-ACLs are exceeded, the excess must also be deducted from a future sub-ACL and would reduce future fishing opportunities. In addition, the public had prior notice and full opportunity to comment on this process when these provisions were put in place. The public expects these actions to occur in a timely way consistent with the fishery management plan's objectives.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 23, 2020.

Jennifer M. Wallace,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2020–26303 Filed 11–24–20; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 85, No. 230
Monday, November 30, 2020

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

[NRC–2020–0253]

Advanced Manufacturing Technologies Subtask 2A

AGENCY: Nuclear Regulatory Commission.

ACTION: Public meeting and request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing a document for public comments as required by Subtask 2A of the Advanced Manufacturing Technologies (AMT) Action Plan, Revision 1. The document addresses the application of quality assurance (QA) criteria and NRC's requirements in its regulations regarding, ''Changes, Tests and Experiments,'' to the implementation of AMT-fabricated components in U.S. nuclear power plants.

DATES: Submit comments by January 14, 2021. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. The NRC will hold a public meeting as an online webinar. See Section IV. Public Meeting, of this document for additional information.

ADDRESSES: You may submit comments by any of the following methods (unless this document describes a different method for submitting comments on a specific subject); however, the NRC encourages electronic comment submission through the Federal Rulemaking website:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0253. Address questions about NRC Docket 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.
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Isaac Anchondo-Lopez, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 817–200–1152; email: *Isaac.Anchondo-Lopez@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2020–0253 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0253.
- *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 draft document entitled ''Implementation of Quality Assurance Criteria and 10 CFR 50.59 for Nuclear Power Plant Components Produced Using Advanced Manufacturing Techniques'' can be found by searching for ADAMS Accession No. ML20317A005.
- *Attention:* The PDR, where you may examine and order copies of public documents is currently closed. You may submit your request to the PDR via email at *PDR.Resource@nrc.gov* or call 1–800–397–4209 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal Rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2020–0253 in your comment submission.

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

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

II. Background

The NRC considers AMTs to consist of material processing and component fabrication methods that have not been traditionally used in the U.S. nuclear industry and have not yet received NRC approval through NRC-endorsed codes and standards or the approval of an industry submittal. There are several regulatory paths available to a licensee for utilizing an AMT in a nuclear application including: (1) Development of a Code or Standard that can be incorporated by reference in section 50.55a of title 10 of the *Code of Federal Regulations* (CFR); (2) selection of an unregulated in-service application; (3) submission of generic technical reports or plant-specific submittals for NRC approval; and (4) implementation of the 10 CFR 50.59, 10 CFR 70.72, or 10 CFR 72.48 process. Industry indicated that plans for the initial installation of AMT-fabricated components would involve the 10 CFR 50.59 process. Therefore, the NRC staff documented a description of the processes, consistent with the QA requirements in Appendix B to 10 CFR

part 50 and in accordance with 10 CFR 50.59, ''Changes, Tests and Experiments,'' to support the staff's performance of potential inspections of a licensee's implementation of these requirements for AMT-fabricated components.

III. Specific Considerations

This report documents completion of the staff's initial review of QA criteria and 10 CFR 50.59 requirements for AMT applications at U.S. nuclear power plants. This report does not represent a complete and final analysis of all aspects of QA criteria and 10 CFR 50.59 requirements and guidance that might be applicable to the use of AMT components at U.S. nuclear power plants. This report does not create new regulatory requirements or establish new regulatory positions with respect to the use or manufacture of AMT components for nuclear power plants. The scope of this report is limited to the review of existing requirements and guidance to address AMT components and the consideration of potential regulatory and technical challenges. This report may be subject to future revision, as additional insights and operating experience for use of AMT components are gained.

The NRC is requesting general comments on this document to be open and transparent in processes involving the installation of AMT-fabricated components.

IV. Public Meeting

The NRC plans to hold a public meeting during the public comment period for this action. A public meeting is planned for December 2020, via webinar. The public meeting will provide forums for the NRC staff to discuss issues and questions with members of the public. The NRC does not intend to provide any responses to comments submitted during the public meeting. The public meeting will be noticed on the NRC's public meeting website at least 10 calendar days before the meeting. Members of the public should monitor the NRC's public meeting website for additional information about the public meetings at *https://www.nrc.gov/public-involve/public-meetings/index.cfm.* The NRC will post the notices for the public meetings and webinars and may post additional material related to this action to the Federal Rulemaking website at *https://www.regulations.gov/* under Docket ID NRC–2020–0253. The Federal Rulemaking website allows you to receive alerts when changes or additions occur in a docket folder. To subscribe: (1) Navigate to the docket folder (NRC–2020–0253); (2) click the ''Sign up for Email Alerts'' link; and (3) enter your email address and select how frequently you would like to receive emails (daily, weekly, or monthly).

Dated: November 23, 2020.

For the Nuclear Regulatory Commission.

Anna H. Bradford,

Director, Division of New and Renewed Licenses, Office of Nuclear Reactor Regulation.

[FR Doc. 2020–26272 Filed 11–27–20; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1037; Project Identifier 2019–SW–077–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters Deutschland GmbH Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Airbus Helicopters Deutschland GmbH Model EC135P1, EC135P2, EC135P2+, EC135P3, EC135T1, EC135T2, EC135T2+, and EC135T3 helicopters. This proposed AD would require removing certain Titanium (Ti) bolts from service and prohibit installing these Ti-bolts in a critical area. This proposed AD was prompted by a report of a broken Ti-bolt. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by January 14, 2021.

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

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

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1037; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the European Union Aviation Safety Agency (EASA) AD, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

For service information identified in this NPRM, contact Airbus Helicopters, 2701 N. Forum Drive, Grand Prairie, TX 75052; telephone 972–641–0000 or 800–232–0323; fax 972–641–3775; or at *https://www.airbus.com/helicopters/services/technical-support.html.* You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110.

FOR FURTHER INFORMATION CONTACT: Katherine Venegas, Aviation Safety Engineer, Los Angeles ACO, FAA, 3960 Paramount Blvd., Lakewood, CA 90712; telephone 562–627–5353; email *katherine.venegas@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2020–1037; Product Identifier 2019–SW–077–AD'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *https://www.regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this proposal.

Confidential Business Information

CBI is commercial or financial information that is both customarily and

actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Katherine Venegas, Aviation Safety Engineer, Los Angeles ACO, FAA, 3960 Paramount Blvd., Lakewood, CA 90712; telephone 562–627–5353; email *katherine.venegas@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Discussion

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD No. 2019–0199, dated August 16, 2019, to correct an unsafe condition for Airbus Helicopters Deutschland GmbH (AHD), formerly Eurocopter Deutschland GmbH, Eurocopter España S.A., Model EC135 P1, EC135 P2, EC135 P2+, EC135 P3, EC135 T1, EC135 T2, EC135 T2+, EC135 T3, EC635 P2+, EC635 P3, EC635 T1, EC635 T2+, and EC635 T3 helicopters. EASA advises of a report of a broken Ti-bolt. Subsequent investigation revealed that an improper heat treatment process was accomplished on a batch of Ti-bolts, which can lead to hydrogen embrittlement. The investigation also identified the critical location where these Ti-bolts are installed on helicopters. According to EASA, this condition, if not detected and corrected, could lead to failure of an affected Ti-bolt installed in a critical location, possibly resulting in reduced control of the helicopter. Accordingly, the EASA AD requires a one-time inspection of Ti-bolt part number (P/N) L535M2001203 marked with manufacturer monogram ''D'' or with an illegible manufacturer monogram installed on the forward tail rotor (T/R) drive shaft and, depending on the inspection results, replacing the Ti-bolt. The EASA AD also prohibits the (re)installation of these Ti-bolts.

FAA's Determination

These helicopters have been approved by EASA and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the European Union, EASA has notified the FAA about the unsafe condition described in its AD. The FAA is proposing this AD after evaluating all known relevant information and determining that an unsafe condition is likely to exist or develop on other helicopters of these same type designs.

Related Service Information

The FAA reviewed Airbus Helicopters Alert Service Bulletin (ASB) No. EC135–00A–001, Revision 1, dated September 2, 2019, for Airbus Helicopters Deutschland GmbH Model EC135 T1, T2, T2+, T3, P1, P2, P2+, P3, 635 T1, 635 T2+, 635 T3, 635 P2+, and 635 P3 helicopters, and Airbus Helicopters ASB No. EC135H–00A–001, Revision 1, dated September 2, 2019, for Airbus Helicopters Deutschland GmbH Model EC135, T3H, P3H, 635 T3H, and 635 P3H helicopters. This service information specifies inspecting the forward T/R drive shaft, distance plate of the 5B–0.50–2.50P–XN–1 antenna, main rotor controls, FWD connection of ball bearing control, and AFT connection of ball bearing control and yaw actuator for the installation of Ti-bolt P/N L535M2001203, EN3308–040020F, L221M1040201, EN3740–060020F, and EN3308–060020F, marked with manufacturer monogram ''D'' or an illegible manufacturer monogram. If a specified Ti-bolt is installed, the service information specifies replacing the Ti-bolt and discarding the removed Ti-bolt.

Proposed AD Requirements

This proposed AD would require removing any Ti-bolt P/N L535M2001203 marked with manufacturer monogram ''D'' or with an illegible manufacturer monogram installed on the forward T/R drive shaft from service. This proposed AD would also prohibit installing an affected Ti-bolt on the forward T/R drive shaft of any helicopter.

Differences Between This Proposed AD and the EASA AD

The EASA AD applies to Model EC135 P1, EC135 P2, EC135 P2+, EC135 P3, EC135 T1, EC135 T2, EC135 T2+, EC135 T3, EC635 P2+, EC635 P3, EC635 T1, EC635 T2+, and EC635 T3 helicopters and requires inspecting Ti-bolt P/N L535M2001203 marked with manufacturer monogram ''D'' or with an illegible manufacturer monogram installed on the forward T/R drive shaft. This proposed AD applies to Model EC135P1, EC135P2, EC135P2+, EC135P3, EC135T1, EC135T2, EC135T2+, and EC135T3 helicopters with a Ti-bolt P/N L535M2001203 marked with manufacturer monogram ''D'' or with an illegible manufacturer monogram installed on the forward T/R drive shaft instead. This proposed AD does not apply to Model EC635 P2+, EC635 P3, EC635 T1, EC635 T2+, or EC635 T3 helicopters because these models are not FAA type-certificated. The EASA AD requires discarding the affected Ti-bolts, whereas this proposed AD would require removing the affected Ti-bolts from service instead.

Costs of Compliance

The FAA estimates that this proposed AD affects 326 helicopters of U.S. registry. Labor rates are estimated at $85 per work-hour. Based on these numbers, the FAA estimates that operators may incur the following costs in order to comply with this proposed AD.

Replacing a Ti-bolt would take about four work-hours and parts would cost about $82 for an estimated cost of $422 per Ti-bolt.

Authority for This Rulemaking

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

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

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus Helicopters Deutschland GmbH: Docket No. FAA–2020–1037; Project Identifier 2019–SW–077–AD.

(a) Applicability

This airworthiness directive (AD) applies to Airbus Helicopters Deutschland GmbH Model EC135P1, EC135P2, EC135P2+, EC135P3, EC135T1, EC135T2, EC135T2+, and EC135T3 helicopters, certificated in any category, with a Titanium (Ti) bolt part number L535M2001203 marked with manufacturer monogram ''D'' or with an illegible manufacturer monogram installed on the forward tail rotor drive shaft.

Note 1 to paragraph (a): Helicopters with an EC135P3H designation are Model EC135P3 helicopters. Helicopters with an EC135T3H designation are Model EC135T3 helicopters.

(b) Unsafe Condition

This AD defines the unsafe condition as failure of an affected Ti-bolt installed in a critical location, possibly resulting in reduced control of the helicopter.

(c) Comments Due Date

The FAA must receive comments by January 14, 2021.

(d) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

(e) Required Actions

(1) Within 50 hours time-in-service or 3 months, whichever occurs first, remove any Ti-bolt identified in paragraph (a) of this AD, located on the forward tail rotor drive shaft, from service.

(2) As of the effective date of this AD, do not install a Ti-bolt identified in paragraph (a) of this AD on the forward tail rotor drive shaft of any helicopter.

(f) Alternative Methods of Compliance (AMOCs):

The Manager, Rotorcraft Standards Branch, FAA, may approve AMOCs for this AD. Send your proposal to: Manager, Rotorcraft Standards Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *9-ASW-FTW-AMOC-Requests@faa.gov.*

(g) Additional Information

(1) Airbus Helicopters Alert Service Bulletin (ASB) No. EC135–00A–001 and ASB No. EC135H–00A–001, each Revision 1 and dated September 2, 2019, which are not incorporated by reference, contain additional information about the subject of this AD. For service information identified in this AD, contact Airbus Helicopters, 2701 N. Forum Drive, Grand Prairie, TX 75052; telephone 972–641–0000 or 800–232–0323; fax 972–641–3775; or at *https://www.airbus.com/helicopters/services/technical-support.html.* You may view the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177.

(2) The subject of this AD is addressed in European Union Aviation Safety Agency (EASA) No. 2019–0199, dated August 16, 2019. You may view the EASA AD on the internet at *https://www.regulations.gov* in the AD Docket.

(h) Subject

Joint Aircraft System Component (JASC) Codes: 1430, Fasteners; and 6510, Tail Rotor Drive Shaft.

Issued on November 20, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–26253 Filed 11–27–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1038; Project Identifier MCAI–2020–00569–E]

RIN 2120–AA64

Airworthiness Directives; Safran Helicopter Engines, S.A. (Type Certificate Previously Held by Turbomeca, S.A.) Turboshaft Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all Safran Helicopter Engines, S.A. (Safran) Arriel 2D and Arriel 2E model turboshaft engines. This proposed AD was prompted by the manufacturer revising the maintenance and overhaul manuals to introduce new or more restrictive airworthiness limitations and maintenance tasks. This proposed AD would require the replacement of certain critical parts before reaching their published in-service life limits, performing scheduled maintenance tasks before reaching their published periodicity, and performing unscheduled maintenance tasks when the engine meets certain conditions. As a terminating action, this proposed AD would require operators to revise the airworthiness limitation section (ALS) of their existing approved aircraft maintenance program (AMP) by incorporating the revised airworthiness limitations and maintenance tasks. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by January 14, 2021.

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

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

For service information identified in this NPRM, contact Safran Helicopter Engines, S.A., 64511 Bordes—Cedex, France; phone: (33) 05 59 74 40 00; fax: (33) 05 59 74 45 15. You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (781) 238–7759.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1038; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other

information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Wego Wang, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7134; fax: (781) 238–7199; email: *wego.wang@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2020–1038; Project Identifier MCAI–2020–00569–E'' at the beginning of your comments The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *https://www.regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Wego Wang, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The European Union Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA AD 2018–0273, dated December 13, 2018 (referred to after this as ''the MCAI''), to address the unsafe condition on these products. The MCAI states:

> The airworthiness limitations and maintenance tasks for the SAFRAN ARRIEL 2D, ARRIEL 2E and ARRIEL 2N engines, which are approved by EASA, are currently defined and published in the SAFRAN ARRIEL 2 Maintenance and Overhaul Manuals, as applicable. These instructions have been identified as mandatory for continued airworthiness.
>
> Failure to accomplish these instructions could result in an unsafe condition.
>
> SAFRAN recently revised the applicable Maintenance and Overhaul Manuals (the applicable ALS), introducing new and/or more restrictive airworthiness limitations and maintenance tasks.
>
> For the reason described above, this [EASA] AD requires accomplishment of the actions specified in the applicable ALS.

You may obtain further information by examining the MCAI in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1038.

FAA's Determination

The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Chapter 05–10–00 of Safran Helicopter Engines ARRIEL 2D Maintenance Manual (MM) No. X292 R1 450 2, Update No. 20, dated June 15, 2020. Safran Helicopter Engines ARRIEL 2D MM X292 R1 450 2 identifies the terms used in tables for limits and mandatory maintenance tasks, usage counters of the engine log book, life limits for life-limited parts, and mandatory inspection tasks to be carried out to reach the airworthiness objectives on Safran Arriel 2D model engines.

The FAA reviewed Chapter 05–10–00 of Safran Helicopter Engines ARRIEL 2E MM No. X292 R2 300 2, Update No. 16, dated June 15, 2020. Safran Helicopter Engines ARRIEL 2E MM X292 R2 300 2 identifies the terms used in tables for limits and mandatory maintenance tasks, usage counters of the engine log book, life limits for life-limited parts, and mandatory inspection tasks to be carried out to reach the airworthiness objectives on Safran Arriel 2E model engines.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

Proposed AD Requirements in This NPRM

This proposed AD would require the replacement of certain critical parts before reaching their published in-service life limits, performance of schedule maintenance tasks before reaching the published periodicity in the applicable Safran Arriel MM chapter, and performance of unscheduled maintenance tasks when the engine meets certain conditions specified in the applicable Safran Arriel MM chapter. As a terminating action, this proposed AD would require operators to revise the ALS of their existing approved AMP by incorporating the revised airworthiness limitations and maintenance tasks.

Differences Between This Proposed AD and the MCAI

The MCAI is applicable to Safran Arriel 2D, Arriel 2E, and Arriel 2N model turboshaft engines. This AD is only applicable to Safran Arriel 2D and 2E model turboshaft engines. Safran Arriel 2N model turboshaft engines are not type certificated in the U.S.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 426 engines installed on helicopters of U.S. registry.

The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Remove and replace critical parts	12 work-hours × $85 per hour = $1,020	$1,152	$2,172	$925,272
Perform maintenance tasks	1 work-hour × $85 per hour = $85	1,152	1,237	526,962
Revise the ALS and AMP	1 work-hour × 85 per hour = 85	0	85	36,210

The FAA estimates the following costs to do any necessary corrective actions that would be required based on the results of the proposed maintenance tasks. The agency has no way of determining the number of aircraft that might need these actions.

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Perform corrective action	1 work-hour × $85 per hour = $85	$0	$85

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

(2) Would not affect intrastate aviation in Alaska, and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Safran Helicopter Engines, S.A., (Type Certificate previously held by Turbomeca, S.A.): Docket No. FAA–2020–1038; Project Identifier MCAI–2020–00569–E.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by January 14, 2021.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Safran Helicopter Engines, S.A. (Safran) (Type Certificate previously held by Turbomeca, S.A.) Arriel 2D and Arriel 2E model turboshaft engines.

(d) Subject

Joint Aircraft System Component (JASC) Code 7250, Turbine Section.

(e) Unsafe Condition

This AD was prompted by the manufacturer revising the maintenance and overhaul manuals to introduce new or more restrictive airworthiness limitations and maintenance tasks. The FAA is issuing this AD to prevent failure of the engine. The unsafe condition, if not addressed, could result in uncontained release of a critical part, damage to the engine, and damage to the helicopter.

(f) Compliance

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

(g) Required Actions

(1) Replace each critical part before reaching the in-service life limits specified in paragraph 1.C., ''Table of authorized in-service life limits for the ARRIEL 2D,'' or ''Table of authorized in-service life limits for the ARRIEL 2E,'' Chapter 05–10–00 of the Safran ARRIEL Maintenance Manual (MM) for that engine.

(2) Before reaching the periodicity specified in paragraph 1., ''Tables of Mandatory Maintenance Tasks,'' table D., ''Scheduled inspection,'' Chapter 05–10–00 of the Safran ARRIEL MM for that engine, perform all maintenance tasks specified in table D.

(3) When the engine meets the conditions specified in paragraph 1., table E., ''Unscheduled inspection,'' Chapter 05–10–00 of the Safran ARRIEL MM for that engine, perform the maintenance tasks specified in table E.

(4) If, during performance of the maintenance tasks required by paragraph (g)(2) or (3) of this AD, a discrepancy is found, as defined in the applicable ALS, perform the corrective actions specified in paragraph 1., ''Tables of Mandatory Maintenance Tasks,'' table D., ''Scheduled inspection,'' or E. ''Unscheduled inspection,'' Chapter 05–10–00 of the Safran ARRIEL MM for the engine.

(5) If no compliance time is identified in Chapter 05–10–00 of the Safran ARRIEL MM, perform the corrective action before further flight.

(h) Exception to Paragraphs (g)(2) and (3)

Where the applicable Safran ARRIEL MM chapters provide instructions to send the Module 03 to a Safran Helicopter Engines-approved repair center, the operator may choose to send the Module 03 to any FAA-approved repair center capable of performing the required actions.

(i) Mandatory Terminating Action

As terminating action to the requirements in paragraph (g) of this AD, within 365 days after the effective date of this AD, revise the ALS of the existing approved aircraft maintenance program (AMP) by incorporating:

(i) Task 05–10–00–150–801–A01, ''Airworthiness Limitations—General,'' from the applicable Safran ARRIEL MM chapter.

(ii) Task 05–10–00–200–801–A01, ''Airworthiness Limitations—Authorized In-Service Life Limits,'' from the applicable Safran ARRIEL MM chapter.

(iii) Task 05–10–10–200–801–A01, ''Airworthiness Limitations—Tables of Mandatory Maintenance Tasks,'' from the applicable Safran ARRIEL MM chapter.

(j) Definitions

(1) For the purpose of this AD, a ''critical part'' is a part identified in paragraph 1.C., ''Table of authorized in-service life limits for the ARRIEL 2D,'' or ''Table of authorized in-service life limits for the ARRIEL 2E,''

Chapter 05–10–00 of the Safran ARRIEL MM for that engine.

(2) For the purpose of this AD, the ''Chapter 05–10–00 of the Safran ARRIEL MM'' is:

(i) Chapter 05–10–00 of Safran Aircraft Engines ARRIEL 2D MM No. X292 R1 450 2, Update No. 20, dated June 15, 2020; or

(ii) Chapter 05–10–00 of Safran Aircraft Engines ARRIEL 2E MM No. X292 R2 300 2, Update No. 16, dated June 15, 2020.

(3) For the purpose of this AD, the ''approved maintenance program'' is defined as the basis for which the operator ensures the continuing airworthiness of each operated helicopter.

(k) Credit for Previous Actions

(1) For affected Safran Arriel 2D model turboshaft engines, you may take credit for revising the ALS of the existing approved AMP that is required by paragraph (i) of this AD if you incorporated the tasks before the effective date of this AD using Chapter 05–10–00 of Safran ARRIEL 2D MM No. X292 R1 450 2, Update No. 19, dated December 30, 2019.

(2) For affected Safran Arriel 2E model turboshaft engines, you may take credit for revising the ALS of the existing approved AMP that is required by paragraph (i) of this AD if you incorporated the tasks before the effective date of this AD using Chapter 05–10–00 of Safran ARRIEL 2E MM No. X292 R2 300 2, Update No. 15, dated December 30, 2019.

(l) Alternative Methods of Compliance (AMOCs)

(1) The Manager, ECO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in Related Information. You may email your request to: *ANE-AD-AMOC@faa.gov.*

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

(m) Related Information

(1) For more information about this AD, contact Wego Wang, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7134; fax: (781) 238–7199; email: *wego.wang@faa.gov.*

(2) Refer to European Union Aviation Safety Agency (EASA) AD 2018–0273, dated December 13, 2018, for more information. You may examine the EASA AD in the AD docket at *https://www.regulations.gov* by searching for and locating it in Docket No. FAA–2020–1038.

(3) For service information identified in this AD, contact Safran Helicopter Engines, S.A., 64511 Bordes—Cedex, France; phone: (33) 05 59 74 40 00; fax: (33) 05 59 74 45 15. You may view this referenced service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (781) 238–7759.

Issued on November 24, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–26337 Filed 11–27–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1036; Project Identifier MCAI–2020–01430–R]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Airbus Helicopters Model SA–365N, SA–365N1, AS–365N2, AS 365 N3, EC 155B, and EC155B1 helicopters. This proposed AD was prompted by the FAA's determination that to improve the process and performance in collecting metal particles in the main gear box (MGB) certain existing magnetic plugs (electrical and non-electrical) installed in the MGB pump intake must be replaced with improved non-electrical magnetic plugs. This proposed AD would require replacing the existing magnetic plug with an improved non-electrical magnetic plug, as specified in a European Aviation Safety Agency (now European Union Aviation Safety Agency) (EASA) AD, which is proposed for incorporation by reference. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by January 14, 2021.

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

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

For material that will be incorporated by reference (IBR) in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this IBR material on the EASA website at *https://ad.easa.europa.eu.* You may view this IBR material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1036.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1036; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Mahmood Shah, Aviation Safety Engineer, Fort Worth ACO Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5538; email *mahmood.g.shah@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2020–1036; Project Identifier MCAI–2020–01430–R'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other

information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *https://www.regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this proposal.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Mahmood Shah, Aviation Safety Engineer, Fort Worth ACO Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5538; email *mahmood.g.shah@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2018–0176, dated August 21, 2018 (EASA AD 2018–0176) (also referred to as the Mandatory Continuing Airworthiness Information, or the MCAI), to correct an unsafe condition for certain Airbus Helicopters Model SA–365N, SA–365N1, AS–365N2, AS 365 N3, EC 155B, and EC155B1 helicopters.

This proposed AD was prompted by the FAA's determination that to improve the process and performance in collecting metal particles in the MGB certain existing magnetic plugs (electrical and non-electrical) installed in the MGB pump intake should be replaced with improved non-electrical magnetic plugs. The FAA is proposing this AD to address metal particles causing seizure of the MGB, loss of power to the main rotor, and subsequent loss of control of the helicopter. See the MCAI for additional background information.

Related Service Information Under 1 CFR Part 51

EASA AD 2018–0176 describes procedures for replacing the existing magnetic plug (electrical and non-electrical) installed in the MGB pump intake with an improved non-electrical magnetic plug. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to the bilateral agreement with the State of Design Authority, the FAA has been notified of the unsafe condition described in the MCAI referenced above. The FAA is proposing this AD because the FAA evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in EASA AD 2018–0176, described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this proposed AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA initially worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and civil aviation authorities (CAAs) to use this process. As a result, EASA AD 2018–0176 will be incorporated by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2018–0176 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in the EASA AD. Service information specified in EASA AD 2018–0176 that is required for compliance with EASA AD 2018–0176 will be available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1036 after the FAA final rule is published.

Interim Action

The FAA considers this proposed AD interim action. If final action is later identified, the FAA might consider further rulemaking then.

Costs of Compliance

The FAA estimates that this proposed AD affects 52 helicopters of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Up to 7.5 work-hours × $85 per hour = $637.50.	$55	Up to $692.50	Up to $36,010.

Authority for This Rulemaking

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

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

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus Helicopters: Docket No. FAA–2020–1036; Project Identifier MCAI–2020–01430–R.

(a) Comments Due Date

The FAA must receive comments by January 14, 2021.

(b) Affected Airworthiness Directives (ADs)

None.

(c) Applicability

This AD applies to Airbus Helicopters Model SA–365N, SA–365N1, AS–365N2, AS 365 N3, EC 155B, and EC155B1 helicopters, certificated in any category, equipped with magnetic plugs, part number (P/N) 1B7807 or P/N 704A34543017 (electrical), or P/N 365A32–1711–00 (non-electrical), as applicable, installed in the main gearbox (MGB) pump intake.

(d) Subject

Joint Aircraft System Component (JASC) Code 6320, Main Rotor Gearbox.

(e) Reason

This AD was prompted by the FAA's determination that to improve the process and performance in collecting metal particles in MGB certain existing magnetic plugs (electrical and non-electrical) installed in the MGB pump intake must be replaced with improved non-electrical magnetic plugs. The FAA is issuing this AD to address metal particles causing seizure of the MGB, loss of power to the main rotor, and subsequent loss of control of the helicopter.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Aviation Safety Agency (now European Union Aviation Safety Agency) (EASA) AD 2018–0176, dated August 21, 2018 (EASA AD 2018–0176).

(h) Exceptions to EASA AD 2018–0176

(1) Where EASA AD 2018–0176 refers to its effective date, this AD requires using the effective date of this AD.

(2) The ''Remarks'' section of EASA AD 2018–0176 does not apply to this AD.

(3) Although the service information referenced in EASA AD 2018–0176 specifies to discard certain parts, this AD does not include that requirement.

(4) Where EASA AD 2018–0176 refers to flight hours (FH), this AD requires using hours time-in-service.

(i) Special Flight Permit

Special flight permits may be issued in accordance with 14 CFR 21.197 and 21.199 to operate the helicopter to a location where the helicopter can be modified (if the operator elects to do so), provided the helicopter is operated using day visual flight rules and no passengers are onboard.

(j) Alternative Methods of Compliance (AMOCs):

The Manager, Rotorcraft Standards Branch, FAA, may approve AMOCs for this AD. Send your proposal to: Manager, Rotorcraft Standards Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *9-ASW-FTW-AMOC-Requests@faa.gov.*

(k) Related Information

(1) For EASA AD 2018–0176, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.* You may view this material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy, Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1036.

(2) For more information about this AD, contact Mahmood Shah, Aviation Safety Engineer, Fort Worth ACO Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5538; email *mahmood.g.shah@faa.gov.*

Issued on November 20, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–26249 Filed 11–27–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–1058; Airspace Docket No. 20–AGL–39]

RIN 2120–AA66

Proposed Amendment of Class E Airspace and Revocation of Class E Airspace; Multiple Minnesota Towns

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend the Class E airspace extending upward from 700 feet above the surface at multiple Minnesota Towns and to revoke the Class E airspace extending upward from 700 feet above the surface at Silver Bay Municipal Airport, Silver Bay, MN. The FAA is proposing this action as the result of airspace reviews caused by the decommissioning of multiple non-federal non-directional beacons (NDBs) within Minnesota. The names and geographic coordinates of various airports would also be updated to coincide with the FAA's aeronautical database.

DATES: Comments must be received on or before January 14, 2021.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations,

West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590; telephone (202) 366–9826, or (800) 647–5527. You must identify FAA Docket No. FAA–2020–1058/Airspace Docket No. 20–AGL–39, at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays.

FAA Order 7400.11E, 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 7400.11E at NARA, email: *fedreg.legal@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FOR FURTHER INFORMATION CONTACT: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

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 amend the Class E airspace extending upward from 700 feet above the surface at: Aitkin Municipal Airport-Steve Kurtz Field, Aitkin, MN; Appleton Municipal Airport, Appleton, MN; Benson Municipal Airport, Benson, MN; Cambridge Municipal Airport, Cambridge, MN; Cloquet Carlton County Airport, Cloquet, MN; Crookston Municipal Airport Kirkwood Field, Crookston, MN; Glencoe Municipal Airport, Glencoe, MN; and Mora Municipal Airport, Mora, MN, to support instrument flight rule operations at these airports; and to revoke the Class E airspace extending upward from 700 feet above the surface at Silver Bay Municipal Airport, Silver Bay, MN, as the airspace is no longer required.

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 and be submitted in triplicate to the address listed above. Commenters 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–2020–1058/Airspace Docket No. 20–AGL–39.'' 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 at the Federal Aviation Administration, Air Traffic Organization, Central Service Center, Operations Support Group, 10101 Hillwood Parkway, Fort Worth, TX 76177.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020. FAA Order 7400.11E is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11E 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:

Amending the Class E airspace extending upward from 700 feet above the surface to within a 6.5-mile (increased from a 6.4-mile) radius of Aitkin Municipal Airport-Steve Kurtz Field, Aitkin, MN; removing the Aitkin NDB and associated extension from the airspace legal description; and updating the name (previously Aitkin Municipal Airport) and geographic coordinates of the airport to coincide with the FAA's aeronautical database;

Amending the Class E airspace extending upward from 700 feet above the surface at Appleton Municipal Airport, Appleton, MN, by removing the extension northwest of the airport as it is no longer required; and updating the geographic coordinates of the airport to coincide with the FAA's aeronautical database;

Amending the Class E airspace extending upward from 700 feet above the surface to within a 6.4-mile (decreased from a 7-mile) radius of Benson Municipal Airport, Benson, MN; and updating the geographic coordinates of the airport to coincide with the FAA's aeronautical database;

Amending the Class E airspace extending upward from 700 feet above the surface to within a 6.4-mile (decreased from a 7-mile) radius of Cambridge Municipal Airport, Cambridge, MN; and updating the geographic coordinates of the airport to coincide with the FAA's aeronautical database;

Amending the Class E airspace extending upward from 700 feet above the surface to within a 6.4-mile (decreased from a 7-mile) radius of Cloquet Carlton County Airport, Cloquet, MN; and updating the

geographic coordinates of the airport to coincide with the FAA's aeronautical database;

Amending the Class E airspace extending upward from 700 feet above the surface to within a 6.4-mile (decreased from a 7-mile) radius of Crookston Municipal Airport Kirkwood Field, Crookston, MN; and updating the name (previously Crookston Municipal Kirkwood Field) and geographic coordinates of the airport to coincide with the FAA's aeronautical database;

Amending the Class E airspace extending upward from 700 feet above the surface at Glencoe Municipal Airport, Glencoe, MN, by removing the Glencoe NDB and associated extension from the airspace legal description; and updating the geographic coordinates of the airport to coincide with the FAA's aeronautical database;

Amending the Class E airspace extending upward from 700 feet above the surface to within a 6.4-mile (decreased from a 6.5-mile) radius of Mora Municipal Airport, Mora, MN; removing the Mora NDB and associated extension from the airspace legal description; and updating the geographic coordinates of the airport to coincide with the FAA's aeronautical database;

And revoking the Class E airspace extending upward from 700 feet above the surface at Silver Bay Municipal Airport, Silver Bay, MN, as the instrument procedures at this airport have been cancelled and the airspace is no longer required.

This action is the result of airspace reviews caused by the decommissioning of the Aitkin, Appleton, Benson, Cambridge, Cloquet, Crookston, Glencoe, Mora, and Silver Bay non-federal NDBs, which provided navigation information for the instrument procedures these airports.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.11E, dated July 21, 2020, and effective September 15, 2020, which is incorporated by reference in 14 CFR 71.1. The Class D and 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 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. Since 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; AIRTRAFFIC SERVICE ROUTES; AND REPORTING POINTS

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward from 700 feet or More Above the Surface of the Earth

* * * * *

AGL MN E5 Aitkin, MN [Amended]

Aitkin Municipal Airport-Steve Kurtz Field, MN
(Lat. 46°32′54″ N, long. 93°40′36″ W)
That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of the Aitkin Municipal Airport-Steve Kurtz Field.

* * * * *

AGL MN E5 Appleton, MN [Amended]

Appleton Municipal Airport, MN
(Lat. 45°13′39″ N, long. 96°00′16″ W)
That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of the Appleton Municipal Airport.

* * * * *

AGL MN E5 Benson, MN [Amended]

Benson Municipal Airport, MN
(Lat. 45°19′55″ N, long. 95°39′02″ W)
That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of Benson Municipal Airport.

* * * * *

AGL MN E5 Cambridge, MN [Amended]

Cambridge Municipal Airport, MN
(Lat. 45°33′27″ N, long. 93°15′51″ W)
That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of the Cambridge Municipal Airport.

* * * * *

AGL MN E5 Cloquet, MN [Amended]

Cloquet Carlton County Airport, MN
(Lat. 46°42′04″ N, long. 92°30′13″ W)
That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of the Cloquet Carlton County Airport.

* * * * *

AGL MN E5 Crookston, MN [Amended]

Crookston Municipal Airport Kirkwood Field, MN
(Lat. 47°50′30″ N, long. 96°37′17″ W)
That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of the Crookston Municipal Airport Kirkwood Field.

* * * * *

AGL MN E5 Glencoe, MN [Amended]

Glencoe Municipal Airport, MN
(Lat. 44°45′22″ N, long. 94°04′53″ W)
That airspace extending upward from 700 feet above the surface within a 6.3-mile radius of Glencoe Municipal Airport.

* * * * *

AGL MN E5 Mora, MN [Amended]

Mora Municipal Airport, MN
(Lat. 45°53′31″ N long. 93°16′23″ W)
That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of the Mora Municipal Airport.

* * * * *

AGL MN E5 Silver Bay, MN [Remove]

Issued in Fort Worth, Texas, on November 23, 2020.

Steven T. Phillips,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2020–26214 Filed 11–27–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 230

[FHWA Docket No. FHWA–2019–0026]

RIN 2125–AF87

State Highway Agency Equal Employment Opportunity Programs

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FHWA is proposing to remove its outdated and duplicative regulations requiring State highway agencies to submit to FHWA, on an annual basis, Equal Employment Opportunity (EEO) Program plans for FHWA approval. Currently, FHWA is responsible for oversight of State highway agencies' EEO programs, which include collection and analysis of internal employment data, development of an internal affirmative action hiring plan, and contractor compliance reporting. These regulations overlap with, and are duplicative of, other Federal requirements enforced by other Federal agencies. Elimination of these regulations would reduce administrative and monetary burdens on Federal-aid recipients.

DATES: Comments must be received on or before January 29, 2021. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Mail or hand deliver comments to the U.S. Department of Transportation, Dockets Management Facility, 1200 New Jersey Ave. SE, Washington, DC 20590, or submit electronically at *www.regulations.gov.* All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or may print the acknowledgment page that appears after submitting comments electronically.

FOR FURTHER INFORMATION CONTACT: Nichole McWhorter, Team Leader, Office of Civil Rights, Federal Highway Administration, 1200 New Jersey Ave. SE, Room E81–330, Washington, DC 20590, *Nichole.McWhorter@dot.gov,* or James Esselman, Office of the Chief Counsel, Federal Highway Administration, 1200 New Jersey Ave, SE, Room E82–322, Washington, DC 20590, *James.Esselman@dot.gov.* Office hours are from 8:00 a.m. to 4:30 p.m. e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

This document and all comments received may be viewed online through the Federal eRulemaking portal at *http://www.regulations.gov.* The website is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded by accessing the Office of the Federal Register's home page at: *https://www.federalregister.gov.*

Background

The FHWA regulations at 23 CFR part 230, subpart C, currently require that all State highway agencies submit to FHWA for approval, on an annual basis, an EEO Program, which must include provisions for reporting on contractor compliance and internal State highway agency employment. The internal employment provisions require submission of an affirmative action plan and an analysis of employment statistical data.

In addition to FHWA, other Federal agencies share an interest in ensuring nondiscrimination in employment of State highway agency personnel and Federal-aid contractors. The Office of Federal Contract Compliance (OFCCP) is a U.S. Department of Labor (DOL) program that, since reorganization in 2009, reports directly to the Secretary of Labor. The OFCCP Program regulations at 41 CFR part 60 were implemented to achieve the objectives found in parts II, III, and IV of Executive Order (E.O.) 11246 [1] for the promotion of and ensuring equal opportunity for all persons, regardless of race, color, religion, sex, sexual orientation, gender identity, or national origin, employed or seeking employment with Federal Government contractors or with contractors performing under federally assisted construction contracts.

The Equal Employment Opportunity Commission (EEOC) is the Federal agency responsible for enforcing nondiscrimination laws in the workplace. Its jurisdiction extends to private as well as State and local government employers that meet certain employee thresholds. The EEOC has contracts with State and local fair employment practice agencies (FEPA) that may process complaints on EEOC's behalf. The EEOC enforces Federal employment laws, including: Title VII of the Civil Right Act of 1964, as amended; [2] the Age Discrimination in Employment Act of 1967; [3] the Equal Pay Act of 1963; [4] Title I of the Americans with Disabilities Act of 1990, as amended; [5] and the Genetic Information Nondiscrimination Act of 2008.[6]

The EEOC shares jurisdiction of Title VII and Title I of the Americans with Disabilities Act with the U.S. Department of Justice (DOJ). Both have the authority to initiate, mediate, investigate, and conciliate charges of discrimination, but only DOJ has the jurisdiction to litigate cases against State and local employers under these laws. In cases where EEOC is unable to satisfactorily resolve employment discrimination complaints or reasonable cause findings, it transfers the files to DOJ for litigation consideration. For age-related cases, EEOC has sole authority for investigation and litigation.

In addition to addressing charges of discrimination, EEOC collects and publishes workforce parity data from private employers each year through Form EEO–1 (*https://www.eeoc.gov/employers/eeo1survey/index.cfm*) and from State and local governments biennially through Form EEO–4 (*https://egov.eeoc.gov/eeo4/pdf/EEO4.pdf*). The reporting agencies provide information on their employment totals, employees' job categories, and salary by sex and race/ethnic groups as of June 30 of the survey year (every odd-numbered year).

The FHWA added Subpart C to the regulations at 23 CFR part 230, in 1976, as an administrative amendment to the regulation. The subpart was written prior to the creation of many State equal opportunity programs and prior to President Carter's issuance of Reorganization Plan No. 1 of 1978, which consolidated many EEO authorities that had been spread among various departments and agencies under the EEOC. The FHWA's regulation states that State EEO programs that meet or exceed the standards prescribed in the regulation will comply with FHWA requirements. In the more than 40 years since the subpart was added to the regulation, the equal employment laws of States and related equal employment enforcement authority of the EEOC and OFCCP have been created or modified to cover any gap in employment discrimination coverage for State

[1] E.O. No. 11,246, 30 FR 12319 (Sept. 24, 1965).

[2] 42 U.S.C. 2000e *et seq.*

[3] 29 U.S.C. 621–634.

[4] 29 U.S.C. 206(d).

[5] 42 U.S.C. 12101 *et seq.*

[6] Public Law 110–233, 122 Stat 881.

highway employees that might have existed at the time FHWA's regulation was promulgated.

Given that other authorities at both the State and Federal level, provide coverage of employment discrimination charges that apply to State highway agencies, and given that Congress has not expressly directed FHWA to require State highway agencies to create and submit affirmative action plans from State highway agencies, FHWA is proposing to remove the regulatory requirements at 23 CFR part 230, subpart 230.

General Discussion of the Proposals

The FHWA seeks public comment on its proposal to eliminate its regulation at 23 CFR part 230, subpart C, in its entirety. To the extent that this Subpart addresses Federal oversight of State highway agencies' internal EEO obligations, it is duplicative of EEOC requirements and DOJ enforcement authorities. To the extent that this Subpart of FHWA's regulations addresses State highway agency contractor compliance on Federal-aid projects, FHWA retains oversight of such activities under 23 CFR part 230, subpart D, which sets forth equal opportunity compliance procedures for construction contracts. In addition, OFCCP retains EEO enforcement authority over Federal-aid contractors under E.O. 11246 and DOL regulations at 41 CFR part 60. The FHWA's proposal to eliminate its regulation at 23 CFR part 230, subpart C, will reduce the reporting and compliance burdens on State highway agencies by eliminating duplicative requirements that will ultimately result in a cost savings to the State agencies and to FHWA, without diminishing Federal oversight of Federal EEO requirements.

Estimated cost savings are based on reduced staff functions at both the State highway agencies and FHWA by eliminating the oversight and reporting activities required under the existing regulation. Currently, each State highway agency is required by the regulation to have an external EEO coordinator and staff support to ensure that the contractor compliance component of its EEO Program is carried out according to this regulatory subpart. In addition, each State highway agency must have an internal EEO officer to develop and manage the internal affirmative action plan required by the regulation, including undertaking the workforce evaluation and collecting and reporting on required data. Multiple members of FHWA staff are also tasked with oversight and training of this regulatory subpart. Based on these considerations, FHWA estimates that elimination of this regulatory subpart will result in savings of approximately $261,374 annually.

Rulemaking Analyses and Notices

All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable. In addition to late comments, FHWA may also continue to file relevant information in the docket as it becomes available after the comment period closing date, and interested persons should continue to examine the docket for new material. A final rule may be published at any time after close of the comment period.

Executive Order 12866 (Regulatory Planning and Review), Executive Order 13562 (Improving Regulation and Regulatory Review), Executive Order 13771 (Reducing Regulations and Controlling Regulatory Costs), and DOT Policies and Procedures for Rulemaking

The FHWA has determined preliminarily that this action would not be a significant regulatory action within the meaning of E.O. 12866 or would not be significant within the meaning of DOT policies and procedures for rulemaking. This action complies with E.O.s 12866, 13563, and 13771 to improve regulation. It is anticipated that the economic impact of this rulemaking would be minimal. This rulemaking proposes to eliminate required reporting and analysis that is currently required under the regulation; therefore, eliminating this portion of the regulation would achieve cost savings.

Although, FHWA has determined that the proposed rulemaking to revise 23 CFR part 230, subpart C would not be a significant regulatory action, it does generate cost savings that are applicable to offsetting the costs associated with other regulatory actions as required by E.O. 13771. The cost savings from this proposed regulatory action would result from reduced administrative burden associated with the efforts by the States and FHWA related to the collecting and analyzing of State internal employment data leading to creation of an affirmative action plan. The annualized cost savings are estimated to be $493,437 per year, measured in 2018 dollars. For the 20-year period from 2020 through 2039 the estimated cost savings are roughly $5.2 million in net present value when discounted at 7 percent to 2018. A summary of the results of the analysis and the assumptions underlying the calculations are included in the docket for this rulemaking.

These proposed changes would not adversely affect, in a material way, any sector of the economy. In addition, these changes would not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 60 l-612), FHWA has evaluated the effects of this proposed action on small entities. Because the regulations are applicable primarily to States, FHWA has determined that the action is not anticipated to have a significant economic impact on a substantial number of small entities. States are not included in the definition of small entity set forth in 5 U.S.C. 601. Therefore, FHWA certifies that the action will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, March 22, 1995, 109 Stat. 48). This proposed rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $155 million or more in any one year (2 U.S.C. 1532).

Executive Order 13132 (Federalism Assessment)

This proposed action has been analyzed in accordance with the principles and criteria contained in E.O. 13132. The FHWA has determined that this proposed action would not have sufficient federalism implications to warrant the preparation of a federalism assessment. The FHWA has also determined that this proposed action would not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et. seq.*), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or

require through regulations. The FHWA has determined that this proposal does not contain collection of information requirements for the purposes of the PRA and there was no PRA number associated with this regulation. However, the elimination of this regulatory section will alleviate current burdens imposed on the State by reducing the need to file a lengthy Affirmative Action Plan along with filing duplicative EEO–4 documents to FHWA.

National Environmental Policy Act

The Agency has analyzed this proposed action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321) and has determined that it qualifies for a categorical exclusion under 23 CFR 771.117(c)(20), which applies to the promulgation of regulations, and that no unusual circumstances are present under 23 CFR 771.117(b). Categorically excluded actions meet the criteria for categorical exclusions under the Council on Environmental Quality regulations (40 CFR 1508.4) and under 23 CFR 771.117(a) and normally do not require any further NEPA approvals by FHWA.

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this action under E.O. 13175 and believes that the proposed action would not have substantial direct effects on one or more Indian tribes; would not impose substantial direct compliance costs on Tribal governments; and, would not preempt Tribal law. Therefore, a Tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

The FHWA has analyzed this proposed rule under E.O. 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that the rule will not constitute a significant energy action under that order because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

Regulation Identification Number

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

List of Subjects in 23 CFR Part 230

Federal-aid construction contracts; Grant programs—transportation; Highways and roads; Equal employment opportunity; Reporting and recordkeeping requirements.

Issued in Washington, DC, under authority delegated in 49 CFR part 1.85(a)(1).

Nicole R. Nason,

Administrator, Federal Highway Administration.

PART 230—EXTERNAL PROGRAMS

■ 1. The authority citation for Part 230 is revised to read as follows:

Authority: 23 U.S.C. 101, 140, and 315; 42 U.S.C. 2000d *et seq.;* and 49 CFR 1.81.

Subpart C—State Highway Agency Equal Employment Opportunity Programs

■ 2. Remove and reserve Subpart C, consisting of §§ 230.301 through Appendix A to Subpart C of Part 230.

[FR Doc. 2020–26274 Filed 11–27–20; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2019–0785]

RIN 1625–AA11

Regulated Navigation Areas; Harbor Entrances Along the Coast of Northern California

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to amend the Regulated Navigation Area (RNA) at the harbor bar entrance to Crescent City Harbor. This document proposes to update coordinates. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before December 30, 2020.

ADDRESSES: You may submit comments identified by docket number USCG–2019–0785 using the Federal eRulemaking Portal at *http://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email Lieutenant Marcia Medina, Coast Guard District 11 Waterways Office; telephone 510–437–2978, email *Marcia.A.Medina@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NOAA National Oceanic and Atmospheric Administration
NPRM Notice of Proposed Rulemaking
OMB Office of Management and Budget
RNA Regulated Navigation Area
§ Section
U.S.C. United States Code

II. Background, Purpose, and Legal Basis

On July 17, 2020, the Coast Guard published a final rule titled ''Regulated Navigation Area: Harbor Entrances along the Coast of Northern California'' at 33 CFR 165.1196 (85 FR 43437). That rule established an RNA at the harbor entrance of Crescent City, California. Since publishing the previous rule, the Eleventh Coast Guard District was contacted by the National Oceanographic and Atmospheric Administration (NOAA) Marine Chart Division, part of the Nautical Data Branch of the Office of Coast Survey of the National Ocean Service. The NOAA Marine Chart Division brought to the Coast Guard's attention that the geographic coordinates for the RNA at the harbor entrance of Crescent City appeared to incorrectly capture the entirety of the harbor entrance. The Coast Guard agreed, and worked with the NOAA Marine Chart Division to develop new coordinates that properly capture the entirety of the harbor entrance of Crescent City. The Coast Guard is proposing to revise the RNA to account for these discussions and to ensure the safety and security of the marine environment. The Coast Guard proposes this rulemaking under authority in 46 U.S.C. 70034.

III. Discussion of Proposed Rule

The Commander of the Eleventh Coast Guard District proposes to amend the Regulated Navigation Area: Harbor Entrances along the Coast of Northern California at (33 CFR 165.1196) by updating the coordinates of the Crescent City RNA. Updating the coordinates will not materially affect the size or the general geographic location of the RNA. Instead, the update will correct an issue raised by the NOAA Marine Chart Division. Specifically, the updated coordinates will fully and properly

capture the entirety of the harbor entrance to Crescent City. The regulatory text we are proposing appears at the end of this document.

IV. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This NPRM has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, the NPRM 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 limited economic impact of this proposed rule amendment. The proposed rule will merely update geographic coordinates. It has no bearing on the impact or the effective period of the current RNA.

B. Impact on Small Entities

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

This rule may affect the following entities, some of which may be small entities: Owners and operators of waterfront facilities, commercial vessels, and pleasure craft engaged in recreational activities and sightseeing, if these facilities or vessels are in the vicinity of the RNA at times when the RNA has been activated. This rule will not have a significant economic impact on a substantial number of small entities for the following reason: The rule merely updates geographic coordinates and does not alter the existing RNA in any other way.

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves a RNA that would prohibit the transit of maritime traffic in times of unsafe conditions. Normally such actions are categorically excluded from further review under L60[a] of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A preliminary Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

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

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking and will consider all comments and material received during the comment period. Your comment can help shape the

outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at *http://www.regulations.gov.* If your material cannot be submitted using *http://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided. For more about privacy and the docket, visit *http://www.regulations.gov/privacyNotice.*

Documents mentioned in this NPRM as being available in the docket, and all public comments, will be in our online docket at *http://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Amend § 165.1196 by:

■ a. Removing paragraph (a)(3), definition for Crescent City Harbor Entrance Channel *Regulated navigation area, and*

■ b. Adding new paragraph (a)(3) to read as follows:

§ 165.1196 Regulated Navigation Areas; Harbor Entrances along the Coast of Northern California.

(a) * * *

(3) Crescent City Harbor Entrance Channel: The navigable waters of the Crescent City Harbor Entrance Channel enclosed by the following coordinates:

(i) 41°43′50″ N, 124°11′27″ W (Point A)

(ii) 41°44′12″ N, 124°11′42″ W (Point B)

(iii) 41°44′26″ N, 124°10′55″ W (Point C)

(iv) 41°44′13″ N, 124°10′20″ W (Point D); and

Thence back to Point A, in Crescent City, CA (NAD 83).

* * * * *

Dated: October 22, 2020.

Brian K. Penoyer,

Rear Admiral, U.S. Coast Guard, Commander, Coast Guard District Eleven.

[FR Doc. 2020–26176 Filed 11–27–20; 8:45 am]

BILLING CODE 9110–04–P

POSTAL REGULATORY COMMISSION

39 CFR Part 3050

[Docket No. RM2021–1; Order No. 5756]

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 Seven). This document informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* February 26, 2021.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction
II. Proposal Seven
III. Notice and Comment
IV. Ordering Paragraphs

I. Introduction

On November 9, 2020, 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 Seven.

II. Proposal Seven

Background. Proposal Seven relates to updating the variabilities for certain types of purchased highway transportation contracts. Petition at 1. In recent years, the Postal Service has made two major operational changes to its highway transportation network: Increased reliance on additional highway transportation during the seasonal volume peak, and the introduction of Dynamic Route Optimization (DRO) contracts. *Id.* The Postal Service characterizes both operational changes as large enough to qualify as major structural reorganizations which, in keeping with Commission guidance, require updating its variabilities. *Id.* Along with the Petition, the Postal Service filed a report by Professor Michael D. Bradley supporting the proposal.[2] The Postal Service additionally filed operational data, econometric programs and results, and additional under-seal materials providing detail on competitive products.[3]

Proposal. The Postal Service's proposal seeks to update its cost-to-capacity variability estimates for Christmas routes based on data from the Transportation Contract Support System, the same data source that was used to estimate the established cost-to-capacity variabilities for regular transportation. Petition at 2. The Postal Service has provided estimates for four variability equations relating to the seasonal peak: Christmas Intra sectional center facility (SCF) van transportation, Christmas Intra SCF tractor trailer transportation, Christmas Inter SCF transportation, and Christmas network distribution center transportation. *Id.* The Postal Service states that the provided variability estimates follow established methodology, and that in all four instances, estimated variability has increased over the current estimates. *Id.* at 2–3.

With regards to the DRO contracts, the Postal Service notes differences from traditional purchased highway

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[1] Petition of the United States Postal Service for the Initiation of a Proceeding to Consider Proposed Changes in Analytical Principles (Proposal Seven), November 9, 2020 (Petition). The Postal Service also filed a notice of non-public materials relating to Proposal Seven. Notice of Filing of USPS–RM2021–1–1 and RM2021–1–NP1 and Application for Nonpublic Treatment, November 9, 2020.

[2] Professor Michael D. Bradley (Department of Economics, George Washington University), Research on Updating Purchased Highway Transportation Variabilities to Account for Structural Changes (Bradley Study).

[3] *See* Library Reference USPS–RM2021–1–1 (showing operational data, programs, and results); Library Reference USPS–RM2021–1–NP1 (showing detail for competitive products).

transportation: They do not have fixed routes and are paid at a per-mile rate in lieu of annual contract awards. *Id.* at 3. Noting a substantial increase in DRO transportation costs from FY 2018 to FY 2019, the Postal Service states that the differences between DRO and traditional purchased highway transportation have become material, making it appropriate to investigate whether DRO contracts have a different variability than traditional contracts. *Id.* at 3–4. The Postal Service provided estimates of three DRO variabilities: Van, tractor-trailer, and both. *Id.* at 4. The Postal Service additionally reestimated variabilities for traditional van, tractor-trailer, and intra-city transportation. *Id.* at 4–5. The Postal Service states that all variabilities were estimated using established methodology. *Id.* at 4–5.

Rationale and impact. The Postal Service notes that the new variability estimates are all higher than the existing estimates. *Id.* at 6. It notes that the absolute dollar increase in competitive attributable cost is larger than the same increase in market dominant attributable cost, but that the percentage increases are about the same. *Id.* The Postal Service states that the impact on the attributable costs of each product will vary based on the proportion of the costs of each product that are highway costs. *Id.* at 7. The Postal Service provides a table that shows the change in unit transportation cost for different products. *Id.* at 8.

III. Notice and Comment

The Commission establishes Docket No. RM2021–1 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 Seven no later than February 26, 2021. Pursuant to 39 U.S.C. 505, Lawrence Fenster is designated as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. RM2021–1 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 Seven), filed November 9, 2020.

2. Comments by interested persons in this proceeding are due no later than February 26, 2021.[4]

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.

Erica A. Barker,

Secretary.

[FR Doc. 2020–25825 Filed 11–27–20; 8:45 am]

BILLING CODE 7710–FW–P

[4] The Commission reminds interested persons that its revised and reorganized Rules of Practice and Procedure became effective April 20, 2020, and should be used in filings with the Commission after April 20, 2020. The new rules are available on the Commission's website and can be found in Order No. 5407. Docket No. RM2019–13, Order Reorganizing Commission Regulations and Amending Rules of Practice, January 16, 2020 (Order No. 5407).

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 90

[WP Docket No. 07–100; FCC 20–137; FRS 17147]

4.9 GHz Band

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this Seventh Further Notice of Proposed Rulemaking (FNPRM), the Federal Communications Commission (Commission) proposes rules for a new state-based licensing regime for public safety operations in the 4.9 GHz band, which would complement the new leasing regime adopted in the Sixth Report and Order. The Seventh FNPRM proposes to make permanent the current freeze on new applications and grandfather all current public safety licensees. It also proposes to allow states without a statewide license to obtain such a license and seeks comment on the creation of a voluntary state band manager to coordinate operations in the band. Lastly, it seeks comment on additional ways to implement and facilitate robust use of the band, including steps to address expanded access in states that divert 911 fees, the use of dynamic spectrum sharing, and ways to encourage collaboration across jurisdictions.

DATES: Interested parties may file comments on or before December 30, 2020; and reply comments on or before January 29, 2021.

ADDRESSES: You may submit comments, identified by WP Docket No. 07–100, by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the ECFS: *http://www.fcc.gov/ecfs/.*
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19.

See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy, Public Notice, DA 20–304 (March 19, 2020), *https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy.*

People with Disabilities. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

FOR FURTHER INFORMATION CONTACT: Jonathan Markman of the Wireless Telecommunications Bureau, Mobility Division, at (202) 418–7090 or *Jonathan.Markman@fcc.gov* Thomas Eng of the Public Safety and Homeland Security Bureau at 202–418–0019 or *Thomas.Eng@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Seventh Further Notice of Proposed Rulemaking* in WP Docket No. 07–100, FCC 20–137 adopted September 30, 2020 and

released October 02, 2020. The full text of the *Seventh Further Notice of Proposed Rulemaking,* including all Appendices, is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street SW, Room CY–A257, Washington, DC 20554, or by downloading the text from the Commission's website at *https://www.fcc.gov/document/fcc-expands-access-and-investment-49-ghz-band-0.* Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an email to *FCC504@fcc.gov* or calling the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Ex Parte Rules

This proceeding shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must: (1) List all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made; and (2) summarize all data presented and arguments made during the presentation.

If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with section 1.1206(b) of the Commission's rules. In proceedings governed by section 1.49(f) of the rules or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

Synopsis

1. In this Seventh Further Notice of Proposed Rulemaking, we propose to license the 4.9 GHz band at the state level going forward, while grandfathering 4.9 GHz licenses that were in effect at the time of the *Freeze Public Notice* and those granted pursuant to a waiver of, or modification of, the freeze. We seek comment on enabling state governments to manage voluntarily 4.9 GHz operations and coordination within their states, so that each state can determine the appropriate use of the band given its unique situation. We anticipate that transitioning to a voluntary state band manager model would allow state governments to coordinate new public safety deployments in the band, alongside non-public safety operations deployed through lease arrangements, through the state entity selected to be the State Lessor. We also seek comment on actions that we can take to further encourage robust use of the 4.9 GHz band and to implement the new leasing framework adopted in the accompanying Sixth Report and Order.

A. Revised 4.9 GHz Licensing and Grandfathering Incumbent Licenses

2. *State-Based Licensing.* Under the *Freeze Public Notice,* the Bureaus will not accept 4.9 GHz applications or issue new or modified licenses absent grant of a waiver. In anticipation of a proposed transition to state-based management of 4.9 GHz public safety operations going forward, we propose to amend our 4.9 GHz licensing rules to limit future licensing to state entities seeking a statewide license in states without an existing statewide licensee. Under this approach, the Commission would not accept new or modified applications for a license authorizing operations of any kind (geographic area or permanent fixed site operations) in the 4.9 GHz band below the state level. License applications would only be accepted and processed if they are filed by a state governmental entity for a statewide license in a state with no statewide licensee, or if they meet other limited exceptions. We seek comment on this approach, which we anticipate will maximize opportunities for states to voluntarily facilitate more efficient 4.9 GHz band operations.

3. *Grandfathering Incumbent Licenses.* We seek to ensure continued access for important incumbent 4.9 GHz band public safety operations under any revised 4.9 GHz band licensing structure. We therefore propose to grandfather licensees authorized as of the date of the *Freeze Public Notice* and any 4.9 GHz licensees granted an authorization pursuant to a waiver of, or modification of, the freeze. We seek comment on whether this is the appropriate scope of any grandfathering. Specifically, we propose that grandfathered geographic area licensees would be able to obtain renewal of existing licenses. They would also be permitted to add base stations, mobile units, and temporary fixed sites within their authorized license area, up to the limits of their jurisdiction—all of which they can do under our rules without Commission approval. Incumbent fixed point-to-point and fixed point-to-multipoint system licensees would also be permitted to obtain renewal and continue operations under existing technical parameters, but would not be permitted to modify their licenses in any way to increase their spectral or geographic coverage or obtain a license for a new fixed system. We seek comment on this approach and on potential alternatives. If we grandfather licenses as proposed, should we apply this treatment to all incumbent 4.9 GHz band operations or only to some specific class of licenses? Should nongovernmental operations receive the same protections as those of public safety agencies? If we grandfather fixed site licenses, should we also grandfather the ''primary'' status certain fixed links enjoy under section 90.1207(d) of our rules? How would removing primary status affect current and future public safety operations in the 4.9 GHz band? If we grandfather these licenses as proposed, to what extent should licensees be permitted to modify those licenses as their deployment needs change? Commenters should describe the costs and benefits of any approach they support.

B. State Management of 4.9 GHz Operations

4. In the accompanying Sixth Report and Order, we adopt a leasing framework in which state governments, acting through a single state entity holding a statewide 4.9 GHz band license (the State Lessor) will have the authority to lease 4.9 GHz band access to public safety and to non-public safety entities. The State Lessor also will be authorized to engage in non-public safety use of the band on behalf of the state government and, upon issuance of the Bureaus' freeze modification public notice, will be permitted to add permanent fixed sites to its network. In this Seventh Further Notice of Proposed

Rulemaking, we seek comment on enabling state governments to exercise similar centralized control over 4.9 GHz band public safety operations in their jurisdictions. Under this voluntary model, a state government would have the option to oversee *all* 4.9 GHz band operations in the state: Non-public safety and/or public safety operations through its role as State Lessor, and public safety operations through its role as a State Band Manager.

1. State Band Manager Model

5. *Commission Use of Band Manager Model.* In 2000, the Commission created a new class of licensee known as ''guard band managers'' in the 700 MHz band. A guard band manager was defined as a ''commercial licensee . . . that functions solely as a spectrum broker by subdividing its licensed spectrum and making it available to system operators or directly to end users for fixed or mobile communications consistent with Commission Rules.'' In establishing this ''new class of commercial licensee . . . engaged in the business of leasing spectrum for value to third parties on a for-profit basis,'' the Commission issued authorizations to licensees for the purpose of overseeing and coordinating, through private contractual lease agreements, the operations of third parties, rather than for their own use. The Guard Band Manager was responsible for coordinating the use of frequencies among its customers to minimize interference and for resolving interference conflicts among its customers and, in the first instance, among its customers and neighboring users of spectrum licensed to other Guard Band Managers or other licensees. The Commission found that Guard Band Manager licensing represented an ''innovative spectrum management approach that should enable parties to more readily acquire spectrum for varied uses, while streamlining the Commission's spectrum management responsibilities.'' The Commission further expected Guard Band Managers not to engage in unjust or unreasonable discrimination among spectrum users and to honor all reasonable requests by potential users for access to the licensed spectrum, while recognizing that a Guard Band Manager may have valid business reasons for denying a potential user's request for spectrum.

6. Notwithstanding that the Commission ultimately moved away from relying on Guard Band Managers in the 700 MHz band, this model points to the Commission's authority to rely on band managers to provide and manage spectrum access where appropriate and with necessary restrictions in place. Further, we believe that the band manager concept can inform our approach to future access and coordination of operations in the 4.9 GHz band given its specific characteristics, including shared spectrum use by public safety licensees with overlapping jurisdictions and extensive licensee coordination of operations (rather than extensive Commission regulation of technical parameters) to prevent harmful interference. Additionally, unlike 700 MHz Guard Band Managers, a state that takes on a band manager role would likely already be part of the 4.9 GHz ecosystem, increasing the opportunities for efficiencies and fostering an environment that brings order to overcome the current challenges of the 4.9 GHz coordination landscape. We seek comment on this assumption.

7. *4.9 GHz State Band Manager.* Under this approach, a state entity would have the opportunity to oversee and coordinate use of the 4.9 GHz band by public safety entities. Specifically, we seek comment on allowing each state to select voluntarily a statewide entity, whether the State Lessor or another statewide licensee, as State Band Manager with authority to manage access to, and public safety operations within, the 4.9 GHz band. A public safety entity seeking new access to the 4.9 GHz band or a licensee seeking to expand operations beyond its grandfathered license parameters would be authorized to operate (if agreed to) under a State Band Manager's license, tantamount to a ''customer'' of a Guard Band Manager in the former 700 MHz paradigm. A State Band Manager also would coordinate operations to prevent harmful interference amongst and between public safety and non-public safety entities. We seek comment on this approach, including its potential costs and benefits.

8. We expect that empowering each state to choose to transition to a State Band Manager model would streamline and facilitate more efficient spectrum use by consolidating oversight with the state government. We seek comment on this assumption. A State Band Manager model could replace the existing informal coordination model that is the basis for shared use of the 4.9 GHz band, while also avoiding the need for substantial regulatory oversight of licensee technical parameters. Under this model, public safety entities (and nongovernmental organizations operating in support of public safety) that seek to deploy in the 4.9 GHz band would work with a State Band Manager to coordinate and plan this deployment based on the policies and procedures it determines are best for its situation, rather than based on individual licensing and interference resolution rules issued by the Commission. We seek comment on this overall approach, including the associated costs and benefits.

9. *Rights and Responsibilities of a State Band Manager.* We anticipate that a State Band Manager would, at a minimum, coordinate operations among grandfathered public safety licensees and 4.9 GHz lessees. Accordingly, we seek comment on whether we should require a State Band Manager to also be a State Lessor. What are the costs and benefits of adopting such an approach? We also seek comment on what additional responsibilities and rights should be assigned to a State Band Manager. For example, as prospective 4.9 GHz public safety users would be authorized to operate through a State Band Manager's license, what flexibility should we provide regarding its consideration of requests for spectrum access for new or modified public safety operations in the band? Should we adopt the approach applicable to 700 MHz Guard Band Managers that created an expectation that all reasonable requests by potential users for access to the licensed spectrum would be honored, while recognizing that there may be valid reasons for denying a potential user's request for spectrum? Should we establish other criteria or guidelines for a State Band Manager to use in determining whether to grant requests for expanded or new public safety operations—*e.g.,* from counties or municipalities within the state? Should a State Band Manager have authority to deny public safety access or prioritize some operations (such as non-public safety operations conducted pursuant to a lease) over others? How much discretion should it have in making these determinations? Should we impose requirements on a State Band Manager to treat its own operations as it would those of other entities under its jurisdiction? What should be the limits of a State Band Manager's authority to grant public safety access to nongovernmental organizations operating in support of public safety?

10. *Commission Oversight.* We also seek comment on the role the Commission should play in overseeing a State Band Manager's decisions. Should we adopt the 700 MHz Guard Band Manager approach and rely on a State Band Manager to be primarily responsible for resolving interference disputes, at least in the first instance, thereby minimizing Commission involvement? Alternatively, should that

authority remain solely with the Commission? To what extent should the Commission impose rules governing the coordination among different operations, either formal or informal, other than through a State Band Manager and a State Lessor? In addition, to what extent should the Commission assess the success of the voluntary leasing framework adopted in the Sixth Report and Order? Should we monitor leasing activities or take further steps to facilitate widespread leasing and, if so, in what form and to what extent?

11. *Implementation of a State Band Manager Model.* We seek comment on the extent to which states are equipped to take on this management and coordination role. Do states have an entity already capable of undertaking this role, or will further expertise be required? Are there legal issues involved in granting a state entity this authority over other state and local entities, such as applicable state laws? We believe that a State Band Manager should be a state entity and a 4.9 GHz band licensee, but we seek comment on the extent to which we should combine the role of State Band Manager with that of a State Lessor. Should we grant states the authority to determine if they should be the same or separate entities? Or should this be a Commission determination? How should a state select its State Band Manager if that entity will be different from a State Lessor? In the accompanying Sixth Report and Order, we established a process for an existing statewide licensee to select a different entity to be the State Lessor and for the Commission to authorize that assignment. We seek comment on whether to apply the same or a similar process to allow for states to select a different entity to be a State Band Manager. We also seek comment on various potential approaches to incentivizing state participation in a State Band Manager construct. Specifically, should we establish a voluntary construct for state government participation, or should we require that any State Lessor benefiting from our flexible leasing approach also become a State Band Manager? Should we require a state with statewide 4.9 GHz licensee(s) to select a State Band Manager? In the alternative, in lieu of a State Band Manager model, should we instead rely solely on a State Lessor entering into secondary markets transactions to accommodate the needs of existing and future 4.9 GHz public safety users? We request that commenters be specific in providing the associated costs and benefits of each of these potential approaches. How can the Commission work with equipment manufacturers, licensees, and lessees to incentivize equipment development and reduce the cost of deploying in this band for both public safety and non-public safety entities? How could State Band Managers work most effectively with those entities? Are there any additional measures the Commission should take to promote greater use of the band in support of public safety services?

12. *New Individual Deployment Licensing.* We seek comment on the future of fixed site licensing in the 4.9 GHz band under a potential State Band Manager framework. The state government, through a State Band Manager and/or a State Lessor, would be in a position to coordinate the needs of lessees and public safety entities to build sites, whether base stations servicing mobile devices or fixed sites for point-to-point or point-to-multipoint systems. This approach potentially eliminates the need for the Commission to license permanent fixed sites individually. We recognize the continuing need for the Commission to exercise its authority and require individual licensing of certain facilities, even under a State Band Manager model (*e.g.,* coordination required by international agreement, environmental assessment required, or where a station impacts a quiet zone). We seek comment on the impact of a State Band Manager model and on the scope of appropriate rules for any continued Commission licensing of 4.9 GHz band fixed site deployments. We also seek comment on whether to continue to afford ''primary'' status to certain fixed links under a State Band Manager model. Would there be a need to continue to grant such status to some sites under a State Band Manager model? Should it be solely within a State Band Managers' discretion as to whether and how to prioritize the status of fixed sites within its jurisdiction?

13. We also seek comment on the interplay of a State Band Manager framework and grandfathering the 4.9 GHz licenses that are in effect at the time of the *Freeze Public Notice* or that are granted through waiver of, or modification of, the freeze. For example, is there any need to grandfather other statewide licenses if a statewide entity will be acting as a State Band Manager? How should our rules define that status if we adopt a State Band Manager approach? We anticipate that allowing a State Band Manager to determine the status of all fixed links in its jurisdiction without Commission involvement may be the most efficient way to maximize flexibility in determining the best use of the band in its jurisdiction. We seek comment on this approach, including the associated costs and benefits.

2. Maximizing Efficiencies To Coordinate 4.9 GHz Operations

14. *4.9 GHz Licensing Data.* In the *Sixth FNPRM,* the Commission sought comment on a proposal to expand the 4.9 GHz deployment data in the Universal Licensing System to include locations and other technical parameters of base stations deployed through geographic area licenses. Although we did not adopt this proposal in the accompanying Sixth Report and Order, we seek further comment on the need to more comprehensively reflect 4.9 GHz band deployments beyond fixed sites given our new leasing framework and our proposed State Band Manager framework. To what extent should the Commission have a continued role in maintaining data on deployments, as opposed to State Band Managers? To the extent we delegate such data management duties to the State Band Managers, should we require the more expansive data collection and maintenance that the Commission was considering? If the Commission should continue to have a role, what should that role be, and what is the most efficient method to effectuate it?

15. *Sharing Arrangements for Public Safety.* Under our current rules, 4.9 GHz licensees are permitted to enter into sharing arrangements for the use of spectrum with entities that do not meet the eligibility requirements for a license. Entities sharing with a 4.9 GHz licensee, however, must use the spectrum in support of public safety services. We seek comment on whether to eliminate the current rules providing for such sharing, given our adoption of rules providing for increased flexibility in leasing and the proposed adoption of a State Band Manager construct. For example, a nongovernmental entity seeking to deploy in the 4.9 GHz band, either in support of public safety or for its own operational needs, is now permitted to enter into a leasing arrangement with a State Lessor. In the alternative, should we permit a non-public safety entity seeking to support public safety to simply work with a State Band Manager to obtain the necessary access, or to enter into a sharing agreement with another 4.9 GHz band licensee? If a State Band Manager model were not adopted, what is the appropriate method for accommodating this sharing in a revised, and substantially more limited, licensing environment (aside from leasing)?

16. We also seek comment on eliminating our similar current rule

allowing operation outside a licensee's jurisdiction with the permission of that jurisdiction. We expect that such operations would be conducted instead under the authority of a State Band Manager in the event we adopt such an approach. What are the specific costs and benefits of no longer permitting by rule these types of operations?

17. *Interference Protection and Resolution.* The existing structure of informal coordination in the 4.9 GHz band relies on licensees cooperating amongst themselves to resolve any interference concerns that may arise from their operations. As use of the band increases through leasing activity and as a variety of potentially disparate technologies and network architectures are introduced into a shared band, will coordination be possible in the absence of more clearly-defined technical rules and interference resolution procedures? Or will a State Band Manager structure be sufficient to prevent or resolve any instances of harmful interference?

18. We seek comment on whether any additional steps are necessary to reduce the likelihood of harmful interference between shared users of the 4.9 GHz band, particularly where we anticipate new and different types of deployments generated by a robust secondary market. Should we adopt additional rules standardizing different types of operations to avoid harmful interference? If so, what type of rules would be appropriate? Should we leave standardization to a State Band Manager or impose some requirements by rule? To what extent should the Commission facilitate interference resolution between lessees and public safety operations, as opposed to leaving these decisions to the state governmental entities charged with coordinating the band? If there is no State Band Manager, what should the resolution process be? We also encourage licensees and lessees to work together to develop best practices for preventing harmful interference and seek comment on how the Commission can encourage these efforts.

19. *Absence of a State Band Manager/State Lessor.* We also seek comment on how to structure our rules for states without a State Band Manager under this framework, either because we determine that states should have the right to decline this role or because there is no statewide licensee eligible for it. In the event a state without a State Band Manager has a State Lessor, public safety entities seeking to gain access to the 4.9 GHz band will be able to do so through leasing arrangements with the State Lessor. We seek comment on whether there are any other implications for public safety access to the 4.9 GHz band in that scenario, and whether there are additional changes we should make to our rules to accommodate public safety use in that event. Also, we recognize that currently there are a few states/territories with no existing 4.9 GHz statewide licensee, and we seek comment on how to provide for future public safety use beyond grandfathered operations if this remains unchanged. How should local or nongovernmental entities, or state entities not seeking status as a State Lessor or State Band Manager, obtain 4.9 GHz band access in the absence of a statewide licensee that has voluntarily assumed either of those roles? How can we best encourage states without a statewide license to obtain one, either for purposes of public safety use and/or to facilitate leasing to commercial entities, critical infrastructure or other users? Are there barriers to such licensing, either logistical or in state law?

C. Supporting and Encouraging Greater 4.9 GHz Band Usage

20. *Encouraging Collaboration Across Jurisdictions.* In the *Sixth FNPRM,* the Commission sought comment on ways to increase the flexibility of regional planning committees in facilitating use of the 4.9 GHz band. Although we decline to adopt any specific changes related to regional planning committees in the accompanying Sixth Report and Order, we seek comment more broadly on whether and how to encourage cross-jurisdictional cooperation, whether directly among State Lessors of different states or through regional planning committees. Are there ways State Lessors (or State Band Managers) could leverage regional planning committees to standardize spectrum availability over larger geographic areas to facilitate spectrum access through secondary markets? Should we modify section 90.1211 of our rules to provide for a different role for regional planning committees in this process? How would this cross-jurisdictional cooperation interact with a State Band Manager framework?

21. *States that Divert 911 Fees.* In the Sixth Report and Order, we create leasing opportunities for the vast majority of states, contingent upon their having not been identified in the Commission's December 2019 911 Fee Report as a state that diverts 911 fees for non-911 purposes. We now seek comment on how to address 911-fee-diverting states. Should we require such states to stop diversion before they are permitted to benefit from the leasing framework, including the ability to create a State Lessor, or extend the leasing framework to such states? Would extending the framework to such states increase innovation and enable access to rural WISPs, electric utilities, and 5G wireless operators that may be able to put this too-fallow spectrum to use? Or would such an extension inappropriately reward states that continue to hurt public safety by diverting 911 fees to non-911 purposes? Should we limit our proposal in this Seventh FNPRM to allow states to create a State Band Manager only to states that do not divert 911 fees? Should we create an exception for states seeking to establish a State Lessor solely for the purpose of leasing to public safety entities? How would these approaches impact future public safety, commercial, and critical infrastructure access to spectrum in the band and operations? We seek comment on the costs and benefits of adopting any of the above approaches to addressing this important public safety issue.

22. We also seek comment on how to address states that start or stop diverting 911 fees. First, we recognize in the Sixth Report and Order that states may stop diverting 911 fees and allow them to petition the Commission to access the 4.9 GHz leasing framework based on documented proof of such a change. Should we continue that process going forward, or should we automatically allow a state that is no longer identified as a fee diverter in a future report to start leasing? To access the leasing framework, is it sufficient for a state to show that it has stopped diverting 911 fees, or must it replenish the diverted funds as well (specifically those that triggered the designation as a fee-diverting state)? Second, how should we treat states that are identified as diverters in a subsequent Commission annual 911 fee report to Congress? Should we prohibit such states from signing new leases until they establish they no longer divert 911 fees? Should we require them to cease diverting 911 fees within some period of time or else face termination of their leasing rights? If so, how long should they have to correct the error? Three months? One year? Three years? In the event a state begins diverting 911 fees, how do we ensure that any lessees are held harmless and can continue to access the spectrum they have leased? Does the Commission have authority to prohibit a lessee from making any payments to use the spectrum during a period in which a state is identified as a fee diverter? Third, should there be a new mechanism for states to challenge the Commission's inclusion of a state a fee-

diverter in annual fee reports, or is the ability to petition the Commission envisioned by today's Sixth Report and Order sufficient for these purposes?

23. Finally, should we create alternative means of accessing unused spectrum in the 4.9 GHz band for serial diverters? Specifically, if the Commission's annual 911 fee report identifies a state as a diverter for three years in a row, should the Commission itself establish a band manager to oversee operations in the states? If so, should we do so through a request for proposal process? Or should we conduct an overlay auction in such states to allow a commercial operator full access to the 50-megahertz band (while protecting incumbent public safety uses)? In short, how can the Commission maximize use of 4.9 GHz band spectrum while further discouraging 911 fee diversion?

24. *Dynamic Spectrum Sharing.* We seek comment on whether a dynamic spectrum access system in the 4.9 GHz band would make it easier for a State Lessor to implement the spectrum leasing structure adopted in the accompanying Sixth Report and Order. If so, which type of spectrum access systems would be most useful in this band? Would a State Lessor be more likely to engage in spectrum leasing if it could rely on dynamic spectrum sharing to ensure continued spectrum availability to suit the needs of public safety entities? How would such dynamic spectrum sharing arrangements work within a State Band Manager framework? As sharing between public safety and non-public safety operations increases, are there particular public safety operations that require protection above and beyond those currently found in the Commission's rules?

25. The Commission has adopted rules facilitating dynamic spectrum access in several spectrum bands, including the TV white spaces, the Citizens Broadband Radio Service, and the 6 GHz band. In those bands, the Commission enabled a range of different dynamic spectrum access solutions that could be implemented in the 4.9 GHz band. Could any of these different models help facilitate coordination of leasing and future public safety operations in this band? Commenters should discuss the costs and benefits of any proposed sharing regime, as well as the logistics of its implementation. What other rule changes or Commission actions would be required to foster dynamic spectrum access? If the Commission were to implement such a system, should it be mandatory or voluntary? How should it differ from existing dynamic spectrum access systems?

26. *Aeronautical Mobile Operations.* In both the *Fifth FNPRM* and *Sixth FNPRM,* the Commission sought comment on whether to authorize aeronautical mobile operations in the 4.9 GHz band, which are currently prohibited by our rules. The Commission, however, has granted numerous waivers of the section 90.1205(c) prohibition on aeronautical use. Although we decline in the accompanying Sixth Report and Order to adopt any changes related to the band plan with respect to aeronautical mobile operations, we seek comment today on whether we should amend our rules to permit these operations given our new leasing framework. Commenters generally support our proposals related to aeronautical mobile operations, and we seek comment on the interplay of these operations and our new leasing framework, as well as a State Band Manager framework. If we permit aeronautical mobile operations in the band, should we permit transmissions by unmanned aerial systems or only manned aircraft? What are the costs and benefits of permitting aeronautical mobile operations in the 4.9 GHz band? Would such operations be likely to increase the potential for harmful interference to public safety operations, or to new non-public safety operations deployed in the band through leasing? Should the Commission make these decisions by rule or allow State Band Managers the flexibility to make these decisions?

II. Procedural Matters

27. *Regulatory Flexibility Act.*—The Regulatory Flexibility Act of 1980, as amended (RFA) requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.''

28. The Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) concerning the potential impact of rule and policy change proposals in the Seventh FNPRM on small entities. The IRFA is set forth in Appendix E.

29. *Paperwork Reduction Act.*—The Seventh Further Notice of Proposed Rulemaking may result in new or revised information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

III. Initial Regulatory Flexibility Analysis

30. As required by the Regulatory Flexibility Act (RFA) of 1980, as amended, the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the *Seventh Further Notice of Proposed Rulemaking (Seventh FNPRM).* Written public comments are requested on this IRFA. As required by the Regulatory Flexibility Act (RFA) of 1980, as amended, the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the *Seventh Further Notice of Proposed Rulemaking (Seventh FNPRM).* Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments as specified in the *Seventh FNPRM.* The Commission will send a copy of the *Seventh FNPRM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the *Seventh FNPRM* and IRFA (or summaries thereof) will be published in the **Federal Register**.

A. Need for, and Objectives of, the Proposed Rules

31. In the *Seventh FNPRM,* we propose to modify the licensing regime for the 4.9 GHz band to adopt licensing at the state level going forward to allow only state entities in states without a statewide licensee in the 4.9 GHz band to receive a new license. States with an existing statewide licensee will not see any new licensing, and local entities will not be permitted to obtain licenses. We seek comment on this proposal. We also propose to grandfather existing public safety licenses as of the date of the *Freeze Public Notice* and licensees granted pursuant to a waiver of, or modification of, the freeze, in order to protect incumbent public safety operations and will prohibit expansion of spectral rights by local entities other than through agreement with statewide

licensees. We seek comment on the appropriate scope and application of grandfathering if we adopted this proposal.

32. In the *Seventh FNPRM,* we also seek comment on a new State Band Manager model for coordination of public safety entity access to the 4.9 GHz band similar to the band manager model the Commission adopted in the 700 MHz band. Under this framework, the state government will be responsible for coordinating all 4.9 GHz band operations, whether through leasing (through the State Lessor role) or by public safety (through the State Band Manager role) in each state, as well as assisting in cross-jurisdictional cooperation to avoid harmful interference. This model will also ensure that each state determines the balance of public safety and non-public safety use that is best for its own situation. We seek comment on the role of the Commission in oversight of the decisions of the state government as part of its role as State Band Manager. We also seek comment on the extent to which states are equipped to take on such a management and coordination and the costs and benefits of this approach. Further, we seek comment on the future of individual site licensing under this model, and on the continued use of primary status for some sites in the band. In addition, we seek comment on the future of the band where no statewide licensee exists, or where the state chooses not to take on the role of State Band Manager or State Lessor. We also seek comment on whether and how we should permit access to the leasing framework for states that start or stop diverting 911 fees, including whether to have an exception for leasing solely to public safety entities, and if there should be a new mechanism for a state to challenge the Commission's designation of the state as a fee-diverter in annual fee reports.

33. Finally, we seek comment on the implementation of this approach and any changes which can facilitate the transition to this model. Given our new leasing framework and a State Band Manager framework on which we seek comment, we seek comment on a proposal raised in the *Sixth FNPRM* to expand the data included in our Universal Licensing System to more comprehensively reflect 4.9 GHz band deployments beyond fixed site licenses, to include locations and other technical parameters of base station deployed through geographic area licenses. We also seek comment on whether and how to encourage cross-jurisdictional cooperation, whether directly between State Lessors of different states or through regional planning committees and inquire whether to modify section 90.1211 of our rules to provide for a different role for regional planning committees in this process. Within the scope dynamic spectrum sharing, we ask whether we should implement rules similar to those governing the use of dynamic spectrum access systems in other spectrum bands (*i.e.* Citizens Broadband Radio Service and 6 GHz band), in the 4.9 GHz band to make the spectrum leases we authorize in the Sixth Report and Order and a new State Band Manager model we propose in the Seventh FNPRM easier to implement. Further, with respect to aeronautical mobile operations, we seek comment on whether we should amend our rules to permit these operations, given our new leasing approach and a proposed State Band Manager framework.

B. Legal Basis

34. The *proposed* action is authorized pursuant to Sections 1, 4(i), 4(j), 4(o), 301, 303(b), 303(g), 303(r), 316, 332, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 154(o), 301, 303(b), 303(g), 303(r), 316, 332, and 403.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

35. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

36. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small *entities* that are not easily categorized at present. We therefore describe here, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA's Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States which translates to 30.7 million businesses.

37. Next, the type of small entity described as a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' The Internal Revenue Service (IRS) uses a revenue benchmark of $50,000 or less to delineate its annual electronic filing requirements *for* small exempt organizations. Nationwide, for tax year 2018, there were approximately 571,709 small exempt organizations in the U.S. reporting revenues of $50,000 or less according to the registration and tax data for exempt organizations available from the IRS.

38. Finally, the small entity described as a ''small governmental jurisdiction'' is defined generally as ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' U.S. Census Bureau data from the 2017 Census of Governments indicate that there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number there were 36,931 general purpose governments (county, municipal and town or township) with populations of less than 50,000 and 12,040 special purpose governments—independent school districts with enrollment populations of less than 50,000. Accordingly, based on the 2017 U.S. Census of Governments data, we estimate that at least 48,971 entities fall into the category of ''small governmental jurisdictions.''

39. *Private Land Mobile Radio Licensees.* Private land mobile radio (PLMR) systems serve an essential role in a vast range of industrial, business, land transportation, and public safety activities. Companies of all sizes operating in all U.S. business categories use these radios. Because of the vast array of PLMR users, the Commission has not developed a small business size standard specifically applicable to PLMR users. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engaged in radiotelephone communications. The appropriate size standard for this category under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census Bureau data for 2012 shows that there were 967 firms that operated for the entire year. Of this total, 955 firms had employment of 999

or fewer employees and 12 had employment of 1000 employees or more. Thus under this category and the associated size standard, the Commission estimates that the majority of PLMR licensees are small entities.

40. According to the Commission's records, a total of approximately 269,953 licenses comprise PLMR users. Of this number there are a total of 3,565 PLMR licenses in the 4.9 GHz band. The Commission does not require PLMR licensees to disclose information about number of employees, and does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. The Commission however believes that a substantial number of PLMR licensees may be small entities despite the lack of specific information.

41. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* This *industry* comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment. The SBA has established a size standard for this industry of 1,250 employees or less. U.S. Census Bureau data for 2012 show that 841 establishments operated in this industry in that year. Of that number, 828 establishments operated with fewer than 1,000 employees, 7 establishments operated with between 1,000 and 2,499 employees and 6 establishments operated with 2,500 or more employees. Based on this data, we conclude that a majority of manufacturers in this industry are small.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

42. The proposals in the *Seventh FNPRM* may impose new or additional reporting or recordkeeping and/or other compliance obligations on small entities, if adopted. The Commission seeks comment on information collections related to the implementation of a State Band Manager model, and what entity that information should be submitted to. To the extent the Commission adopts a State Band Manager model similar to the Guard Band Manager model it adopted for the 700 MHz band, implementation of this model could include reporting by a State Band Manager on the policies and procedures (including recordkeeping and reporting requirements by small entities and other lessees in its jurisdiction) adopted to facilitate and manage shared use by non-public safety entities as well as annual reporting on information about the manner in which the spectrum is being utilized, including but not limited to the number and type of non-public safety entities operating in the band, the amount of spectrum being used by non-public safety entities pursuant to lease agreements with unaffiliated third parties, and the length of the term of such lease agreements.

43. At this time, the Commission cannot quantify the cost of compliance for small entities if the proposals and other matters under consideration in the *Seventh FNPRM* are adopted, and is not in a position to determine whether small entities will be required to hire attorneys, engineers, consultants, or other professionals to meet any compliance obligations. We expect the information we receive in comments to help the Commission identify and evaluate relevant matters for small entities, including compliance costs and other burdens that may result from the proposals and matters raised in the *Seventh FNPRM.*

E. Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

44. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): ''(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for such small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.''

45. The Commission's reliance on policies and frameworks utilized in other spectrum bands as the basis of proposals and inquires in *Seventh FNPRM* potentially provides regulatory policies and frameworks that small entities are operationally familiar with and may therefore minimize any substantial economic impact if similar requirements are adopted in this proceeding. To assist in the Commission's evaluation of the economic impact on small entities as a result of the actions that have been proposed in this proceeding, and the options and alternatives for such entities, the Commission has raised questions and sought comment on these matters in the *Seventh FNPRM.* As part of the inquiry, the Commission has specifically requested that commenters include costs and benefit analysis data in their comments. The Commission is hopeful that the comments it receives will specifically address matters impacting small entities and include data and analyses relating to these matters. Further, while the Commission believes the rules that are eventually adopted in this proceeding should benefit small entities, whether public safety or non-public safety, by giving them more options for gaining access to valuable wireless spectrum, the Commission expects to more fully consider the economic impact and alternatives for small entities following the review of comments filed in response to the *Seventh FNPRM.* The Commission's evaluation of such comments will shape the final conclusions it reaches, the final alternatives it considers, and the actions it ultimately takes in this proceeding to minimize any significant economic impact that may occur on small entities.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

46. None.

IV. Ordering Clauses

47. Accordingly, *it is ordered* that, pursuant to the authority found in sections 4(i), 302, 303(b), 303(f), 303(g), 303(r), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 302a, 303(b), 303(f), 303(g), 303(r), and 405, this *Seventh Further Notice of Proposed Rulemaking is hereby adopted.*

48. *it is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *Seventh Further Notice of Proposed Rulemaking,* including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 90

Communications equipment; Radio; Reporting and recordkeeping requirements.

Federal Communications Commission.

Cecilia Sigmund,

Federal Register Liaison Officer.

Proposed Rules

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

■ 1. The authority citation for part 90 continues to read as follows:

Authority: 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7), 1401–1473.

■ 2. Revise § 90.1203 to read as follows:

§ 90.1203 Licensing.

(a) Except as provided in paragraphs (c) and (d) of this section, no new licenses will be issued for the 4940–4990 MHz band. Licenses issued prior to the effective date of these rules are subject to renewal but may not be modified in any way to increase a licensee's spectral or geographic coverage.

(b) Operations conducted pursuant to a license held by a State Lessor (as defined in § 90.1217), whether conducted by the State Lessor or its lessee(s), are not limited to operations in support of public safety. All other operations in this band are limited to those in support of public safety.

(c) Where there is no statewide license in a state, a state entity may apply for a license covering the entire state, provided it includes with Form 601 a letter, signed by the elected chief executive (Governor) for that state, or his or her designee, affirming that the entity is to act as the State Lessor for that state.

(d) The following applications may also be submitted by entities holding a license under this subpart:

(1) applications to renew existing licenses without modification;

(2) applications that seek to modify existing licenses by deleting frequencies or fixed sites;

(3) applications that seek to modify existing licenses by changing technical parameters in a manner that does not expand the station's spectral or geographic coverage, such as decreases in bandwidth, power level, or antenna height;

(4) applications to assign or transfer;

(5) notifications of construction for permanent fixed site licenses or consummation of assignments or transfers;

(6) requests for extensions of time to construct or consummate previously granted assignment or transfer applications;

(7) applications to cancel licenses;

(8) applications for special temporary authority for short-term operations; and

(9) applications from geographic area licensees that require individual licensing under § 90.1207(b).

[FR Doc. 2020–23514 Filed 11–27–20; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register

Vol. 85, No. 230

Monday, November 30, 2020

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

November 24, 2020.

The Department of Agriculture will submit the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. Comments are requested regarding: Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding these information collections are best assured of having their full effect if received by December 30, 2020. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

National Agricultural Statistics Service

Title: Oregon Christmas Tree Survey—Production Year 2020.

OMB Control Number: 0535–0264.

Summary of Collection: The primary objectives of the National Agricultural Statistics Service (NASS) are to prepare and issue official State and national estimates of crop and livestock production, disposition and prices, economic statistics, and environmental statistics related to agriculture and to conduct the Census of Agriculture and its follow-on surveys. NASS will conduct a survey of agricultural operations with Christmas Tree acreage in Oregon. Selected farmers will be asked to provide data on (1) Number of trees sold and gross sales both by species and county, (2) Number of new seedlings by species, and (3) Percentage of mortality. General authority for these data collection activities is granted under U.S.C. Title 7, Section 2204. This project is conducted as a cooperative effort with the Oregon Christmas Tree Commission (OCTC), which is chartered under the Oregon Department of Agriculture. Funding for this survey is being provided by the OCTC.

Need and Use of the Information: Oregon leads the nation in Cut Christmas Tree production. The latest low-price cycle ended in 2016 and a third of the producers are no longer growing trees. NASS estimates have brought stability into this important Oregon industry. Some data from the 2019 Census of Horticulture will be used by the industry, but more detail is needed. No other data source is available to enable growers to make decisions about production.

Description of Respondents: A sample of all active agricultural operations with Christmas Trees in Oregon. Sampling will include strata based on acreage.

Number of Respondents: 450.

Frequency of Responses: Reporting: Once a year.

Total Burden Hours: 111.

Levi S. Harrell,

Departmental Information Collection Clearance Officer.

[FR Doc. 2020–26300 Filed 11–27–20; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

November 24, 2020.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by December 30, 2020 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food and Nutrition Service

Title: WIC Nutrition Assessment and Tailoring Study.

OMB Control Number: 0584–NEW.

Summary of Collection: This is a new information collection for the WIC Nutrition Assessment and Tailoring Study that will collect data concerning

the nutrition assessment process used by local agencies in the Supplemental Nutrition Program for Women, Infants, and Children (WIC) to identify nutrition risks and apply that information to the tailoring of participant benefits. This study will provide the Food and Nutrition Service (FNS) with a comprehensive, detailed description of the WIC nutrition risk assessment process and explore the ways in which WIC clinics tailor participant benefits to address the results of the assessment. It will also evaluate the relationship between this process and participant program satisfaction. This study is an FNS priority resulting from policy changes from the publication in 2006 of the ''Value Enhanced Nutrition Assessment (VENA) in WIC: The First Step in Quality Nutrition Services'' and the publication in October 2009 of the interim final rule, ''Revisions in the WIC Food Packages,'' both of which affected the nutrition assessment or nutrition services process. Section 28 of the Richard B. Russell National School Lunch Act as amended by the Healthy, Hunger-Free Kids Act of 2010 (Pub. L. 111–296, Section 305) provides the general statutory authority for this study.

Need and Use of the Information: This voluntary study will collect data from state and local government respondents in WIC State and Local Agencies, and in WIC clinics; businesses and other for-profit and non-profit institutions in the form of WIC Local Agencies and WIC clinics, and WIC Participants. FNS will use the information gathered from this study to inform program guidance and technical assistance related to the nutrition assessment process to support the implementation of best practices that meet the goals ensuring satisfaction with the program experience, promoting self-sufficiency, and improving the nutrition and health of women and children who participate in WIC. The study will identify specific practices or features of the nutrition services process associated with participant and staff satisfaction, reduced staff burden, and improved efficiency and will also provide FNS with a comprehensive, detailed description of the WIC nutrition risk assessment process, including how WIC staff apply the process to tailoring participant benefits.

FNS published a notice on Friday, July 19, 2019, in the **Federal Register**, Volume 84, Number 139, pages 34849 to 34858, and provided a 60-day period for public comments. This collection has not changed significantly since the publication of the 60-Day Notice. FNS made some updates to their accounting of burden to streamline the burden table. These changes did decrease the number of responses, but the burden hours only increased slightly. There was a delay to submit this collection due to: (1) The high number of regulations which FNS is trying to issue by the end of the year, each of which includes associated Information Collection Request (ICRs) and (2) COVID–19 rated Emergency ICRs and Guidance Documents which necessitate priority attention.

Description of Respondents: State, Local, or Tribal Government; businesses or other for-profit, non-profit institutions, and individuals or households.

Number of Respondents: 1,454.

Frequency of Responses: Reporting: One-time only.

Total Burden Hours: 870.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2020–26304 Filed 11–27–20; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2019–0002]

Notice of Availability of an Environmental Assessment and Finding of No Significant Impact for the Release of Aphalara itadori for the Biological Control of Japanese, Giant, and Bohemian Knotweeds

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of availability.

SUMMARY: We are advising the public that we have prepared a final environmental assessment and finding of no significant impact relative to the release of *Aphalara itadori* for the biological control of Japanese, Giant, and Bohemian knotweeds *(Fallopia japonica, F. sachalinensis,* and *F.* x *bohemica),* significant invasive weeds, within the contiguous United States. Based on our finding of no significant impact, we have determined that an environmental impact statement need not be prepared.

FOR FURTHER INFORMATION CONTACT: Dr. Colin D. Stewart, Assistant Director, Pests, Pathogens, and Biocontrol Permits, Permitting and Compliance Coordination, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1231; (301) 851–2327; email: *Colin.Stewart@usda.gov.*

SUPPLEMENTARY INFORMATION: Invasive knotweeds in North America are a complex of three closely related species in the family Polygonaceae that were introduced from Japan during the late 19th century. They include *Fallopia japonica* (Japanese knotweed), *F. sachalinensis* (Giant knotweed), and the hybrid between the two, *F.* x *bohemica* (Bohemian knotweed). These large herbaceous perennials have spread throughout much of North America, with the greatest infestations in the Pacific Northwest, the northeast of the United States, and eastern Canada. While capable of growing in diverse habitats, the knotweeds have become especially problematic along the banks and floodplains of rivers and streams, where they crowd out native plants and potentially affect stream nutrients and food webs. While several States have active control programs against knotweeds, the inaccessibility of some of the infestations and the difficulty with which the plants are killed suggest that complete eradication of knotweeds within the United States is unlikely.

The Hokkaido and Kyushu biotypes of the insect, *Aphalara itadori,* were chosen as potential biological control organisms. The biotypes are expected to reduce the severity of infestations of Japanese, Giant, and Bohemian knotweed, and are known to be highly host specific due to their intimate relationship with their host plants.

On May 28, 2019, we published in the **Federal Register** (84 FR 24463–24464, Docket No. APHIS–2019–0002) a notice [1] in which we announced the availability, for public review and comment, of an environmental assessment (EA) that examined the potential environmental impacts associated with the release of *Aphalara itadori* for the biological control of Japanese, Giant, and Bohemian knotweed within the contiguous United States. Comments on the notice were required to be received on or before June 27, 2019; however, we reopened the comment period for an additional 60 days ending August 26, 2019 in a subsequent notice (84 FR 37825–37826, Docket No. APHIS–2019–0002). We received 300 comments by that date. Our responses to the comments are included in the final EA.

In this document, we are advising the public of our finding of no significant impact (FONSI) regarding the release of *Aphalara itadori* for the biological control of Japanese, Giant, and

[1] To view the notice, supporting document, and the comments we received, go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2019-0002.*

Bohemian knotweeds (*F. japonica, F. sachalinensis,* and *F.* x *bohemica*) within the contiguous United States. The finding, which is based on the EA, reflects our determination that release of *Aphalara itadori* for the biological control of Japanese, Giant, and Bohemian knotweeds (*F. japonica, F. sachalinensis,* and *F.* x *bohemica*) will not have a significant impact on the quality of the human environment. Concurrent with this announcement, we will issue a permit for the release of *Aphalara itadori* for the biological control of Japanese, Giant, and Bohemian knotweeds (*F. japonica, F. sachalinensis,* and *F.* x *bohemica*).

The EA and FONSI may be viewed on the *Regulations.gov* website (see footnote 1). Copies of the EA and FONSI are also available for public inspection at USDA, room 1620, South Building, 14th Street and Independence Avenue SW, Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect copies are requested to call ahead on (202) 799–7039 to facilitate entry into the reading room. In addition, copies may be obtained by calling or writing to the individual listed under **FOR FURTHER INFORMATION CONTACT**.

The EA and FONSI have been prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*); (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508); (3) USDA regulations implementing NEPA (7 CFR part 1b); and (4) Animal and Plant Health Inspection Service's NEPA Implementing Procedures (7 CFR part 372).

Done in Washington, DC, this 23rd day of November 2020.

Mark Davidson,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2020–26290 Filed 11–27–20; 8:45 am]

BILLING CODE 3410–34–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Massachusetts Advisory Committee

AGENCY: 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 a meeting of the Massachusetts Advisory Committee to the Commission will convene by conference call on Wednesday, December 16, 2020 at 11:30 a.m. (ET). The purpose of the meeting is to review and vote on a report on water accessibility in Massachusetts.

DATES: Wednesday, December 16, 2020 at 11:30 a.m. (ET).

Public Call-In Information: Conference call-in number: 1–800–353–6461 and conference ID: 2739300.

FOR FURTHER INFORMATION CONTACT: Evelyn Bohor at *ero@usccr.gov* or by phone at 202–376–7533.

SUPPLEMENTARY INFORMATION: Interested members of the public may listen to the discussion by calling the following toll-free Conference call-in number: 1–800–353–6461 and conference ID: 2739300. Please be advised that before placing them into the conference call, the conference call operator will ask callers to provide their names, their organizational affiliations (if any), and email addresses (so that callers may be notified of future meetings). 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 conference call-in number.

Individuals who are deaf, deafblind and hard of hearing may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Federal Relay Service operator with the conference call-in numbers: 1–800–353–6461 and conference ID: 2739300.

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 respective meeting. Written comments may be emailed to Barbara Delaviez at *ero@usccr.gov.* Persons who desire additional information may contact the Regional Programs Unit at (202) 809–9618. Records and documents discussed during the meeting will be available for public viewing as they become available at the *www.facadatabase.gov.* Persons interested in the work of this advisory committee are advised to go to the Commission's website, *www.usccr.gov,* or to contact the Regional Programs Unit at the above phone number or email address.

Agenda

Wednesday, December 16, 2020; 11:30 a.m. (ET)

1. Roll Call
2. Review and Edit Report on Water Accessibility in Massachusetts
3. Other Business
4. Open Comment
5. Adjourn

Dated: November 24, 2020.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–26296 Filed 11–27–20; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meetings of the Maine Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meetings.

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 that the Maine Advisory Committee (Committee) will hold three meetings. One will be on Friday, December 11, 2020, at 2:30 p.m. (ET) for the purpose of hearing from the public on the challenges to digital access in Maine. The second and third meetings will be on Thursdays, December 17, 2020 and January 21, 2021, both at 12:00 p.m. for the purpose of hearing testimony about digital equity issues in Maine.

DATES: Friday, December 11, 2020, at 2:30 p.m. ET; Thursday, December 17, 2020, at 12:00 p.m.; Thursday, January 21, 2020, at 12:00 p.m.

Public Call Information for Both Meetings: Dial: 1–800–367–2403; conference ID: 1644409.

FOR FURTHER INFORMATION CONTACT: Evelyn Bohor, at *ero@usccr.gov* or 202–921–2212.

SUPPLEMENTARY INFORMATION: Members of the public can listen to the discussions. These meetings are available to the public through the above listed toll-free number. Any interested member of the public may call this number and listen to the meeting. An open comment period for each date will be provided to allow members of the public to make a statement as time allows. The conference call operator will ask callers to identify themselves, the organization they are affiliated with (if any), and an email address prior to placing callers into the conference room. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. 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.

Individuals who are deaf, deafblind and hard of hearing may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Federal Relay Service operator with the conference call-in numbers: 1–800–367–2403; Conference ID: 1644409.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Barbara Delaviez at *ero@usccr.gov.* Persons who desire additional information may contact the Barbara Delaviez at 202–539–8246.

Records of the meeting will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Maine Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Eastern Regional Office at the above email or phone number.

Agenda

Friday, December 11, 2020 at 2:30 p.m. (ET); and Thursday, December 17, 2020 and Thursday, January 21, 2021, at 12:00 p.m.

- Welcome/Opening
- Briefing on Digital Equity: Community Forum Open Session
- Next Steps
- Other Business
- Public Comment
- Adjournment

Dated: November 24, 2020.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–26297 Filed 11–27–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–876]

Welded Line Pipe From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2017–2018

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) finds that producers or exporters of welded line pipe from the Republic of Korea sold welded line pipe at less than normal value during the period of review (POR), December 1, 2017, through November 30, 2018.

DATES: Applicable November 30, 2020.

FOR FURTHER INFORMATION CONTACT: David Goldberger or Joshua Tucker, 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) 482–4136 or (202) 482–0244, respectively.

SUPPLEMENTARY INFORMATION:

Background

This review covers 32 producers or exporters. Commerce selected two companies, NEXTEEL Co., Ltd. (NEXTEEL) and SeAH Steel Corporation (SeAH), for individual examination. The producers or exporters not selected for individual examination are listed in the ''Final Results of the Review'' section of this notice.

On February 7, 2020, Commerce published the *Preliminary Results.*[1] On March 11, 2020, we received case briefs from Husteel Co. Ltd.; Hyundai Steel Company; NEXTEEL; SeAH, domestic producers California Steel Industries, Welspun Tubular LLC USA, Stupp Corporation, a Division Of Stupp Bros., Inc., and American Cast Iron Pipe Company, (collectively, ''Domestic Producers''); and Domestic Producers along with Maverick Tube Corporation, and TMK IPSCO (collectively, ''Domestic Interested Parties'').[2] On March 18, 2020, we received rebuttal briefs from Domestic Interested Parties, Domestic Producers, Husteel, Hyundai Steel, NEXTEEL, and SeAH.[3]

On April 24, 2020, Commerce tolled all deadlines in administrative reviews by 50 days.[4] On July 21, 2020, Commerce tolled all deadlines for preliminary and final results in administrative reviews by an additional 60 days.[5] Therefore, the deadline for the final results of this review is November 23, 2020.

Scope of the Order

The merchandise subject to the order is welded line pipe.[6] The product is currently classified under the following Harmonized Tariff Schedule of the United States (HTSUS) item numbers: 7305.11.1030, 7305.11.1060, 7305.11.5000, 7305.12.1030, 7305.12.1060, 7305.12.5000, 7305.19.1030, 7305.19.5000, 7306.19.1010, 7306.19.1050, 7306.19.5110, and 7306.19.5150. Although the HTSUS numbers are provided for convenience and for customs purposes, the written product description remains dispositive.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs are listed in Appendix I to this notice and addressed in the IDM.[7] Interested parties can find a complete discussion of these issues and the corresponding recommendations in this public memorandum, which is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* In addition, a complete version of the IDM can be accessed directly at *http://enforcement.trade.gov/frn/index.html.* The signed IDM and the electronic

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[1] *See Welded Line Pipe from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2017–2018,* 85 FR 7268 (February 7, 2020) (*Preliminary Results*).

[2] *See* Husteel's Letter, ''Welded Line Pipe from South Korea, Case No. A–580–876; Husteel Case Brief,'' dated March 11, 2020; *see also* Hyundai Steel's Letter, ''Welded Line Pipe from the Republic of Korea: Case Brief,'' dated March 11, 2020; NEXTEEL's Letter, ''Welded Line Pipe from the Republic of Korea: NEXTEEL's Case Brief,'' dated March 11, 2020; SeAH's Letter, ''Case Brief of SeAH Steel Corporation,'' dated March 11, 2020; Domestic Producers' Letter, ''Welded Line Pipe from the Republic of Korea: Case Brief of California Steel Industries (CSI), Welspun Tubular LLC USA, Stupp Corporation, A Division Of Stupp Bros., Inc, and American Cast Iron Pipe Company, '' dated March 11, 2020; and Domestic Interested Parties' Letter, ''Welded Line Pipe from the Republic of Korea: Case Brief of the Domestic Interested Parties,'' dated March 11, 2020.

[3] *See* Domestic Interested Parties' Letter, ''Welded Line Pipe from the Republic of Korea: Rebuttal Brief of the Domestic Interested Parties,'' dated March 18, 2020; *see also* Domestic Producers Letter, ''Welded Line Pipe from the Republic of Korea: Rebuttal Brief Of California Steel Industries, Welspun Tubular LLC USA, Stupp Corporation, A Division Of Stupp Bros., Inc., and American Cast Iron Pipe Company,'' dated March 18, 2020; Husteel's Letter, ''Welded Line Pipe from South Korea, Case No. A–580–876; Husteel Rebuttal Brief,'' dated March 18, 2020; Hyundai Steel's Letter, ''Welded Line Pipe from the Republic of Korea: Rebuttal Brief,'' dated March 18, 2020; NEXTEEL's Letter, ''Welded Line Pipe from the Republic of Korea: NEXTEEL's Rebuttal Brief,'' dated March 18, 2020; and SeAH's Letter, ''Rebuttal Brief of SeAH Steel Corporation,'' dated March 18, 2020.

[4] *See* Memorandum, ''Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews in Response to Operational Adjustments Due to COVID–19,'' dated April 24, 2020.

[5] *See* Memorandum, ''Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews,'' dated July 21, 2020.

[6] For a complete description of the scope of the order, *see Preliminary Results,* and accompanying Preliminary Decision Memorandum (PDM).

[7] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the 2017–2018 Administrative Review of the Antidumping Duty Order on Welded Line Pipe from Korea'', dated concurrently with, and hereby adopted by, this notice (IDM).

version of the IDM are identical in content.

Changes Since the Preliminary Results

Based on a review of the record and comments received from interested parties regarding our *Preliminary Results,* we made certain changes to the preliminary weighted-average margins for NEXTEEL and SeAH.[8]

Final Results of the Review

We are assigning the following weighted-average dumping margins to the firms listed below for the period December 1, 2017 through November 30, 2018:

Producer or exporter	Weighted-average dumping margin (percent)
NEXTEEL Co., Ltd	15.07
SeAH Steel Corporation	9.33

Review-Specific Average Rate for Companies Not Selected for Individual Review

The dumping margins for the exporters or products not selected for individual review are listed in Appendix II.

Disclosure of Calculations

We intend to disclose the calculations performed within five days of the date of publication of this notice to parties in this proceeding, in accordance with 19 CFR 351.224(b).

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Tariff Act of 1930, as amended (Act), and 19 CFR 351.212(b)(1), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review.

Pursuant to 19 CFR 351.212(b)(1), NEXTEEL reported the entered value of its U.S. sales such that we calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of dumping calculated for the examined sales to the total entered value of the sales for which entered value was reported. SeAH did not report actual entered value for all of its U.S. sales; in such instances, we calculated importer-specific per-unit duty assessment rates by aggregating the total amount of antidumping duties calculated for the examined sales and dividing this amount by the total quantity of those sales. Where either the respondent's weighted-average dumping margin is zero or *de minimis* within the meaning of 19 CFR 351.106(c)(1), or an importer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

For the companies which were not selected for individual review, we will assign an assessment rate equal to each company's weighted-average dumping margin identified above. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.[9]

We intend to issue liquidation instructions to CBP 15 days after publication of the final results of this review.

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for each specific company listed above will be equal to the weighted-average dumping margin that is established in the final results of this review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for previously investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding in which the company participated; (3) if the exporter is not a firm covered in this review, or the original less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the cash deposit rate established for the most recently completed segment for the producer of the subject merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 4.38 percent, the all-others rate established in the LTFV investigation.[10] These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Administrative Protective Order

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: November 20, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the IDM

I. Summary
II. Background
III. Margin Calculations
IV. Discussion of the Issues
  Comment 1: Lawfulness of Commerce's Interpretation of the Particular Market Situation (PMS) Provision
  Comment 2: Evidence of a PMS
  Comment 3: PMS Adjustment
  Comment 4: Differential Pricing
  Comment 5: Non-Prime Costs for NEXTEEL
  Comment 6: Suspended Production Loss for NEXTEEL
  Comment 7: Capping of Freight Revenue for SeAH
  Comment 8: General and Administrative Expense Adjustment for SeAH's U.S. Affiliates
  Comment 9: SeAH's Constructed Export Price Offset Claim
V. Recommendation

[8] *See* IDM at 3.

[9] *See* section 751(a)(2)(C) of the Act.

[10] *See Welded Line Pipe from the Republic of Korea and the Republic of Turkey: Antidumping Duty Orders,* 80 FR 75056, 75057 (December 1, 2015).

Appendix II

Review-Specific Average Rate Applicable to Companies Not Selected for Individual Review: [11]

Exporter or producer	Weighted-average dumping margin (percent)
AJU Besteel Co, Ltd	11.60
BDP International, Inc.	11.60
Daewoo International Corporation	11.60
Dongbu Incheon Steel Co	11.60
Dongbu Steel Co, Ltd	11.60
Dongkuk Steel Mill	11.60
Dong Yang Steel Pipe	11.60
EEW Korea Co, Ltd	11.60
HISTEEL Co, Ltd	11.60
Husteel Co, Ltd	11.60
Hyundai RB Co Ltd	11.60
Hyundai Steel Company/Hyundai HYSCO	11.60
Kelly Pipe Co, LLC.	11.60
Keonwoo Metals Co, Ltd	11.60
Kolon Global Corp	11.60
Korea Cast Iron Pipe Ind. Co, Ltd	11.60
Kurvers Piping Italy S.R.L	11.60
MSTEEL Co, Ltd	11.60
Miju Steel MFG Co, Ltd	11.60
Poongsan Valinox (Valtimet Division)	11.60
POSCO	11.60
POSCO Daewoo	11.60
R&R Trading Co Ltd	11.60
Sam Kang M&T Co, Ltd	11.60
Sin Sung Metal Co, Ltd	11.60
SK Networks	11.60
Soon-Hong Trading Company	11.60
Steel Flower Co, Ltd	11.60
TGS Pipe	11.60
Tokyo Engineering Korea Ltd	11.60

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[11] This rate is based on the weighted-average of the margins calculated for those companies selected for individual review using the publicly-ranged U.S. quantities. Because we cannot apply our normal methodology of calculating a weighted-average margin due to requests to protect business proprietary information, we find this rate to be the best proxy of the actual weighted-average margin determined for the mandatory respondents. *See Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part,* 75 FR 53661, 53663 (September 1, 2010); *see also* Memorandum, ''Calculation of the Review-Specific Average Rate for the Final Results,'' dated concurrently with this notice.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–122–857]

Certain Softwood Lumber Products from Canada: Final Results of Antidumping Duty Administrative Review; 2017–2018

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that producers and/or exporters subject to this administrative review made sales of subject merchandise at less than normal value during the period of review (POR), June 30, 2017 through December 31, 2018.

DATES: Effective November 30, 2020.

FOR FURTHER INFORMATION CONTACT: Jeff Pedersen (Canfor), Stephen Bailey (Resolute), Thomas Martin (West Fraser), or Maisha Cryor, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2769, (202) 482–0193, (202) 482–3936, or (202) 482–5831, respectively.

SUPPLEMENTARY INFORMATION:

Background

Commerce published the *Preliminary Results* of this administrative review on February 7, 2020.[1] This review covers 253 producers/exporters of subject merchandise, including three mandatory respondents: Canfor,[2] Resolute,[3] and West Fraser.[4] For events subsequent to the *Preliminary Results, see* Commerce's Issues and Decision Memorandum.[5] The final weighted-average dumping margins are listed below in the ''Final Results of Review'' section of this notice. Commerce conducted this administrative review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).

Scope of the Order

The product covered by this review is softwood lumber from Canada. For a full description of the scope, *see* the IDM.

Analysis of Comments Received

All issues raised in the case briefs filed in this administrative review are addressed in the Issues and Decision Memorandum (IDM). A list of the topics discussed in the Issues and Decision Memorandum is appended to this notice. The IDM is a public document and is available electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Services System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* In addition, a complete version of the IDM is also accessible at *http://enforcement.trade.gov/frn/index.html.* The signed IDM and the electronic versions of the IDM are identical in content.

Changes Since the Preliminary Results

Based on our review of the record and comments received from interested parties regarding our *Preliminary Results,* Commerce has made the following changes to the *Preliminary Results:*

- As detailed in the February 28, 2020 Memorandum, ''Correction of Company names on the Record,'' we revised certain names listed in the *Preliminary Results.* These revisions resulted in the number of stated producers/exporters under review changing from 257 to 253.
- In the *Preliminary Results,* we incorrectly stated the all-others rate established in the LTFV investigation to be 6.58 percent. The correct all-others rate, as stated in the *Softwood Lumber Order,* is 6.04 percent.[6]
- We adjusted Canfor's affiliated purchase prices of electricity and an input the identity of which is proprietary by the percentage the affiliated electricity purchases were below market prices.[7]
- We included Canfor's inventory carrying costs incurred in the United States that were reported in U.S. dollars

[1] *See Certain Softwood Lumber Products from Canada: Preliminary Results of Antidumping Duty Administrative Review and Rescission of Review, in Part; 2017–2018,* 85 FR 7282 (February 7, 2020) (*Preliminary Results*) and accompanying Preliminary Decision Memorandum (PDM).

[2] We continue to treat Canfor Corporation; Canadian Forest Products Ltd.; and Canfor Wood Products Marketing Ltd. (collectively, Canfor) as a single entity. *See Preliminary Results* PDM at 5.

[3] We continue to treat Resolute Growth Canada Inc.; Forest Products Mauricie LP; Société en commandite Scierie Opitciwan; Resolute-LP Engineered Wood Larouche Inc.; Resolute-LP Engineered Wood St-Prime Limited Partnership; and Resolute FP Canada Inc. (collectively, Resolute) as a single entity. *See Preliminary Results* PDM at 6.

[4] We continue to treat West Fraser Mills Ltd.; Blue Ridge Lumber Inc.; Manning Forest Products Ltd.; and Sundre Forest Products Inc. (collectively, West Fraser) as a single entity. *See Preliminary Results* PDM at 6–7.

[5] *See* IDM.

[6] *See Certain Softwood Lumber Products from Canada: Antidumping Duty Order and Partial Amended Final Determination,* 83 FR 350 (January 3, 2018) (*Softwood Lumber Order*).

[7] *See* IDM at Comment 4.

in calculating Canfor's final dumping margin.[8]

• We included Resolute's domestic inventory carrying costs in the constructed export price calculation.[9]

Final Results of Review

As a result of this administrative review, we are assigning the following weighted-average dumping margins to the manufacturers/exporters listed below for the period of June 30, 2017 through December 31, 2018:

Exporter/producer	Weighted-average margin (percent)
Canfor Corporation/Canadian Forest Products Ltd./Canfor Wood Products Marketing Ltd	1.99
Resolute Growth Canada Inc./Forest Products Mauricie LP, Société en commandite Scierie Opitciwan/Resolute-LP Engineered Wood Larouche Inc./Resolute-LP Engineered Wood St-Prime Limited Partnership/Resolute FP Canada Inc	1.15
West Fraser Mills Ltd., Blue Ridge Lumber Inc./Manning Forest Products Ltd./and Sundre Forest Products Inc	1.40
Non-selected Companies	1.57

Assessment Rates

Pursuant to section 751(a)(2)(A) the Act and 19 CFR 351.212(b)(1), Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review.

We intend to calculate importer- (or customer-) specific assessment rates on the basis of the ratio of the total amount of antidumping duties calculated for each importer's (or customer's) examined sales and the total entered value of the sales in accordance with 19 CFR 351.212(b)(1). Where an importer- (or customer-) specific rate is zero or *de minimis* within the meaning of 19 CFR 351.106(c)(1), we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

Generally, when calculating margins for non-selected respondents, Commerce looks to section 735(c)(5) of the Act for guidance, which provides instructions for calculating the all-others margin in an investigation. Section 735(c)(5)(A) of the Act provides that when calculating the all-others margin, Commerce will exclude any zero and *de minimis* weighted-average dumping margins, as well as any weighted-average dumping margins based on total facts available. Accordingly, Commerce's usual practice has been to average the margins for selected respondents, excluding margins that are zero, *de minimis,* or based entirely on facts available.

In this review, we calculated a weighted-average dumping margin of 1.99 percent for Canfor, 1.15 percent for Resolute, and 1.40 percent for West Fraser. In accordance with section 735(c)(5)(A) of the Act, Commerce assigned the weighted-average of these three calculated weighted-average dumping margins, 1.57 percent, to the non-selected companies in these final results. The rate calculated for the non-selected companies is a weighted-average percentage margin which is calculated based on the U.S. values of the three reviewed companies with an affirmative antidumping duty margin.[10] Accordingly, we have applied a rate of 1.57 percent to the non-selected companies.[11] A list of all non-selected companies is included in Attachment II.

For entries of subject merchandise during the POR produced by each respondent for which it did not know its merchandise was destined for the United States, we will instruct CBP to liquidate such entries at the all-others rate if there is no rate for the intermediate company or companies involved in the transaction.

We intend to issue liquidation instructions to CBP 15 days after publication of the final results of this administrative review.

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of these final results, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for the companies under review will be equal to the weighted-average dumping margin listed above in the ''Final Results of Review'' section; (2) for merchandise exported by producers or exporters not covered in this review but covered in a previously completed segment of this proceeding, the cash deposit rate will continue to be the company-specific rate published in the final results for the most recent period in which that producer or exporter participated; (3) if the exporter is not a firm covered in this review or in any previous segment of this proceeding, but the producer is, then the cash deposit rate will be that established for the producer of the merchandise in these final results of review or in the final results for the most recent period in which that producer participated; and (4) if neither the exporter nor the producer is a firm covered in this review or in any previously completed segment of this proceeding, then the cash deposit rate will be 6.04 percent *ad valorem,* the all-others rate established in the less than fair value investigation.[12] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification Regarding Administrative Protective Order

This notice is the only reminder to parties subject to the administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under the APO in accordance with 19 CFR 351.305(a)(3), which

[8] *See* IDM at Comment 7.

[9] *See* IDM at Comment 9.

[10] *See Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part,* 75 FR 53661, 53663 (September 1, 2010).

[11] *See* Memorandum, ''Calculation of the Rate for Non-Selected Respondents,'' dated concurrently with this notice.

[12] *See Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances,* 82 FR 51806 (November 8, 2017).

continues to govern business proprietary information in this segment of the proceeding. 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 the terms of an APO is a violation subject to sanction.

Notification to Interested Parties

We are issuing and publishing these final results and this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213(h).

Dated: November 23, 2020.

Joseph A. Laroski Jr.,

Deputy Assistant Secretary for Policy and Negotiations.

Appendix I

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Discussion of the Issues
Comment 1. Particular Market Situation Allegation
Comment 2. Canfor's Reported Grades
Comment 3. Canfor's Reported Costs
Comment 4. Valuing Affiliated Transactions Involving Canfor's Grande Prairie Mill
Comment 5. Valuing Canfor's Seed Purchases
Comment 6. Canfor's Price George Sawmill's Purchases of Electricity
Comment 7. Ministerial Error Regarding Canfor's Inventory Carrying Costs Incurred in the United States
Comment 8. Whether to Adjust Resolute's Grade Groups and Grade Equivalents
Comment 9. Whether to Adjust for DINVCARU and INVCARU
Comment 10. Whether to Adjust Resolute's Costs for Other Direct Charges
Comment 11. Zeroing
Comment 12. The Differential Pricing Analysis is Inconsistent with the AD Agreement
Comment 13. The Cohen's *d* and Ratio Tests are Irrational
Comment 14. Time Periods for the Cohen's *d* Test
Comment 15. Simple Average of Variances in the Cohen's *d* Coefficient
Comment 16. External Factors Which Explain the Price Differences
Comment 17. Cohen's *d* Test is Subject to Rule-Making Procedures
Comment 18. Whether Commerce Should Modify West Fraser's Reporting of Alternate Grades
Comment 19. Whether Commerce Should Apply Facts Available Due to Discrepancies in West Fraser's Reported Tally Sales
Comment 20. Whether to Apply Offsets to West Fraser's General and Administrative (G&A) Expense Ratio
Comment 21. Whether Commerce Should Allocate Certain Affiliate Expenses to West Fraser G&A Expenses
Comment 22. Whether Commerce Should Offset West Fraser's G&A Expenses for Greenhouse Gas Credits
Comment 23. Whether Commerce Should Include Equity-Based Compensation in G&A Expenses
Comment 24. Whether Commerce Should Exclude Foreign Exchange Gain in West Fraser's Financial Expense Ratio
Comment 25. Iterations of Olympic's Name
Comment 26. Listing of Tolko's Name in the Final Results
V. Recommendation

Appendix II

Non-Selected Exporters/Producers

- 1074712 BC Ltd.
- 5214875 Manitoba Ltd.
- 752615 B.C Ltd, Fraserview Remanufacturing Inc, dba Fraserview Cedar Products.
- 9224–5737 Quebec Inc. (aka A.G. Bois)
- A.B. Cedar Shingle Inc.
- Absolute Lumber Products, Ltd.
- AJ Forest Products Ltd.
- Alberta Spruce Industries Ltd.
- Aler Forest Products, Ltd.
- Alpa Lumber Mills Inc.
- American Pacific Wood Products
- Anbrook Industries Ltd.
- Andersen Pacific Forest Products Ltd.
- Anglo American Cedar Products Ltd.
- Anglo-American Cedar Products Ltd.
- Antrim Cedar Corporation
- Aquila Cedar Products, Ltd.
- Arbec Lumber Inc.
- Aspen Planers Ltd.
- B&L Forest Products Ltd
- B.B. Pallets Inc.
- Babine Forest Products Limited
- Bakerview Forest Products Inc.
- Bardobec Inc.
- Barrette-Chapais Ltee
- BarretteWood Inc.
- Benoit & Dionne Produits Forestiers Ltee
- Best Quality Cedar Products Ltd.
- Blanchet Multi Concept Inc.
- Blanchette & Blanchette Inc.
- Bois Aise de Montreal inc.
- Bois Bonsaï inc.
- Bois D'oeuvre Cedrico Inc. (aka Cedrico Lumber Inc.)
- Bois Daaquam inc.
- Bois et Solutions Marketing SPEC, Inc.
- Boisaco
- Boscus Canada Inc.
- Boucher Bros. Lumber Ltd.
- BPWood Ltd.
- Bramwood Forest Inc.
- Brunswick Valley Lumber Inc.
- Busque & Laflamme Inc.
- C&C Wood Products Ltd.
- Caledonia Forest Products Inc.
- Campbell River Shake & Shingle Co., Ltd.
- Canadian American Forest Products Ltd.
- Canadian Wood Products Inc.
- Canusa cedar inc.
- Canyon Lumber Company, Ltd.
- Careau Bois inc.
- Carrier & Begin Inc.
- Carrier Forest Products Ltd.
- Carrier Lumber Ltd.
- Cedar Valley Holdings Ltd.
- Cedarline Industries, Ltd.
- Central Cedar Ltd.
- Centurion Lumber, Ltd.
- Chaleur Sawmills LP
- Channel-ex Trading Corporation
- Clair Industrial Development Corp. Ltd.
- Clermond Hamel Ltee
- Coast Clear Wood Ltd.
- Coast Mountain Cedar Products Ltd.
- Commonwealth Plywood Co. Ltd.
- Comox Valley Shakes Ltd.
- Conifex Fibre Marketing Inc.
- Cowichan Lumber Ltd.
- CS Manufacturing Inc. dba Cedarshed
- CWP—Industriel inc.
- CWP—Montreal inc.
- D & D Pallets, Ltd.
- Dakeryn Industries Ltd.
- Decker Lake Forest Products Ltd.
- Delco Forest Products Ltd.
- Delta Cedar Specialties Ltd.
- Devon Lumber Co. Ltd.
- DH Manufacturing Inc.
- Direct Cedar Supplies Ltd.
- Doubletree Forest Products Ltd.
- Downie Timber Ltd.
- Dunkley Lumber Ltd.
- EACOM Timber Corporation
- East Fraser Fiber Co. Ltd.
- Edgewood Forest Products Inc.
- ER Probyn Export Ltd.
- Eric Goguen & Sons Ltd.
- Falcon Lumber Ltd.
- Fontaine Inc
- Foothills Forest Products Inc.
- Fornebu Lumber Co. Ltd.
- Fraser Specialty Products Ltd.
- Fraserview Cedar Products
- Furtado Forest Products Ltd.
- G & R Cedar Ltd.
- Galloway Lumber Company Ltd.
- Glandell Enterprises Inc.
- Goat Lake Forest Products Ltd.
- Goldband Shake & Shingle Ltd.
- Golden Ears Shingle Ltd.
- Goldwood Industries Ltd.
- Goodfellow Inc.
- Gorman Bros. Lumber Ltd.
- Groupe Crete Chertsey
- Groupe Crete division St-Faustin
- Groupe Lebel inc.
- Groupe Lignarex inc.
- H.J. Crabbe & Sons Ltd.
- Haida Forest Products Ltd.
- Harry Freeman & Son Ltd.
- Hornepayne Lumber LP
- Imperial Cedar Products, Ltd.
- Imperial Shake Co. Ltd.
- Independent Building Materials Dist.
- Interfor Corporation
- Island Cedar Products Ltd
- Ivor Forest Products Ltd.
- J&G Log Works Ltd.
- J.D. Irving, Limited
- J.H. Huscroft Ltd.
- Jan Woodland (2001) inc.
- Jhajj Lumber Corporation
- Kalesnikoff Lumber Co. Ltd.
- Kan Wood, Ltd.
- Kebois Ltee/Ltd
- Keystone Timber Ltd.
- Kootenay Innovative Wood Ltd.
- Lafontaine Lumber Inc.
- Langevin Forest Products Inc.
- Lecours Lumber Co. Limited
- Ledwidge Lumber Co. Ltd.

- Leisure Lumber Ltd.
- Les Bois d'oeuvre Beaudoin Gauthier inc.
- Les Bois Martek Lumber
- Les Bois Traites M.G. Inc.
- Les Chantiers de Chibougamau ltd.
- Les Produits Forestiers D&G Ltee
- Leslie Forest Products Ltd.
- Lignum Forest Products LLP
- Linwood Homes Ltd.
- Longlac Lumber Inc.
- Lulumco inc.
- Magnum Forest Products, Ltd.
- Maibec inc.
- Manitou Forest Products Ltd.
- Marcel Lauzon Inc.
- Marwood Ltd.
- Materiaux Blanchet Inc.
- Matsqui Management and Consulting Services Ltd. dba Canadian Cedar Roofing Depot
- Metrie Canada Ltd.
- Mid Valley Lumber Specialties, Ltd.
- Midway Lumber Mills Ltd.
- Mill & Timber Products Ltd.
- Millar Western Forest Products Ltd.
- Mobilier Rustique (Beauce) Inc.
- MP Atlantic Wood Ltd.
- Multicedre ltee
- Nakina Lumber Inc.
- National Forest Products Ltd.
- New Future Lumber Ltd.
- Nicholson and Cates Ltd
- Norsask Forest Products Limited Partnership
- North American Forest Products Ltd. (located in Saint-Quentin, New Brunswick)
- North American Forest Products, Ltd. (located in Abbotsford, British Columbia)
- North Enderby Timber Ltd.
- Olympic Industries ULC/Olympic Industries ULC-Reman/Olympic Industries ULC-Reman Code/Olympic Industries Inc./ Olympic Industries Inc-Reman Codes
- Pacific Coast Cedar Products Ltd.
- Pacific Pallet, Ltd.
- Pacific Western Wood Works Ltd.
- Parallel Wood Products Ltd.
- Pat Power Forest Products Corporation
- Phoenix Forest Products Inc.
- Pine Ideas Ltd.
- Pioneer Pallet & Lumber Ltd
- Porcupine Wood Products Ltd.
- Power Wood Corp.
- Precision Cedar Products Corp.
- Prendiville Industries Ltd. (aka Kenora Forest Products)
- Produits Forestiers Petit Paris
- Produits forestiers Temrex, s.e.c.
- Produits Matra Inc.
- Promobois G.D.S. inc.
- Rayonier A.M. Canada GP
- Rembos Inc.
- Rene Bernard Inc.
- Richard Lutes Cedar Inc.
- Rielly Industrial Lumber Inc.
- Roland Boulanger & Cie Ltee
- S & K Cedar Products Ltd.
- S&R Sawmills Ltd
- S&W Forest Products Ltd.
- San Industries Ltd.
- Sawarne Lumber Co. Ltd.
- Scierie Alexandre Lemay & Fils Inc.
- Scierie St-Michel inc.
- Scierie West Brome Inc.
- Scotsburn Lumber Co. Ltd.
- Sechoirs de Beauce Inc.
- Serpentine Cedar Ltd.
- Serpentine Cedar Roofing Ltd.
- Sexton Lumber Co. Ltd.
- Sigurdson Forest Products Ltd.
- Silvaris Corporation
- Silver Creek Premium Products Ltd.
- Sinclar Group Forest Products Ltd.
- Skana Forest Products Ltd.
- Skeena Sawmills Ltd
- Sound Spars Enterprise Ltd.
- South Beach Trading Inc.
- Specialiste du Bardeau de Cedre Inc
- Spruceland Millworks Inc.
- Surrey Cedar Ltd.
- T.G. Wood Products, Ltd
- Taan Forest Products
- Taiga Building Products Ltd.
- Tall Tree Lumber Company
- Teal Cedar Products Ltd.
- Tembec Inc.
- Terminal Forest Products Ltd.
- The Teal-Jones Group
- The Wood Source Inc.
- Tolko Industries Ltd./Tolko Marketing and Sales Ltd./Gilbert Smith Forest Products Ltd.
- Trans-Pacific Trading Ltd.
- Triad Forest Products Ltd.
- Twin Rivers Paper Co. Inc.
- Tyee Timber Products Ltd.
- Universal Lumber Sales Ltd.
- Usine Sartigan Inc.
- Vaagen Fibre Canada, ULC
- Valley Cedar 2 ULC
- Vancouver Island Shingle, Ltd.
- Vancouver Specialty Cedar Products Ltd.
- Visscher Lumber Inc
- W.I. Woodtone Industries Inc.
- Waldun Forest Product Sales Ltd.
- Watkins Sawmills Ltd.
- West Bay Forest Products Ltd.
- West Fraser Timber Co. Ltd.
- West Wind Hardwood Inc.
- Western Forest Products Inc.
- Western Lumber Sales Limited
- Western Wood Preservers Ltd.
- Weston Forest Products Inc.
- Westrend Exteriors Inc.
- Weyerhaeuser Co.
- White River Forest Products L.P.
- Winton Homes Ltd.
- Woodline Forest Products Ltd.
- Woodstock Forest Products
- Woodtone Specialties Inc.
- Yarrow Wood Ltd.

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–714–001]

Phosphate Fertilizers From the Kingdom of Morocco: Preliminary Affirmative Countervailing Duty Determination

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that countervailable subsidies are being provided to producers and exporters of phosphate fertilizers from the Kingdom of Morocco (Morocco). The period of investigation is January 1, 2019 through December 31, 2019. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable November 30, 2020.

FOR FURTHER INFORMATION CONTACT: Robert Palmer or Samuel Glickstein, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–9068 or (202) 482–5307, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 703(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on July 23, 2020.[1] On September 2, 2020, Commerce postponed the preliminary determination of this investigation and the revised deadline is now November 23, 2020.[2] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics discussed in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and electronic versions of the Preliminary Decision Memorandum are identical in content.

[1] *See Phosphate Fertilizers from the Kingdom of Morocco and the Russian Federation: Initiation of Countervailing Duty Investigations,* 85 FR 44505 (July 23, 2020) (*Initiation Notice).*

[2] *See Phosphate Fertilizers from the Kingdom of Morocco and the Russian Federation: Postponement of Preliminary Determinations in the Countervailing Duty Investigations,* 85 FR 54535 (September 2, 2020).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Affirmative Determination of the Countervailing Duty Investigation of Phosphate Fertilizers from the Kingdom of Morocco,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

Scope of the Investigation

The products covered by this investigation are phosphate fertilizers from Morocco. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the *Preamble* to Commerce's regulations,[4] the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage, (*i.e.,* scope).[5] No interested party submitted timely comments on the scope of the investigation as it appeared in the *Initiation Notice*.[6] Therefore, no changes were made to the scope of the investigation.

Methodology

Commerce is conducting this investigation in accordance with section 701 of the Act. For each of the subsidy programs found countervailable, Commerce preliminarily determines that there is a subsidy, *i.e.,* a financial contribution by an ''authority'' that gives rise to a benefit to the recipient, and that the subsidy is specific.[7]

All-Others Rate

Sections 703(d) and 705(c)(5)(A) of the Act provide that in the preliminary determination, Commerce shall determine an estimated all-others rate for companies not individually examined. This rate shall be an amount equal to the weighted average of the estimated subsidy rates established for those companies individually examined, excluding any zero and *de minimis* rates and any rates based entirely under section 776 of the Act.

In this investigation, Commerce preliminarily calculated an individual estimated countervailable subsidy rate for OCP S.A., the only individually examined exporter/producer in this investigation. Because the only individually calculated rate is not zero, *de minimis,* or based entirely on facts otherwise available, the estimated weighted-average rate calculated for OCP S.A. is the preliminary rate assigned to all-other producers and exporters, pursuant to section 705(c)(5)(A)(i) of the Act.

Preliminary Determination

Commerce preliminarily determines that the following estimated countervailable subsidy rates exist:

Company	Subsidy rate (percent)
OCP S.A.[8]	23.46
All-Others	23.46

Suspension of Liquidation

In accordance with section 703(d)(1)(B) and (d)(2) of the Act, Commerce will direct 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 this notice in the **Federal Register**. Further, pursuant to 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the rates indicated above.

Disclosure

Commerce intends to disclose its calculations and analysis performed to interested parties in this preliminary determination within five days of its public announcement, or if there is no public announcement, within five days of the date of this notice in accordance with 19 CFR 351.224(b).

Verification

Commerce is currently unable to conduct on-site verification of the information relied upon in making its final determination in this investigation. Accordingly, we intend to take additional steps in lieu of on-site verification. Commerce will notify interested parties of any additional documentation or information required.

Public Comment

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance. Interested parties will be notified of the timeline for the submission of such case briefs and written comments at a later date. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline date for case briefs.[9] Commerce has modified certain of its requirements for serving documents containing business proprietary information until further notice.[10] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

International Trade Commission Notification

In accordance with section 703(f) of the Act, Commerce will notify the International Trade Commission (ITC) of its preliminary determination. If Commerce's final determination is affirmative, the ITC will make its final injury determination before the later of 120 days after the date of Commerce's preliminary determination or 45 days after its final determination.

Notification to Interested Parties

This determination is issued and published pursuant to sections 703(f) and 777(i) of the Act and 19 CFR 351.205(c).

Dated: November 23, 2020.

Joseph A. Laroski Jr.,

Deputy Assistant Secretary for Policy and Negotiations.

Appendix I

Scope of the Investigation

The merchandise covered by this investigation is phosphate fertilizers in all physical forms (*i.e.,* solid or liquid form), with or without coating or additives such as anti-caking agents. Phosphate fertilizers in solid form are covered whether granular,

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997) (*Preamble*).

[5] *See Initiation Notice.*

[6] Commerce's Letter, re: ''Countervailing Duty Investigation of Phosphate Fertilizers from Morocco: Rejection of Untimely Filed Scope Comments,'' dated August 24, 2020.

[7] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

[8] As discussed in the Preliminary Decision Memorandum, Commerce has found the following companies to be cross-owned with OCP S.A.: Jorf Fertilizers Company I, Jorf Fertilizers Company II, Jorf Fertilizers Company III, Jorf Fertilizers Company IV, Jorf Fertilizers Company V, and Maroc Phosphore.

[9] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements). *See also Temporary Rule* Modifying AD/CVD Service Requirements Due to COVID–19, 85 FR 17006, 17007 (March 26, 2020).

[10] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

prilled (*i.e.,* pelletized), or in other solid form (*e.g.,* powdered).

The covered merchandise includes phosphate fertilizers in the following forms: ammonium dihydrogenorthophosphate or monoammonium phosphate (MAP), chemical formula NH4H2PO4; diammonium hydrogenorthophosphate or diammonium phosphate (DAP), chemical formula (NH4)2HPO4; normal superphosphate (NSP), also known as ordinary superphosphate or single superphosphate, chemical formula Ca(H2PO4)2-CaSO4; concentrated superphosphate, also known as double, treble, or triple superphosphate (TSP), chemical formula Ca(H2PO4)2-H2O; and proprietary formulations of MAP, DAP, NSP, and TSP.

The covered merchandise also includes other fertilizer formulations incorporating phosphorous and non-phosphorous plant nutrient components, whether chemically-bonded, granulated (*e.g.,* when multiple components are incorporated into granules through, *e.g.,* a slurry process), or compounded (*e.g.,* when multiple components are compacted together under high pressure), including nitrogen, phosphate, sulfur (NPS) fertilizers, nitrogen, phosphorous, potassium (NPK) fertilizers, nitric phosphate (also known as nitrophosphate) fertilizers, ammoniated superphosphate fertilizers, and proprietary formulations thereof that may or may not include other nonphosphorous plant nutrient components. For phosphate fertilizers that contain non-phosphorous plant nutrient components, such as nitrogen, potassium, sulfur, zinc, or other non-phosphorous components, the entire article is covered, including the non-phosphorous content, provided that the phosphorous content (measured by available diphosphorous pentaoxide, chemical formula P2O5) is at least 5% by actual weight.

Phosphate fertilizers that are otherwise subject to this investigation are included when commingled (*i.e.,* mixed or blended) with phosphate fertilizers from sources not subject to this investigation. Phosphate fertilizers that are otherwise subject to this investigation are included when commingled with substances other than phosphate fertilizers subject to this investigation (*e.g.,* granules containing only non-phosphate fertilizers such as potash or urea). Only the subject component of such commingled products is covered by the scope of this investigation. The following products are specifically excluded from the scope of this investigation:

(1) ABC dry chemical powder preparations for fire extinguishers containing MAP or DAP in powdered form;

(2) industrial or technical grade MAP in white crystalline form with available P2O5 content of at least 60% by actual weight;

(3) industrial or technical grade diammonium phosphate in white crystalline form with available P2O5 content of at least 50% by actual weight;

(4) liquid ammonium polyphosphate fertilizers;

(5) dicalcium phosphate, chemical formula CaHPO4;

(6) monocalcium phosphate, chemical formula CaH4P2O8;

(7) trisodium phosphate, chemical formula Na3PO4;

(8) sodium tripolyphosphate, chemical formula Na5P3O10;

(9) prepared baking powders containing sodium bicarbonate and any form of phosphate;

(10) animal or vegetable fertilizers not containing phosphate fertilizers otherwise covered by the scope of this investigation;

(11) phosphoric acid, chemical formula H3PO4.

The Chemical Abstracts Service (CAS) numbers for covered phosphate fertilizers include, but are not limited to: 7722–76–1 (MAP); 7783–28–0 (DAP); and 65996–95–4 (TSP). The covered products may also be identified by Nitrogen-Phosphate- Potash composition, including but not limited to: NP 11–52–0 (MAP); NP 18–46–0 (DAP); and NP 0–46–0 (TSP).

The covered merchandise is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings 3103.11.0000; 3103.19.0000; 3105.20.0000; 3105.30.0000; 3105.40.0010; 3105.40.0050; 3105.51.0000; and 3105.59.0000. Phosphate fertilizers subject to this investigation may also enter under subheadings 3103.90.0010, 3105.10.0000, 3105.60.0000, 3105.90.0010, and 3105.90.0050. Although the HTSUS subheadings and CAS registry numbers are provided for convenience and customs purposes, the written description of the scope is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Injury Test
IV. Subsidies Valuation
V. Benchmarks and Interest Rates
VI. Analysis of Programs
VII. Recommendation

[FR Doc. 2020–26331 Filed 11–27–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–821–825]

Phosphate Fertilizers From the Russian Federation: Preliminary Affirmative Countervailing Duty Determination

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that countervailable subsidies are being provided to producers and exporters of phosphate fertilizers from the Russian Federation (Russia). The period of investigation is January 1, 2019, through December 31, 2019. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable November 30, 2020.

FOR FURTHER INFORMATION CONTACT: George Ayache or William Horn, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2623 or (202) 482–4868, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 703(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on July 23, 2020.[1] On September 2, 2020, Commerce postponed the preliminary determination of this investigation and the revised deadline is now November 23, 2020.[2] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics discussed in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and electronic versions of the Preliminary Decision Memorandum are identical in content.

Scope of the Investigation

The products covered by this investigation are phosphate fertilizers from Russia. For a complete description of the scope of this investigation, *see* Appendix I.

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[1] *See Phosphate Fertilizers from the Kingdom of Morocco and the Russian Federation: Initiation of Countervailing Duty Investigations,* 85 FR 44505 (July 23, 2020) (*Initiation Notice*).

[2] *See Phosphate Fertilizers from the Kingdom of Morocco and the Russian Federation: Postponement of Preliminary Determinations in the Countervailing Duty Investigations,* 85 FR 54535 (September 2, 2020).

[3] *See* Memorandum, ''Decision Memorandum for the Affirmative Preliminary Determination of the Countervailing Duty Investigation of Phosphate Fertilizers from the Russian Federation,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

Scope Comments

In accordance with the *Preamble* to Commerce's regulations,[4] the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage, (*i.e.,* scope).[5] No interested party commented on the scope of the investigation as it appeared in the *Initiation Notice.* Therefore, no changes were made to the scope of the investigation.

Methodology

Commerce is conducting this investigation in accordance with section 701 of the Act. For each of the subsidy programs found countervailable, Commerce preliminarily determines that there is a subsidy, *i.e.,* a financial contribution by an ''authority'' that gives rise to a benefit to the recipient, and that the subsidy is specific.[6]

All-Others Rate

Sections 703(d) and 705(c)(5)(A) of the Act provide that in the preliminary determination, Commerce shall determine an estimated all-others rate for companies not individually examined. This rate shall be an amount equal to the weighted average of the estimated subsidy rates established for those companies individually examined, excluding any zero and *de minimis* rates and any rates based entirely under section 776 of the Act.

In this investigation, Commerce calculated individual estimated countervailable subsidy rates for Industrial Group Phosphorite LLC and Joint Stock Company Apatit that are not zero, *de minimis,* or based entirely on facts otherwise available. Commerce calculated the all-others' rate using a weighted average of the individual estimated subsidy rates calculated for the examined respondents using each company's publicly-ranged values for the merchandise under consideration.[7]

Preliminary Determination

Commerce preliminarily determines that the following estimated countervailable subsidy rates exist:

Company	Subsidy rate (percent)
Industrial Group Phosphorite LLC [8]	72.50
Joint Stock Company Apatit [9]	20.94
All-Others	32.92

Suspension of Liquidation

In accordance with section 703(d)(1)(B) and (d)(2) of the Act, Commerce will direct 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 this notice in the **Federal Register**. Further, pursuant to 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the rates indicated above.

Disclosure

Commerce intends to disclose its calculations and analysis performed to interested parties in this preliminary determination within five days of its public announcement, or if there is no public announcement, within five days of the date of this notice in accordance with 19 CFR 351.224(b).

Verification

Commerce is currently unable to conduct on-site verification of the information relied upon in making its final determination in this investigation. Accordingly, we intend to take additional steps in lieu of on-site verification. Commerce will notify interested parties of any additional documentation or information required.

Public Comment

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance. Interested parties will be notified of the timeline for the submission of such case briefs and written comments at a later date. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline date for case briefs.[10] Commerce has modified certain of its requirements for serving documents containing business proprietary information until further notice.[11] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

International Trade Commission Notification

In accordance with section 703(f) of the Act, Commerce will notify the International Trade Commission (ITC) of its preliminary determination. If Commerce's final determination is affirmative, the ITC will make its final injury determination before the later of 120 days after the date of Commerce's preliminary determination or 45 days after its final determination.

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997) (*Preamble*).

[5] *See Initiation Notice.*

[6] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

[7] With two respondents under examination, Commerce normally calculates (A) a weighted-average of the estimated subsidy rates calculated for the examined respondents; (B) a simple average of the estimated subsidy rates calculated for the examined respondents; and (C) a weighted-average of the estimated subsidy rates calculated for the examined respondents using each company's publicly-ranged U.S. sale values for the merchandise under consideration. Commerce then compares (B) and (C) to (A) and selects the rate closest to (A) as the most appropriate rate for all other producers and exporters. *See, e.g., Cast Iron Soil Pipe Fittings from the People's Republic of China: Final Affirmative Countervailing Duty Determination,* 83 FR 32075 (July 11, 2018). As complete publicly ranged sales data were available, Commerce based the all-others rate on the publicly ranged sales data of the mandatory respondents. For a complete analysis of the data, please *see* the All-Others' Rate Calculation Memorandum.

[8] As discussed in the Preliminary Decision Memorandum, Commerce has found the following companies to be cross-owned with Industrial Group Phosphorite LLC: Mineral and Chemical Company EuroChem, JSC; NAK Azot, JSC; EuroChem Northwest, JSC; Joint Stock Company Kovdorksy GOK; EuroChem-Energo, LLC; EuroChem-Usolsky Potash Complex, LLC; EuroChem-BMU, LLC; JSC Nevinnomyssky Azot; and EuroChem Trading Rus, LLC.

[9] As discussed in the Preliminary Decision Memorandum, Commerce has found the following companies to be cross-owned with Joint Stock Company Apatit: PhosAgro PJSC; PhosAgro-Belgorod LLC; PhosAgro-Don LLC; PhosAgro-Kuban LLC; PhosAgro-Kursk LLC; PhosAgro-Lipestk LLC; PhosAgro-Orel LLC; PhosAgro- Stavropol LLC; PhosAgro-Volga LLC; PhosAgro-SeveroZapad LLC; PhosAgro- Tambov LLC; and Martynovsk AgrokhimSnab LLC.

[10] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements). *See also Temporary Rule* Modifying AD/CVD Service Requirements Due to COVID–19, 85 FR 17006, 17007 (March 26, 2020).

[11] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

Notification to Interested Parties

This determination is issued and published pursuant to sections 703(f) and 777(i) of the Act and 19 CFR 351.205(c).

Dated: November 23, 2020.

Joseph A. Laroski Jr.,

Deputy Assistant Secretary for Policy and Negotiations.

Appendix I

Scope of the Investigation

The merchandise covered by this investigation is phosphate fertilizers in all physical forms (*i.e.,* solid or liquid form), with or without coating or additives such as anti-caking agents. Phosphate fertilizers in solid form are covered whether granular, prilled (*i.e.,* pelletized), or in other solid form (*e.g.,* powdered).

The covered merchandise includes phosphate fertilizers in the following forms: ammonium dihydrogenorthophosphate or monoammonium phosphate (MAP), chemical formula NH4H2PO4; diammonium hydrogenorthophosphate or diammonium phosphate (DAP), chemical formula (NH4)2HPO4; normal superphosphate (NSP), also known as ordinary superphosphate or single superphosphate, chemical formula Ca(H2PO4)2ĊCaSO4; concentrated superphosphate, also known as double, treble, or triple superphosphate (TSP), chemical formula Ca(H2PO4)2ĊH2O; and proprietary formulations of MAP, DAP, NSP, and TSP.

The covered merchandise also includes other fertilizer formulations incorporating phosphorous and non-phosphorous plant nutrient components, whether chemically-bonded, granulated (*e.g.,* when multiple components are incorporated into granules through, *e.g.,* a slurry process), or compounded (*e.g.,* when multiple components are compacted together under high pressure), including nitrogen, phosphate, sulfur (NPS) fertilizers, nitrogen, phosphorous, potassium (NPK) fertilizers, nitric phosphate (also known as nitrophosphate) fertilizers, ammoniated superphosphate fertilizers, and proprietary formulations thereof that may or may not include other nonphosphorous plant nutrient components. For phosphate fertilizers that contain non-phosphorous plant nutrient components, such as nitrogen, potassium, sulfur, zinc, or other non-phosphorous components, the entire article is covered, including the non-phosphorous content, provided that the phosphorous content (measured by available diphosphorous pentaoxide, chemical formula P2O5) is at least 5% by actual weight.

Phosphate fertilizers that are otherwise subject to this investigation are included when commingled (*i.e.,* mixed or blended) with phosphate fertilizers from sources not subject to this investigation. Phosphate fertilizers that are otherwise subject to this investigation are included when commingled with substances other than phosphate fertilizers subject to this investigation (*e.g.,* granules containing only non-phosphate fertilizers such as potash or urea). Only the subject component of such commingled products is covered by the scope of this investigation. The following products are specifically excluded from the scope of this investigation:

(1) ABC dry chemical powder preparations for fire extinguishers containing MAP or DAP in powdered form;

(2) industrial or technical grade MAP in white crystalline form with available P2O5 content of at least 60% by actual weight;

(3) industrial or technical grade diammonium phosphate in white crystalline form with available P2O5 content of at least 50% by actual weight;

(4) liquid ammonium polyphosphate fertilizers;

(5) dicalcium phosphate, chemical formula CaHPO4;

(6) monocalcium phosphate, chemical formula CaH4P2O8;

(7) trisodium phosphate, chemical formula Na3PO4;

(8) sodium tripolyphosphate, chemical formula Na5P3O10;

(9) prepared baking powders containing sodium bicarbonate and any form of phosphate;

(10) animal or vegetable fertilizers not containing phosphate fertilizers otherwise covered by the scope of this investigation;

(11) phosphoric acid, chemical formula H3PO4.

The Chemical Abstracts Service (CAS) numbers for covered phosphate fertilizers include, but are not limited to: 7722–76–1 (MAP); 7783–28–0 (DAP); and 65996–95–4 (TSP). The covered products may also be identified by Nitrogen-Phosphate-Potash composition, including but not limited to: NP 11–52–0 (MAP); NP 18–46–0 (DAP); and NP 0–46–0 (TSP).

The covered merchandise is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings 3103.11.0000; 3103.19.0000; 3105.20.0000; 3105.30.0000; 3105.40.0010; 3105.40.0050; 3105.51.0000; and 3105.59.0000. Phosphate fertilizers subject to this investigation may also enter under subheadings 3103.90.0010, 3105.10.0000, 3105.60.0000, 3105.90.0010, and 3105.90.0050. Although the HTSUS subheadings and CAS registry numbers are provided for convenience and customs purposes, the written description of the scope is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Injury Test
IV. Subsidies Valuation
V. Benchmarks and Interest Rates
VI. Analysis of Programs
VII. Recommendation

[FR Doc. 2020–26332 Filed 11–27–20; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–601]

Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Rescission, in Part, of Antidumping Duty Administrative Review; 2019—2020

AGENCY: Enforcement and Compliance, International Trade Administration, United States Department of Commerce.

SUMMARY: On August 6, 2020, the Department of Commerce (Commerce) initiated an administrative review of the antidumping duty order on tapered roller bearings and parts thereof, finished and unfinished (TRBs) from the People's Republic of China (China) for 10 companies. Based on timely withdrawal of requests for review, we are now rescinding this administrative review with respect to four of these companies.

DATES: Applicable November 30, 2020.

FOR FURTHER INFORMATION CONTACT: Alex Wood or Whitley Herndon, 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) 482–6274, respectively.

Background

In June 2020, Commerce received multiple timely requests to conduct an administrative review of the antidumping duty order on TRBs from China. Based upon these requests, on August 6, 2020, in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act), Commerce published a notice of initiation of an administrative review covering the period June 1, 2019, through May 31, 2020, with respect to 10 companies.[1] In August and September, 2020, the following companies withdrew their requests for an administrative review: Changshan Peer Bearing Co., Ltd. (CPZ/SKF); GGB Bearing Technology (Suzhou) Co., Ltd. (GGB); Ningbo Xinglun Bearings Import & Export Co., Ltd. (Xinglun Bearings); and Shanghai General Bearing Co., Ltd (SGBC).[2]

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 85 FR 47731 (August 6, 2020) (*Initiation Notice*). *See also Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 85 FR 54983, 54990 (September 3, 2020), correcting the *Initiation Notice.*

[2] *See* CPZ/SKF's Letter, ''Tapered Roller Bearing from the People's Republic of China: Withdrawal of

Partial Rescission

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if a party who requested the review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. CPZ/SKF, GGB, SGBC, and Xinglun Bearings timely withdrew their requests for an administrative review. No other party requested a review of these four companies. Accordingly, we are rescinding this review, in part, with respect to these companies, pursuant to 19 CFR 351.213(d)(1).

The instant review will continue with respect to the following companies: BRTEC Wheel Hub Bearing Co., Ltd.; C&U Group Shanghai Bearing Co., Ltd.; Hebei Xintai Bearing Forging Co., Ltd.; Shanghai Tainai Bearing Co., Ltd.; Xinchang Newsun Xintianlong Precision Bearing Manufacturing Co., Ltd.; and Zhejiang Jingli Bearing Technology Co., Ltd.

Assessment

Commerce will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. For the companies for which this review is rescinded, antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). Commerce intends to issue appropriate assessment instructions to CBP 15 days after publication of this notice in the **Federal Register**.

Notification to Importers

This notice serves as a reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification Regarding Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. 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.

This notice is issued and published in accordance with sections 751 and 777(i)(1) of the Act, and 19 CFR 351.213(d)(4).

Dated: November 24, 2020.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2020–26334 Filed 11–27–20; 8:45 am]

BILLING CODE 3510–DS–P

Request for Administrative Review,'' dated September 4, 2020; GGB's Letter, ''Withdrawal of Request for the Administrative Review of the Antidumping Duty Order on Tapered Roller Bearings from the People's Republic of China, A–570–601 (POR: 6/1/19–5/31/20),'' dated August 18, 2020; Ningbo Xinglun's Letter, ''Tapered Roller Bearing from the People's Republic of China: Withdrawal of Request for Administrative Review,'' dated September 9, 2020; and SGBC's Letter, ''Tapered Roller Bearing from the People's Republic of China: Withdrawal of Request for Administrative Review,'' dated September 4, 2020.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA623]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Port of Kalama Expansion Project on the Lower Columbia River

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; issuance of Renewal incidental harassment authorization.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA), as amended, notification is hereby given that NMFS has issued a Renewal incidental harassment authorization (IHA) to the Port of Kalama (POK) to incidentally harass marine mammals incidental to construction activities associated with an expansion project at the POK on the Lower Columbia River, Washington.

DATES: This Renewal IHA is valid from November 23, 2020 through October 18, 2021.

FOR FURTHER INFORMATION CONTACT: Amy Fowler, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the original application, Renewal request, and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The Marine Mammal Protection Act (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 is 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 such species or stocks for taking for certain subsistence uses (referred to here as ''mitigation measures''). Monitoring and reporting of such takings are also required. The meaning of key terms such as ''take,'' ''harassment,'' and ''negligible impact'' can be found in section 3 of the MMPA (16 U.S.C. 1362) and the agency's regulations at 50 CFR 216.103.

NMFS' regulations implementing the MMPA at 50 CFR 216.107(e) indicate that IHAs may be renewed for additional periods of time not to exceed one year for each reauthorization. In the notice of proposed IHA for the initial authorization, NMFS described the circumstances under which we would consider issuing a Renewal for this activity, and requested public comment on a potential Renewal under those circumstances. Specifically, on a case-

by-case basis, NMFS may issue a one-time one-year Renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical or nearly identical, or nearly identical, activities as described in the Description of the Specified Activities and Anticipated Impacts section of this notice is planned or (2) the activities as described in the Description of the Specified Activities and Anticipated Impacts section of this notice would not be completed by the time the IHA expires and a Renewal would allow for completion of the activities beyond that described in the Dates and Duration section of the notice of proposed IHA for the initial IHA, provided all of the following conditions are met:

- A request for renewal is received no later than 60 days prior to the needed Renewal IHA effective date (recognizing that the Renewal IHA expiration date cannot extend beyond one year from expiration of the initial IHA);
- The request for renewal must include the following:

(1) An explanation that the activities to be conducted under the requested Renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.,* reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take); and

(2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

Upon review of the request for Renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

An additional public comment period of 15 days (for a total of 45 days), with direct notice by email, phone, or postal service to commenters on the initial IHA, is provided to allow for any additional comments on the proposed Renewal. A description of the Renewal process may be found on our website at: *www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals.*

History of Request

On September 28, 2015, we received a request from the POK for authorization of the taking, by Level B harassment only, of marine mammals incidental to the construction associated with the Port of Kalama Expansion Project, which involved construction of the Kalama Marine Manufacturing and Export Facility including a new marine terminal for the export of methanol, and installation of engineered log jams, restoration of riparian wetlands, and the removal of existing wood piles in a side channel as mitigation activities. The specified activity is expected to result in the take of three species of marine mammals (harbor seals (*Phoca vitulina*), California sea lions (*Zalophus californianus*), and Steller sea lions (*Eumetopias jubatus*)). A final version of the application, which we deemed adequate and complete, was submitted on December 10, 2015. We published a notice of a proposed IHA and request for comments on March 21, 2016 (81 FR 15064). After the public comment period and before we issued the final IHA, POK requested that we issue the IHA for 2017 instead of the 2016 work season. We subsequently published the final notice of our issuance of the IHA on December 12, 2016 (81 FR 89436), effective from September 1, 2017-August 31, 2018. In-water work associated with the project was expected to be completed within the one-year timeframe of the IHA.

On June 21, 2018, POK informed NMFS that work relevant to the specified activity considered in the MMPA analysis for the 2017–2018 IHA was postponed and would not be completed. POK requested that the IHA be issued to be effective for the period from 2018—2019. In support of that request, POK submitted an application addendum affirming that no change in the proposed activities is anticipated and that no new information regarding the abundance of marine mammals is available that would change the previous analysis and findings. A notice for the proposed incidental take authorization was published on July 25, 2018 (83 FR 35220), and a corrected notice was published on August 14, 2018 (83 FR 40257). On November 13, 2018, NMFS published final notice of our issuance of an IHA authorizing take of marine mammals incidental to the Port of Kalama Expansion Project (83 FR 56304). The effective dates of that IHA were October 18, 2018 through October 18, 2019.

On August 21, 2019, POK informed NMFS that the project had been delayed by one year. None of the work identified in the IHA (*i.e.* pile driving and removal) had occurred and no take of any marine mammals had occurred since the effective date of the initial IHA. POK submitted a formal request for an identical IHA, but with modified effective dates, in order to conduct the construction work that was analyzed and authorized through the previously issued IHA. On October 17, 2019, NMFS issued an IHA to POK to take marine mammals incidental to construction activities at the Port of Kalama (84 FR 57013; October 24, 2019), effective from October 19, 2019 through October 18, 2020 (hereafter referred to as the initial IHA).

On August 27, 2020, NMFS received an application for the Renewal of that initial IHA. As described in the request for the Renewal IHA, the activities for which incidental take is requested are identical to those covered in the initial authorization. In order to consider an IHA Renewal, NMFS requires the applicant provide a preliminary monitoring report which confirms that the applicant has implemented the required mitigation and monitoring, and which also shows that no impacts of a scale or nature not previously analyzed or authorized have occurred as a result of the activities conducted. As no construction activities have been conducted, POK has no monitoring results to report. NMFS has determined that POK's proposed activities (including mitigation, monitoring, and reporting), estimated incidental take, and anticipated impacts on the affected stocks are the same as those analyzed and authorized through the initial IHA.

Description of the Specified Activities and Anticipated Impacts

POK's planned activities include construction of a marine terminal and dock/pier for the export of methanol, and associated compensatory mitigation activities for the purposes of offsetting habitat effects from the action. Specifically, the location, timing, and nature of the activities, including the types of equipment planned for use, are identical to those described in the original IHA.

Similarly, the anticipated impacts are identical to those described in the initial IHA. NMFS anticipates the take of three species of marine mammals (Pacific harbor seals, California sea lions, and Steller sea lions) by Level A and Level B harassment incidental to underwater noise resulting from construction associated with the proposed activities.

The following documents are referenced in this notice and include important supporting information:

- Initial reissued IHA (84 FR 57013; October 24, 2019);

- Initial final IHA (83 FR 56304; November 13, 2018);
- Initial proposed IHA (83 FR 40257; August 14, 2018);
- 2017 final IHA (81 FR 89436; December 12, 2016);
- 2017 proposed IHA (81 FR 15064; March 21, 2016); and
- 2017 and 2018 IHA applications, references cited, and previous public comments received (available at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities*).

Detailed Description of the Activity

POK is planning to construct a marine terminal and dock/pier for the export of methanol, and associated compensatory mitigation activities for the purposes of offsetting habitat effects from the action. The marine terminal will be approximately 45,000 square feet in size, supported by 320 concrete piles (24-inch precast octagonal piles to be driven by impact hammer) and 16 steel piles (12 x 12-inch and 4 x 18-inch anticipated to be driven by vibratory hammer, and impact hammering will only be done to drive/proof if necessary). The compensatory mitigation includes installation of 8 engineered log jams, which will be anchored by untreated wooden piles driven by impact hammer at low tides (not in water). The compensatory mitigation also includes removal of approximately 320 untreated wooden piles from an abandoned U.S. Army Corps of Engineers (USACE) dike in a nearby backwater area. The piles will be removed either by direct pull or vibratory extraction. Finally, the compensatory mitigation includes wetland restoration and enhancement by removal of invasive species and replacement with native wetland species.

A detailed description of the construction activities for which take is authorized may be found in the **Federal Register** notice of proposed IHA for the 2017 authorization (81 FR 15064; March 21, 2016). As stated above, location, timing (*e.g.,* seasonality), and nature of the pile driving operations, including the type and size of piles and the methods of pile driving, are identical to those analyzed in the initial IHA. The IHA Renewal is effective from the date of issuance (November 23, 2020) to October 18, 2021 (*i.e.,* one year after the expiration of the initial IHA).

Description of Marine Mammals

A description of the marine mammals in the area of the activities for which take is authorized here, including information on abundance, status, distribution, and hearing, may be found in the **Federal Register** notices for the proposed IHA for the initial authorization (83 FR 40257; August 14, 2018) and 2017 IHA (81 FR 15064; March 21, 2016). NMFS has reviewed recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature. The 2019 Stock Assessment Report notes the estimated abundance of the Eastern U.S. stock of Steller sea lions has decreased slightly. However, NMFS has determined that neither this nor any other new information affects which species or stocks have the potential to be affected or the pertinent information in the Description of the Marine Mammals in the Area of Specified Activities contained in the supporting documents for the initial IHA.

Potential Effects on Marine Mammals and Their Habitat

A description of the potential effects of the specified activity on marine mammals and their habitat for the activities for which take is authorized may be found in the **Federal Register** notices for the proposed initial IHA (83 FR 40257; August 14, 2018) and 2017 IHA (81 FR 15064; March 21, 2016). NMFS has reviewed recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature, and determined that neither this nor any other new information affects our initial analysis of impacts on marine mammals and their habitat.

Estimated Take

A detailed description of the methods and inputs used to estimate take for the specified activity are found in the **Federal Register** notices for the proposed initial IHA (83 FR 40257; August 14, 2018) and 2017 IHA (81 FR 15064; March 21, 2016). Specifically, the source levels, days of operation, and marine mammal occurrence data applicable to this authorization remain unchanged from the previously issued IHA. Similarly, the stocks taken, methods of take, and types of take remain unchanged from the previously issued IHA, as do the number of takes, which are indicated below in Table 1. The estimated abundance of Steller sea lions has decreased from that described in the initial IHA (Muto *et al.,* 2020), therefore the percent of stock proposed to be taken has increased.

TABLE 1—AUTHORIZED TAKE AND PROPORTION OF POPULATION POTENTIALLY AFFECTED

	Authorized take by level B harassment	Authorized take by level A harassment	Stock	Abundance of stock	Percentage of stock potentially affected
Harbor seal	1,530	10	Oregon/Washington Coast	24,732	6.2
California sea lion	372	0	U.S.	153,337	0.2
Steller sea lion	372	0	Eastern U.S.	43,201	0.86

Description of Mitigation, Monitoring and Reporting Measures

The mitigation, monitoring, and reporting measures included as requirements in this authorization are identical to those included in the **Federal Register** notice announcing the issuance of the initial IHA (83 FR 56304; November 13, 2018), and the discussion of the least practicable adverse impact included in that document remains accurate. The following measures are included in this Renewal:

Mitigation Requirements

In summary, mitigation includes implementation of shut down procedures if any marine mammal approaches or enters the Level A harassment zone for pile driving (26 meters (m) (85 feet (ft)) for vibratory pile driving of steel piles; 63 m (207 ft) for impact driving of concrete piles; and 252 m (828 ft) for impact driving of steel piles). For in-water heavy machinery work other than pile driving (*e.g.* standard barges, barge-mounted cranes, excavators, *etc.*), if a marine mammal comes within 10 m, operations must cease and vessels must reduce speed to the minimum level required to maintain steerage and safe working conditions. One trained observer must monitor to implement shutdowns and collect

information at each active pile driving location (whether vibratory or impact driving of steel or concrete piles).

Pile driving activities must only be conducted during daylight hours. If the shutdown zone is obscured by fog or poor lighting conditions, pile driving must not be initiated until the entire shutdown zone is visible. Work that has been initiated appropriately in conditions of good visibility may continue during poor visibility. The shutdown zone must be monitored for 30 minutes prior to initiating the start of pile driving, during the activity, and for 30 minutes after activities have ceased. If pinnipeds are present within the shutdown zone prior to pile driving, the start must be delayed until the animals leave the shutdown zone of their own volition, or until 15 minutes elapse without re-sighting the animal(s).

Soft start procedures must be implemented at the start of each day's impact pile driving and at any time following cessation of impact driving for a period of thirty minutes or longer. If steel piles require impact installation or proofing, a bubble curtain must be used for sound attenuation. If water velocity is 1.6 ft per second (1.1 miles per hour (mph)) or less for the entire installation period, the pile being driven must be surrounded by a confined or unconfined bubble curtain that will distribute small air bubbles around 100 percent of the pile perimeter for the full depth of the water column. If water velocity is greater than 1.6 ft per second (1.1 mph) at any point during installation, the pile being driven must be surrounded by a confined bubble curtain (*e.g.,* a bubble ring surrounded by a fabric or non-metallic sleeve) that will distribute air bubbles around 100 percent of the pile perimeter for the full depth of the water column.

Monitoring Requirements

At least three NMFS-approved observers must be on duty during impact driving at all times. As discussed above, one observer must monitor and implement shutdowns and collect information at each pile driving location at all times. In addition, two shore-based observers are required (one upstream of the project and another downstream of the project), whose primary responsibility shall be to record pinnipeds in the Level B harassment zone and to alert the barge-based observer to the presence of pinnipeds, thus creating a redundant alert system for prevention of injurious interaction as well as increasing the probability of detecting pinnipeds in the disturbance zone.

At least three observers must be on duty during vibratory pile driving activity for the first two days, and thereafter on every third day to allow for estimation of Level B harassment takes. Similar to requirements for impact driving, the first observer must be positioned on a work platform or barge where the entirety of the shutdown zone can be monitored. Shore based observers must be positioned to observe the disturbance zone from the bank of the river. Observers must immediately inform other observers and construction personnel of all marine mammal sightings.

Reporting Requirements

POK must provide NMFS with a draft monitoring report within 90 calendar days of the expiration of the IHA, or within conclusion of the construction work, whichever comes first. If comments are received from NMFS on the draft report within 30 days, a final report must be submitted to NMFS within 30 days thereafter. If no comments are received from NMFS within 30 days after receipt of the draft report, the draft report will be considered final. The monitoring report must include the following elements:

- Dates and times (begin and end) of all marine mammal monitoring;
- Construction activities occurring during each daily observation period, including how many and what type of piles were driven or removed and by what method (*i.e.,* impact or vibratory);
- Weather parameters and water conditions during each monitoring period (*e.g.,* wind speed, percent cover, visibility, sea state);
- Age and sex class, if possible, of all marine mammals observed;
- PSO locations during marine mammal monitoring;
- Distances and bearings of each marine mammal observed to the pile being driven or removed for each sighting (if pile driving or removal was occurring at time of sighting);
- Description of any marine mammal behavior patterns during observation, including direction of travel and estimated time spent within the Level A and Level B harassment zones while the source was active;
- Number of individuals of each species detected within the monitoring zone(s), and estimates of the number of marine mammals taken, by species (a correction factor may be applied to total take numbers, as appropriate);
- Detailed information about any implementation of mitigation triggered (*e.g.,* shutdowns and delays), a description of specific actions that ensued, and resulting behavior of the animal, if any;
- Description of attempts to distinguish between the number of individual animals taken and the number of incidences of take, such as ability to track groups or individuals; and
- An extrapolation of the estimated takes by Level B harassment based on the number of observed exposures within the Level B harassment zone, the portion of the Level B harassment zone that was not visible during monitoring, and amount of time monitors were not present during vibratory installation or removal.

POK must also submit all PSO datasheets and/or raw sighting data (in a separate file from the final report).

In the unanticipated event that the construction activities clearly cause the take of a marine mammal in a manner prohibited by this Authorization, such as an injury, serious injury, or mortality (Level A take), POK must immediately cease all operations and immediately report the incident to the NMFS Office of Protected Resources and the NMFS West Coast Regional Stranding Coordinator. The report must include the following information:

1. Time, date, and location (latitude and longitude) of the incident;
2. Description of the incident;
3. Status of all sound sources used in the 24 hours preceding the incident;
4. Environmental conditions (wind speed, wind direction, sea state, cloud cover, visibility, water depth);
5. Description of the marine mammal observations in the 24 hours preceding the incident;
6. Species identification or description of the animal(s) involved;
7. The fate of the animal(s); and
8. Photographs or video footage of the animal(s), if equipment is available.

Activities must not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with POK to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. POK may not resume their activities until notified by NMFS via letter, email, or telephone.

In the event that POK discovers an injured or dead marine mammal, and the marine mammal observer determines that the cause of injury or death is unknown and the death is relatively recent (less than a moderate state of decomposition), POK must immediately report the incident to the NMFS Office of Protected Resources, and the NMFS West Coast Regional Stranding Coordinator. The report must include the same information identified

above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with POK to determine whether modifications in the activities are appropriate.

In the event that POK discovers an injured or dead marine mammal, and the marine mammal observer determines that the injury or death is not associated with or related to the activities authorized in the IHA (previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), POK must report the incident to the NMFS Office of Protected Resources, and the NMFS West Coast Regional Stranding Coordinator within 24 hours of the discovery. POK must provide photographs or video footage (if available) or other documentation of the stranded animal(s) to NMFS Office of Protected Resources and the West Coast Regional Stranding Coordinator. POK may continue its operations under such a case.

Public Comments

A notice of NMFS' proposal to issue a Renewal IHA to POK was published in the **Federal Register** on October 21, 2020 (85 FR 66957). That notice either described, or referenced descriptions of, POK's activity, the marine mammal species that may be affected by the activity, the anticipated effects on marine mammals and their habitat, proposed amount and manner of take, and proposed mitigation, monitoring and reporting measures. NMFS received a comment letter from the Marine Mammal Commission (Commission). The comments and our responses are summarized below.

Comment 1: The Commission reiterated a comment made on the initial 2018 IHA regarding the estimation of the Level A harassment zones and recommended NMFS revise the Level A harassment zones for harbor seals during impact driving of concrete piles and vibratory driving of steel piles based on eight piles driven per day, because harbor seals may be present in the project area for longer periods than California or Steller sea lions and therefore accumulate more sound energy.

Response: NMFS addressed this comment in the **Federal Register** notice announcing the issuance of the initial 2018 IHA (83 FR 56304; November 13, 2018). NMFS agrees that it is possible that harbor seals may be present in the general project area for longer periods than California or Steller sea lions. However, NMFS feels that it is unreasonable to assume that seals would remain within the area for a full eight hours, as they may be transiting between two sites (one approximately one mile upstream and one approximately 3.5 miles downstream) where they are known to forage and/or haul out. In addition, it is not reasonable to assume that pile driving activities would occur for eight consecutive hours daily, and is more likely that these activities would occur for an hour to two hours at a time, and would be broken up by time needed to set up new piles. However, NMFS has determined it is reasonable to assume that seals would be present for double the amount of time as sea lions (assuming a two-hour duration versus a one-hour duration due to the fact that they may be transiting the area twice if they move from one site to the other and return again) results in a Level A harassment threshold distance of 63 m for impact driving of concrete piles and 26 m for vibratory driving of steel piles.

As noted in the notice for the proposed initial IHA, Level A harassment takes proposed for authorization did not rely on calculated takes, and were qualitatively proposed for authorization out of an abundance of caution in the event that some seals may be undetected before entering the Level A harassment zone. Therefore, the amount of Level A harassment takes authorized did not change as a result of reconsidering the Level A harassment zone and only resulted in a revision of the Level A harassment monitoring area. The required shutdown distances to avoid Level A harassment take are 63 m and 26 m, which correspond to a two-hour duration for impact driving of concrete piles and vibratory driving of steel piles, respectively.

Comment 2: The Commission also reiterated their recommendation that NMFS investigate the appropriate timeframes over which sound exposure levels should be accumulated when estimating the extents of the Level A harassment zones. In the absence of relevant recovery time data for marine mammals, the Commission believes that animat modeling that considers various operational and animal scenarios should be used to inform the appropriate accumulation time and could be incorporated into NMFS's acoustic guidance user spreadsheet that currently estimates the Level A harassment zones. The Commission recommended NMFS prioritize this issue in the near future and consider incorporating animat modeling into the user spreadsheet.

Response: NMFS appreciates the Commission's recommendations. As noted by the Commission, NMFS has formed an internal committee to address this issue and has consulted with external acousticians and modelers. NMFS continues to work on improving the user spreadsheet and looks forward to sharing our progress in the future.

Comment 3: The Commission noted that the draft IHA Renewal did not specify what specific information POK would be required to include in its monitoring report and recommended NMFS revise the authorization such that the reporting requirements are consistent with recently issued IHAs.

Response: NMFS agrees with the Commission's recommendations and has revised the authorization to specify the information that must be included in POK's monitoring report (see *Description of Mitigation, Monitoring and Reporting Measures* section of this notice).

Comment 4: The Commission recommended NMFS reinforce the need for POK to keep a running tally of the total takes by Level B harassment based on observed and extrapolated takes to ensure that POK does not exceed the authorized number of takes.

Response: The IHA indicates the number of takes authorized for each species. We agree that POK must ensure they do not exceed authorized takes, and further note that they are required to report ''an extrapolation of the estimated takes by Level B harassment based on the number of observed exposures within the Level B harassment zone, the portion of the Level B harassment zone that was not visible during monitoring, and amount of time monitors were not present during vibratory installation or removal.''

Comment 5: The Commission recommended NMFS refrain from issuing a Renewal for any authorization unless it is consistent with the procedural requirements specified in section 101(a)(5)(D)(iii) of the MMPA.

Response: In prior responses to comments about IHA Renewals (*e.g.,* 84 FR 52464; October 02, 2019 and 85 FR 53342; August 28, 2020), NMFS has explained how the Renewal process, as implemented, is consistent with the statutory requirements contained in section 101(a)(5)(D) of the MMPA, provides additional efficiencies beyond the use of abbreviated notices, and, further, promotes NMFS' goals of improving conservation of marine mammals and increasing efficiency in the MMPA compliance process. Therefore, we intend to continue implementing the Renewal process.

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 review our proposed action (*i.e.,* the issuance of an incidental harassment authorization) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 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 determined that the issuance of the IHA Renewal qualifies to be categorically excluded from further NEPA review.

Determinations

The construction activities planned by POK are identical to those analyzed in the initial IHA, as are the planned number of days of activity, the method of taking, and the effects of the action. The potential effects of POK's activities are limited to Level A and Level B harassment in the form of auditory injury and behavioral disturbance. In analyzing the effects of the activities in the initial IHA, NMSF determined that POK's activities would have a negligible impact on the affected species or stocks and that the authorized take numbers of each species or stock were small relative to the relevant stocks (*e.g.,* less than seven percent of all stocks). The mitigation measures and monitoring and reporting requirements as described above are identical to the initial IHA.

NMFS has concluded that there is no new information suggesting that our analysis or findings should change from those reached for the initial IHA. This includes consideration of the estimated abundance of the Eastern U.S. stock of Steller sea lions decreasing slightly. Based on the information and analysis contained here and in the referenced documents, NMFS has determined the following: (1) the required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; (4) POK's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action, and; (5) appropriate monitoring and reporting requirements are included.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species. No incidental take of ESA-listed marine mammal species is expected to result from this activity, and none would be authorized. Therefore, NMFS has determined that consultation under section 7 of the ESA is not required for this action.

Renewal

NMFS has issued a Renewal IHA to POK for the take of marine mammals incidental to conducting in-water construction activities associated with the POK Expansion Project on the Lower Columbia River, Washington, from November 23, 2020 through October 18, 2021.

Dated: November 24, 2020.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2020–26344 Filed 11–27–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA686]

New England Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Herring Committee via webinar to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This webinar will be held on Friday, December 11, 2020 at 9 a.m. Webinar registration URL information: *https://attendee.gotowebinar.com/register/7246047020300504335.*

ADDRESSES: *Council address:* New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Committee will meet to review and discuss 2021 work priorities for the Atlantic Herring Fishery Management Plan including: (1) A framework action that considers spawning closures on Georges Bank (GB); (2) development of a formal rebuilding plan for Atlantic herring; (3) review and potentially adjust accountability measures (AMs) in the herring plan; and (4) coordinate with the Mid-Atlantic Fishery Management Council (MAFMC) and Atlantic States Marine Fisheries Commission (ASMFC) on various herring management issues (*i.e.* river herring and shad (RH/S)). Other business will be discussed, as necessary.

Although non-emergency issues not contained on the agenda may come before this Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 24, 2020.

Diane M. DeJames-Daly,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2020–26348 Filed 11–27–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA622]

Atlantic Highly Migratory Species; Atlantic Shark Management Measures; 2021 Research Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of intent; request for applications.

SUMMARY: NMFS announces its request for applications for the 2021 shark research fishery from commercial shark fishermen with directed or incidental shark limited access permits. The shark research fishery allows for the collection of fishery-dependent and biological data for future stock assessments and to meet the research objectives of the Agency. The only commercial vessels authorized to land sandbar sharks are those participating in the shark research fishery. Shark research fishery permittees may also land other large coastal sharks (LCS), small coastal sharks (SCS), smoothhound, and pelagic sharks. Commercial shark fishermen who are interested in participating in the shark research fishery need to submit a completed Shark Research Fishery Permit Application to be considered.

DATES: Shark Research Fishery Applications must be received no later than December 30, 2020.

ADDRESSES: Please submit completed applications via email to *NMFS.Research.Fishery@noaa.gov.*

For copies of the Shark Research Fishery Permit Application, please email a request to *NMFS.Research.Fishery@noaa.gov.* Copies of the Shark Research Fishery Application are also available at the HMS website at *https://www.fisheries.noaa.gov/atlantic-highly-migratory-species/atlantic-highly-migratory-species-exempted-fishing-permits.* Additionally, please be advised that your application may be released under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Karyl Brewster-Geisz, Lauren Latchford at (301) 427–8503 (phone) or Delisse Ortiz at (240) 681–9037 or email *NMFS.research.fishery@noaa.gov.*

SUPPLEMENTARY INFORMATION: The Atlantic shark fisheries are managed under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The 2006 Consolidated HMS Fishery Management Plan (FMP), as amended, is implemented by regulations at 50 CFR part 635.

The shark research fishery was established, in part, to maintain time series data for stock assessments and to meet NMFS' research objectives. Since the shark research fishery was established in 2008, the research fishery has allowed for: The collection of fishery-dependent data for current and future stock assessments; the operation of cooperative research to meet NMFS' ongoing research objectives; the collection of updated life-history information used in the sandbar shark (and other species) stock assessment; the collection of data on habitat preferences that might help reduce fishery interactions through bycatch mitigation; evaluation of the utility of the mid-Atlantic closed area on the recovery of dusky sharks and collection of hook-timer and pop-up satellite archival tag information to determine at-vessel and post-release mortality of dusky sharks; and collection of sharks to determine the weight conversion factor from dressed weight to whole weight.

The shark research fishery allows selected commercial fishermen the opportunity to earn revenue from selling additional sharks, including sandbar sharks. Only the commercial shark fishermen selected to participate in the shark research fishery are authorized to land sandbar sharks subject to the sandbar quota available each year. The base quota is 90.7 metric tons (mt) dressed weight (dw) per year, although this number may be reduced in the event of overharvests. The selected shark research fishery permittees will also be allowed to land other LCS, SCS, smoothhound, and pelagic sharks consistent with any restrictions established on their shark research fishery permit. Generally, the shark research fishery permits are valid only for the calendar year for which they are issued.

The specific 2021 trip limits and number of trips per month will depend on the availability of funding, number of selected vessels, the availability of observers, the available quota, and the objectives of the research fishery, and will be included in the permit terms at time of issuance. The number of participants in the research fishery changes each year. In 2020, five fishermen were initially chosen to participate. Due to various issues, midway through 2020, three of the initial five fishermen were replaced with three other qualified fishermen. From 2008 through 2020, there has been an average of seven participants each year with the range from five to eleven. The number of trips allowed per month can change, but in the last few years this number has remained constant with partipating vessels on average been able to take one trip per month. The number of trips taken per month are limited by the scientific and research needs of the Agency and the number of NMFS-approved observers available. Participants may also be limited on the amount of gear they can deploy on a given set (*e.g.,* number of hooks and sets, soak times, length of longline). These limits may change both between years and during the year depending on research goals and bycatch limits.

In the 2020 fishing season, NMFS split 90 percent of the sandbar and LCS research fishery quotas equally among selected participants, with each vessel allocated 16.3 mt dw (35,992 lb dw) of sandbar shark research fishery quota and 9.0 mt dw (19,841 lb dw) of other LCS research fishery quota. The remaining quota was held in reserve to ensure the overall sandbar and LCS research fishery quotas were not exceeded. NMFS also established a regional dusky bycatch limit, which was implemented in 2013, specific to this research fishery, where once three or more dusky sharks were brought to the vessel dead in any of four regions across the Gulf of Mexico and Atlantic through the entire year, any shark research fishery permit holder in that region was not able to soak their gear for longer than 3 hours. If, after the change in soak time, there were two additional dusky shark interactions (alive or dead) observed, shark research fishery permit holders were not able to make a trip in that region for the remainder of the year, unless otherwise permitted by NMFS. There were slightly different measures established for shark research fishery participants in the mid-Atlantic shark closed area in order to allow NMFS observers to place satellite archival tags on dusky sharks and collect other scientific information on dusky sharks while also minimizing any dusky shark mortality.

Participants were also required to land any dead sharks, unless they were a prohibited species, in which case they were required to discard them. All prohibited species must be released, unless the observer requests that the shark be retained for research purposes. If the regional non-blacknose SCS, blacknose, and/or pelagic shark commercial management group quotas were closed, then any shark research fishery permit holder fishing in the region was required to discard all of the species from the closed management groups regardless of condition. Any

sharks, except prohibited species or species from closed commercial management groups, caught and brought to the vessel alive could be released alive or landed. The vessels participating in the shark research fishery averaged four trips in 2020, but the timing, and number of the trips varied based on seasonal availability of certain species and individual allocated quotas.

To participate in the shark research fishery, commercial shark fishermen need to submit a completed Shark Research Fishery Application by the deadline noted above (see **DATES**) showing that the vessel and owner(s) meet the specific criteria outlined below.

Research Objectives

Each year, the research objectives are developed by a shark board, which is comprised of representatives within NMFS, including representatives from the Southeast Fisheries Science Center (SEFSC) Panama City Laboratory, the Southeast Regional Office Protected Resources Division, and the HMS Management Division. The research objectives for 2021 are based on various documents, including the 2020 Biological Opinion of the Atlantic Shark Fisheries Except Pelagic Longline, as well as recent stock assessments for the U.S. South Atlantic blacknose, U.S Gulf of Mexico blacknose, U.S. Gulf of Mexico blacktip, sandbar, and dusky sharks (all these stock assessments can be found at *http://sedarweb.org/*). The 2021 research objectives are:

- Collect reproductive, length, sex, and age data from sandbar and other sharks throughout the calendar year for species-specific stock assessments;
- Monitor the size distribution of sandbar sharks and other species captured in the fishery;
- Continue on-going tagging shark programs for identification of migration corridors and stock structure using dart and/or spaghetti tags;
- Maintain time-series of abundance from previously derived indices for the shark bottom longline observer program;
- Sample fin sets (*e.g.,* dorsal, pectoral) from prioritized species to further develop fin identification guides;
- Acquire fin-clip samples of all shark and other species for genetic analysis;
- Attach satellite archival tags to endangered smalltooth sawfish to provide information on critical habitat and preferred depth, consistent with the requirements listed in the take permit issued under section 10 of the Endangered Species Act to the SEFSC observer program;
- Attach satellite archival tags to prohibited dusky and other sharks, as needed, to provide information on daily and seasonal movement patterns, and preferred depth;
- Evaluate hooking mortality and post-release survivorship of dusky, hammerhead, blacktip, and other sharks using hook-timers and temperature-depth recorders;
- Evaluate the effects of controlled gear experiments to determine the effects of potential hook changes to prohibited species interactions and fishery yields;
- Examine the size distribution of sandbar and other sharks captured throughout the fishery including in the Mid-Atlantic shark time/area closure off the coast of North Carolina from January 1 through July 31;
- Develop allometric and weight relationships of selected species of sharks (*e.g.,* hammerhead, sandbar, blacktip shark);
- Collect samples such as liver and muscle plugs for stable isotope analysis as a part of a trophic level-based ecosystem study; and
- Examine the feasibility of using electronic monitoring to accurately measure soak times of bottom longline sets. This specific research objective will require participating vessels to have an electronic monitoring system (EM) sensors installed for the duration of the 2021 research fishery. During each research trip, the EM sensors must be operating. The sensors will be removed after the end of the 2021 research fishery.

Selection Criteria

Shark Research Fishery Permit Applications will only be accepted from commercial shark fishermen who hold a current directed or incidental shark limited access permit. While incidental permit holders are welcome to submit an application, to ensure that an appropriate number of sharks are landed to meet the research objectives for this year, NMFS will give priority to directed permit holders as recommended by the shark board. As such, qualified incidental permit holders will be selected only if there are not enough qualified directed permit holders to meet research objectives.

The Shark Research Fishery Permit Application includes, but is not limited to, a request for the following information: Type of commercial shark permit possessed; past participation and availability in the commercial shark fishery (not including sharks caught for display); past involvement and compliance with HMS observer programs per 50 CFR 635.7; past compliance with HMS regulations at 50 CFR part 635; past and present availability to participate in the shark research fishery year-round; ability to fish in the regions and seasons requested; ability to attend necessary meetings regarding the objectives and research protocols of the shark research fishery; and ability to carry out the research objectives of the Agency, including the new research objective that will require vessels to have a specific EM sensors installed. Preference will be given to those applicants who are willing and available to fish year-round and who affirmatively state that they intend to do so, to ensure the timely and accurate data collection NMFS needs to meet this year's research objectives. An applicant who has been charged criminally or civilly (*e.g.,* issued a Notice of Violation and Assessment (NOVA) or Notice of Permit Sanction) for any HMS-related violation will not be considered for participation in the shark research fishery. In addition, applicants who were selected to carry an observer in the previous 2 years for any HMS fishery, but failed to contact NMFS to arrange the placement of an observer as required per 50 CFR 635.7, will not be considered for participation in the 2021 shark research fishery. Applicants who were selected to carry an observer in the previous 2 years for any HMS fishery and failed to comply with all the observer regulations per 50 CFR 635.7 will also not be considered. Exceptions will be made for vessels that were selected for HMS observer coverage but did not fish in the quarter when selected and thus did not require an observer. Applicants who do not possess a valid USCG safety inspection decal when the application is submitted will not be considered. Applicants who have been non-compliant with any of the HMS observer program regulations in the previous two years, as described above, may be eligible for future participation in shark research fishery activities by demonstrating two subsequent years of compliance with observer regulations at 50 CFR 635.7.

Selection Process

The HMS Management Division will review all submitted applications and develop a list of qualified applicants from those applications that are deemed complete. A qualified applicant is an applicant that has submitted a complete application by the deadline (see **DATES**) and has met the selection criteria listed above. Qualified applicants are eligible to be selected to participate in the 2021

shark research fishery. The HMS Management Division will provide the list of qualified applicants without identifying information to the SEFSC. The SEFSC will then evaluate the list of qualified applicants and, based on the temporal and spatial needs of the research objectives, the availability of observers, the availability of qualified applicants, and the available quota for a given year, will randomly select qualified applicants to conduct the prescribed research. Where there are multiple qualified applicants that meet the criteria, permittees will be randomly selected through a lottery system. If a public meeting is deemed necessary, NMFS will announce details of a public selection meeting in a subsequent **Federal Register** notice.

Once the selection process is complete, NMFS will notify the selected applicants and issue the shark research fishery permits. The shark research fishery permits will be valid through December 31, 2021, unless otherwise specified. If needed, NMFS will communicate with the shark research fishery permit holders to arrange a captain's meeting to discuss the research objectives and protocols. NMFS usually holds mandatory captain's meetings before observers are placed on vessels and may hold one for the 2021 shark research fishery in early 2021. Once the fishery starts, the shark research fishery permit holders must contact the NMFS or designee to arrange the placement of a NMFS-approved observer for each shark research trip, and in the beginning, to arrange the installation of the specific EM sensors. Additionally, selected applicants are expected to allow observers the opportunity to perform their duties as required and assist observers as necessary. At the end of the fishery, shark research fishery permit holders must contact NMFS or a designee to arrange for the removal of the EM sensors.

A shark research fishery permit will only be valid for the vessel and owner(s) and terms and conditions listed on the permit, and, thus, cannot be transferred to another vessel or owner(s). Shark research fishery permit holders must carry a NMFS-approved observer in order to land sandbar sharks. Issuance of a shark research permit does not guarantee that the permit holder will be assigned a NMFS-approved observer on any particular trip. Rather, issuance indicates that a vessel may be issued a NMFS-approved observer for a particular trip, and on such trips, may be allowed to harvest Atlantic sharks, including sandbar sharks, in excess of the retention limits described in 50 CFR 635.24(a). These retention limits will be based on available quota, number of vessels participating in the 2021 shark research fishery, the research objectives set forth by the shark board, the extent of other restrictions placed on the vessel, and may vary by vessel and/or location. When not operating under the auspices of the shark research fishery, the vessel would still be able to land LCS, SCS, and pelagic sharks subject to existing retention limits on trips without a NMFS-approved observer. Additionally, during those times, the vessel would not need to operate the EM sensors.

NMFS annually invites commercial shark permit holders (directed and incidental) to submit an application to participate in the shark research fishery. Permit applications can be found on the HMS Management Division's website at *https://www.fisheries.noaa.gov/atlantic-highly-migratory-species/atlantic-highly-migratory-species-permits-and-reporting-forms* or by calling (301) 427–8503. Final decisions on the issuance of a shark research fishery permit will depend on the submission of all required information by the deadline (see **DATES**), and NMFS' review of applicant information as outlined above. The 2021 shark research fishery will start after the opening of the shark fishery and under available quotas as published in a separate **Federal Register** final rule.

Dated: November 24, 2020.

Jennifer M. Wallace,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2020–26325 Filed 11–27–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA678]

Western Pacific Fishery Management Council; Pacific Island Fisheries; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; public meeting.

SUMMARY: NMFS and the Western Pacific Fishery Management Council (Council) will convene a Western Pacific Stock Assessment Review (WPSAR) of a 2020 stock assessment update for seven deep-water bottomfish species (''Deep 7'' bottomfish complex) in the Main Hawaiian Islands.

DATES: The WPSAR panel will meet on December 16–17, 2020. For specific times and agenda, see **SUPPLEMENTARY INFORMATION.**

ADDRESSES: The meeting will be held by web conference via WebEx. Audio and visual portions for all of the web conferences can be accessed at: *https://wprfmc.webex.com/join/info.wpcouncilnoaa.gov.* Web conference access information and instructions for providing public comments will be posted on the Council website at *www.wpcouncil.org.* For assistance with the web conference connection, contact the Council office at (808) 552–8220.

FOR FURTHER INFORMATION CONTACT: Kitty Simonds, Executive Director, Western Pacific Regional Fishery Management Council; telephone: (808) 522–8220.

SUPPLEMENTARY INFORMATION: The NMFS Pacific Islands Fisheries Science Center (PIFSC) conducted a stock assessment update for the Main Hawaiian Island Deep 7 bottomfish complex. PIFSC previously conducted a Benchmark stock assessment for the Deep 7 bottomfish in 2018 using a Bayesian surplus production model fit to commercial catch and effort data and independent survey biomass estimates. This assessment update used the methodology of the 2018 benchmark assessment and updated it with data through 2019.

PIFSC used this assessment update to estimate biomass and stock status of the Deep 7 bottomfish complex through time, and evaluated stock status against the maximum sustainable yield based reference points described in the Council's Fishery Ecosystem Plan for the Hawaii Archipelago. The 2020 assessment update provides projections to inform setting of acceptable biological catch and annual catch limits for 2021–24.

The WPSAR panel will meet virtually beginning at 9 a.m., Hawaii Standard Time (HST), each day. A public comment period will be provided at the end of the first day. The agenda order may change and the meeting will run as late as necessary to complete scheduled business.

Meeting Agenda

Wednesday, December 16, 2020, 9 a.m. to 2 p.m. HST

1. Introduction
2. Review objectives and terms of reference
3. Review of stock assessment updates
4. Summary of comments and analysis during desktop phase
5. Questions to presenters
6. Public comment

Thursday, December 17, 2020, 9 a.m. to 11 a.m. HST

7. Panel presentation on the review results and recommendations
8. Questions to reviewers
9. Adjourn

Special Accommodations

This virtual meeting will be accessible to people with disabilities. Please direct request for accommodations to the Council Office (see **FOR FURTHER INFORMATION CONTACT**) at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 24, 2020.

Diane M. DeJames-Daly,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2020–26317 Filed 11–27–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA684]

North Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meeting.

SUMMARY: The North Pacific Fishery Management Council (Council) Bering Sea Fishery Ecosystem Plan Climate Change Taskforce will meet December 14, 2020 and December 16, 2020, via webconference.

DATES: The meeting will be held on Monday, December 14, 2020, and Wednesday, December 16, 2020, from 12 p.m. to 2 p.m., Alaska Time.

ADDRESSES: The meeting will be a webconference. Join online through the link at *https://meetings.npfmc.org/Meeting/Details/1804.*

Council address: North Pacific Fishery Management Council, 1007 W 3rd Ave., Anchorage, AK 99501–2252; telephone: (907) 271–2809. Instructions for attending the meeting are given under **SUPPLEMENTARY INFORMATION**, below.

FOR FURTHER INFORMATION CONTACT: Dr. Diana Stram, Council staff; phone: (907) 271–2809 and email: *diana.stram@noaa.gov.* For technical support please contact our administrative staff; email: *npfmc.admin@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Agenda

Monday, December 14, 2020 and Wednesday, December 16, 2020

The agenda will include (a) draft Climate Change Taskforce workplan; (b) planning for future meetings and activities; and (c) other business. The agenda is subject to change, and the latest version will be posted at *https://meetings.npfmc.org/Meeting/Details/1804* prior to the meeting, along with meeting materials.

Connection Information

You can attend the meeting online using a computer, tablet, or smart phone; or by phone only. Connection information will be posted online at: *https://meetings.npfmc.org/Meeting/Details/1804.*

Public Comment

Public comment letters will be accepted and should be submitted electronically to *https://meetings.npfmc.org/Meeting/Details/1804.*

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 24, 2020.

Diane M. DeJames-Daly,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2020–26318 Filed 11–27–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Alaska Region Permit Family of Forms

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before January 29, 2021.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at *Adrienne.thomas@noaa.gov.* Please reference OMB Control Number 0648–0206 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Gabrielle Aberle 586–7228.

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Marine Fisheries Services (NMFS), Alaska Region, is requesting extension of a currently approved information collection for the applications for the Federal Fisheries Permit, the Federal Processor Permit, and the Exempted Fishing Permit.

NMFS requires a Federal Fisheries Permit (FFP) or Federal Processor Permit (FPP) for participation in the groundfish fisheries of the exclusive economic zone off Alaska. NMFS issues an Exempted Fishing Permit (EFP) to allow groundfish fishing activities that would otherwise be prohibited under regulations for groundfish fishing. EFPs are issued to support projects that could benefit the groundfish fisheries and the environment and result in gathering information not otherwise available through research or commercial fishing operations. Regulations governing these permits are at 50 CFR 600.745, 679.4, and 679.6.

Operators of vessels and managers of processors must have a permit on board or on site when fishing, receiving, buying, or processing groundfish and non-groundfish species. The permit information provides harvest gear types; descriptions of vessels, shoreside processors, and stationary floating processors; and expected fishery activity levels. The information requested on the permit applications is used for fisheries management and regulatory compliance by NMFS Sustainable Fisheries Division, NMFS Restricted Access Management Program, NMFS Observer Program, NOAA Office of Law Enforcement, the U.S. Coast Guard, and the North Pacific Fisheries Management Council.

Section 303(b)(1) of the Magnuson-Stevens Fishery Conservation and Management Act specifically recognizes the need for permit issuance. Requiring

a permit for marine resource users is one of the regulatory steps taken to carry out conservation and management objectives. Permit issuance is essential in fishery resources management for identification of the participants and expected activity levels and for regulatory compliance.

II. Method of Collection

The FFP and FPP application forms are available as fillable pdfs on the NMFS Alaska Region website and may be downloaded, completed, and printed prior to submission by mail, delivery, or fax. An FPP may be renewed online through eFISH on the NMFS Alaska Region website. There is no form to apply for an EFP. Applicants submit the required information by mail, delivery, email, or fax.

III. Data

OMB Control Number: 0648–0206.

Form Number(s): None.

Type of Review: Regular submission (extension of a current information collection).

Affected Public: Individuals or households; Business or other for-profit organizations.

Estimated Number of Respondents: 531.

Estimated Time per Response: FFP application, 21 minutes; FPP application, 25 minutes; EFP application, 100 hours.

Estimated Total Annual Burden Hours: 590 hours.

Estimated Total Annual Cost to Public: $440.

Respondent's Obligation: Mandatory.

Legal Authority: Magnuson-Stevens Fishery Conservation and Management Act.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2020–26371 Filed 11–27–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; International Design Applications (Hague Agreement)

The United States Patent and Trademark Office (USPTO) will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The USPTO invites comment on this information collection renewal, which helps the USPTO assess the impact of its information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on September 29, 2020 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: United States Patent and Trademark Office, Department of Commerce.

Title: International Design Applications (Hague Agreement).

OMB Control Number: 0651–0075.

Form Number(s): WIPO DM = WIPO Dessins et Modeles (design representations); PTOL = Patent Trademark Office Legal

- PTO–1595: (Assignment Cover Sheet)
- PTOL–85 Part B (Hague): (Issue Fee to USPTO for an International Design Application)
- WIPO DM/1 (Application for International Registration—entitled Hague Agreement Concerning The International Registration of Industrial Design)
- WIPO DM/1/I Annex: (Declaration on Inventorship for Purposes of Designation of the United States)
- WIPO DM/1/I Annex: (Substitute Statement in Lieu of a Declaration of Inventorship for the Purpose of Designating the United States)
- WIPO DM/1/III Annex: (Information On Eligibility For Protection)
- WIPO DM/1/IV Annex: (Reduction of United States Individual Designation Fee)
- WIPO DM/1/V Annex: (Supporting Document(s) Concerning Priority Claim To The Korean Intellectual Property Office (KIPO))

Type of Request: Extension and revision of a currently approved information collection.

Number of Respondents: 1,406 respondents per year.

Average Hour per Response: The USPTO estimates that it will take the public between 15 minutes (0.25 hours) and 6 hours to complete a response, depending upon the complexity of the situation. This includes the time to gather the necessary information, prepare the appropriate documents, and submit the completed response to the USPTO.

Estimated Total Annual Respondent Burden Hours: 2,301 hours.

Estimated Total Annual Non-Hour Cost Burden: $3,389,280.

Needs and Uses: The Patent Law Treaties Implementation Act of 2012 (PLTIA) amends the patent laws to implement the provisions of the Geneva Act of the Hague Agreement Concerning International Registration of Industrial Designs (hereinafter ''Hague Agreement'') in title 1, and the Patent Law Treaty (PLT) in title 2. The Hague Agreement is an international agreement that enables an applicant to file a single international design application which may have the effect of an application for protection for the design(s) in countries and/or intergovernmental organizations that are Parties to the Hague Agreement (the ''Contracting Parties'') designated in the applications. The United States is a Contracting Party to the Hague Agreement, which took effect with respect to the United States on May 13, 2015. The Hague Agreeement is administered by the International Bureau (IB) of World Intellectual Property Organization (WIPO) located in Geneva, Switzerland.

This information collection covers information filed by U.S. applicants for the prosecution of international design applications ''indirectly'' through the United States Patent and Trademark

Office (USPTO), which will forward the applications to the IB or ''directly'' with the IB. The IB ascertains whether the international design application complies with formal requirements, registers the international design in the International Register, and publishes the international registration in the International Designs Bulletin. The international registration contains all of the data of the international application, any reproduction of the industrial design, date of the international registration, number of the international registration, and relevant class of the International Classification.

The IB will provide a copy of the publication of the international registration to each Contracting Party designated by the applicant. A designated Contracting Party may perform a substantive examination of the design application. The USPTO will perform a substantive examination for patentability of the international design application, as in the case of regular U.S. design applications. The industrial design or designs will be eligible for protection in all the Contracting Parties designated by applicants.

In addition, this information collection covers the various fees related to the processing of International design applications, such as the: (1) basic fee; (2) standard designation fee(s); (3) individual designation fee(s); and (4) publication fee. Also, an additional fee is required where the applications contain a description that exceeds 100 words, and a transmittal fee is required for international design applications filed through an office of indirect filing. The fees required by the IB may be paid either directly to the IB or through the USPTO as an office of indirect filing in the amounts specified on the WIPO website. If applicants want to pay the required fees through USPTO as an office of indirect filing, the fees must be paid no later than the date of payment of the transmittal fee. The fees will then be forwarded to the IB.

The Hague Agreement enables applicants from Contracting Parties to obtain protection of their designs with minimal formalities and expenses in multiple countries and/or regions. The Hague Agreement is administered by the IB, which simplifies the management of an industrial design registration. For example, through the IB, applicants can record changes of their representatives or changes in ownership, and renew their international registration.

Affected Public: Private sector; individuals or households.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Commerce, USPTO information collections currently under review by OMB.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the information collection or the OMB Control Number 0651–0075.

Further information can be obtained by:

- *Email: InformationCollection@uspto.gov.* Include ''0651–0075 information request'' in the subject line of the message.
- *Mail:* Kimberly Hardy, Office of the Chief Administrative Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

Kimberly Hardy,

Information Collections Officer, Office of the Chief Administrative Officer, United States Patent and Trademark Office.

[FR Doc. 2020–26350 Filed 11–27–20; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Initial Patent Applications

The United States Patent and Trademark Office (USPTO) will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The USPTO invites comment on this information collection renewal, which helps the USPTO assess the impact of its information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on September 29, 2020 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: United States Patent and Trademark Office, Department of Commerce.

Title: Initial Patent Applications.

OMB Control Number: 0651–0032.

Form Number(s): (AIA = American Invents; SB = Specimen Book).

- PTO/AIA/01 (Declaration (37 CFR 1.63) for Utility or Design Patent Application using an Application Data Sheet (37 CFR 1.76))
- PTO/AIA/01CN (Chinese Language Declaration (37 CFR 1.63) for Utility or Design Application Using an Application Data Sheet (37 CFR 1.76))
- PTO/AIA/01DE (German Language Declaration (37 CFR 1.63) for Utility or Design Application Using an Application Data Sheet (37 CFR 1.76))
- PTO/AIA/01ES (Spanish Language Declaration (37 CFR 1.63) for Utility or Design Application Using an Application Data Sheet (37 CFR 1.76))
- PTO/AIA/01FR (French Language Declaration (37 CFR 1.63) for Utility or Design Application Using an Application Data Sheet (37 CFR 1.76))
- PTO/AIA/01IT (Italian Language Declaration (37 CFR 1.63) for Utility or Design Application Using an Application Data Sheet (37 CFR 1.76))
- PTO/AIA/01JP (Japanese Language Declaration (37 CFR 1.63) for Utility or Design Application Using an Application Data Sheet (37 CFR 1.76))
- PTO/AIA/01KR (Korean Language Declaration (37 CFR 1.63) for Utility or Design Application Using An Application Data Sheet (37 CFR 1.76))
- PTOAIA/01NL (Dutch Language Declaration (37 CFR 1.63) for Utility or Design Application Using an Application Data Sheet (37 CFR 1.76))
- PTO/AIA/01RU (Russian Language Declaration (37 CFR 1.63) for Utility or Design Application Using An Application Data Sheet (37 CFR 1.76))
- PTO/AIA/01SE (Swedish Language Declaration (37 CFR 1.63) for Utility or Design Application Using an Application Data Sheet (37 CFR 1.76))
- PTO/AIA/02 (Substitute Statement in Lieu of an Oath or Declaration for Utility or Design Patent Application (35 U.S.C. 115(d) and 37 CFR 1.64))
- PTO/AIA/02CN (Chinese (simplified) Language Substitute Statement in Lieu of an Oath or Declaration for Utility or Design Patent Application (35 U.S.C. 115(d) and 37 CFR 1.64))
- PTO/AIA/02DE (German Language Substitute Statement in Lieu of an Oath or Declaration for Utility or Design Patent Application (35 U.S.C. 115(d) and 37 CFR 1.64))
- PTO/AIA/02ES (Spanish Language Substitute Statement in Lieu of an Oath or Declaration for Utility or

Design Patent Application (35 U.S.C. 115(d) and 37 CFR 1.64))
- PTO/AIA/02FR (French Language Substitute Statement in Lieu of an Oath or Declaration for Utility or Design Patent Application (35 U.S.C. 115(d) and 37 CFR 1.64))
- PTO/AIA/02IT (Italian Language Substitute Statement in Lieu of an Oath or Declaration for Utility or Design Patent Application (35 U.S.C. 115(d) and 37 CFR 1.64))
- PTO/AIA/02KR (Korean Language Substitute Statement in Lieu of an Oath or Declaration for Utility or Design Patent Application (35 U.S.C. 115(d) and 37 CFR 1.64))
- PTO/AIA/02NL (Dutch Language Substitute Statement in Lieu of an Oath or Declaration for Utility or Design Patent Application (35 U.S.C. 115(d) and 37 CFR1.64))
- PTO/AIA/02RU (Russian Language Substitute Statement in Lieu of an Oath or Declaration for Utility or Design Patent Application (35 U.S.C. 115(d) and 37 CFR 1.64))
- PTO/AIA/02SE (Swedish Language Substitute Statement in Lieu of an Oath or Declaration for Utility or Design Patent Application (35 U.S.C. 115(d) and 37 CFR 1.64)
- PTO/AIA/03 (Declaration (37 CFR 1.63) for Plant Patent Application using an Application Data Sheet (37 CFR 1.76))
- PTO/AIA/04 (Substitute Statement in Lieu of an Oath or Declaration for Plant Patent Application (35 U.S.C. 115(d) and 37 CFR 1.64))
- PTO/AIA/08 (Declaration for Utility or Design Patent Application (37 CFR 1.63))
- PTO/AIA/09 (Plant Patent Application (35 U.S.C. 161) Declaration (37 CFR 1.162))
- PTO/AIA/10 (Supplemental Sheet for Declaration)
- PTO/AIA/10 (Declaration (supplemental sheet for PTO/SB/AIA09))
- PTO/AIA/11 (Substitute Statement Supplemental Sheet)
- PTO/AIA/11 (Substitute Statement Supplemental Sheet (supplemental sheet for PTO/SB/AIA04))
- PTO/AIA/14 (Application Data Sheet (37 CFR 1.76))
- PTO/AIA/14 (EFS-Web (Application Data Sheet Form)
- PTO/AIA/15 (Utility Patent Application Transmittal)
- PTO/AIA/18 (Design Patent Application Transmittal)
- PTO/AIA/19 (Plant Patent Application Transmittal)
- PTO/SB/01 (Declaration for Utility or Design Patent Application (37 CFR 1.63)—applications filed before September 16, 2012)
- PTO/SB/01A (Declaration (37 CFR 1.63) for Utility or Design Application Using an Application Data Sheet (37 CFR 1.76)—applications filed on or before September 16, 2012)
- PTO/SB/02 (Declaration (Additional Inventors) and Supplemental Priority Data Sheet—applications filed before September 16, 2012)
- PTO/SB/02A, 02B (Declaration—Additional Inventors—Supplemental Sheet)
- PTO/SB/02CN (Declaration (Additional Inventors) and Supplemental Priority Data Sheets (Chinese Language Declaration for Additional Inventors)
- PTO/SB/02DE (Declaration (Additional Inventors) and Supplemental Priority Data Sheets (German Language Declaration for Additional Inventors))
- PTO/SB/02ES (Declaration (Additional Inventors) and Supplemental Priority Data Sheet (Spanish Language Declaration for Additional Inventors))
- PTO/SB/02FR (Declaration (Additional Inventors) and Supplemental Priority Data Sheet (French Language Declaration for Additional Inventors))
- PTO/SB/02IT (Declaration (Additional Inventors) and Supplemental Priority Data Sheet (Italian Language Declaration for Additional Inventors))
- PTO/SB/02JP (Declaration (Additional Inventors) and Supplemental Priority Data Sheet (Japanese Language Declaration for Additional Inventors))
- PTO/SB/02KR (Declaration (Additional Inventors) and Supplemental Priority Data Sheet (Korean Language Declaration for Additional Inventors))
- PTO/SB/02NL (Declaration (Additional Inventors) and Supplemental Priority Data Sheet (Dutch Language Declaration for Additional Inventors))
- PTO/SB/02RU (Declaration (Additional Inventors) and Supplemental Priority Data Sheet (Russian Language Declaration for Additional Inventors))
- PTO/SB/02SE (Declaration (Additional Inventors) and Supplemental Priority Data Sheet (Swedish Language Declaration for Additional Inventors))
- PTO/SB/02LR (Declaration Supplemental Sheet for Legal Representatives (35 U.S.C. 117) on Behalf of a Deceased or Incapacitated Inventor)
- PTO/SB/03 (Plant Patent Application (35 U.S. C. 161) Declaration (37 CFR 1.63))
- PTO/SB/03A (Declaration (37 CFR 1.63) for Plant Application Using an Application Data Sheet (37 CFR 1.76))
- PTO/SB/04 (Supplemental Declaration for Utility or Design Patent Application (37 CFR 1.67))
- PTO/SB/06 (Patent Application Fee Determination Record)
- PTO/SB/07 (Multiple Dependent Claim Fee Calculation Sheet)
- PTO/SB/08a (Information Disclosure Statement by Applicant)
- PTO/SB/09 (Certification and Request for Consideration of an Information Disclosure Statement Filed After Payment of the Issue Fee Under the QPIDS Pilot Program)
- PTO/SB/16 (Provisional Application for Patent Cover Sheet—Paper and Electronic Filing)
- PTO/SB/17 (Fee Transmittal)
- PTO/SB/29 (Continued Prosecution Application (CPA) Request Transmittal)
- PTO/SB/29A (Receipt for Facsimile Transmitted CPA)
- PTO/SB/101 (Declaration for Utility or Design Patent Application (37 CFR 1.63), Chinese Language—applications filed before September 16, 2012)
- PTO/SB/102 (Declaration for Utility or Design Patent Application (37 CFR 1.63), Dutch Language—applications filed before September 16, 2012)
- PTO/SB/103 (Declaration for Utility or Design Patent Application (37 CFR 1.63), German Language—applications filed before September 16, 2012)
- PTO/SB/104 (Declaration for Utility or Design Patent Application (37 CFR 1.63), Italian Language—applications filed before September 16, 2012)
- PTO/SB/105 (Declaration for Utility or Design Patent Application (37 CFR 1.63), French Language—applications filed before September 16, 2012)
- PTO/SB/106 (Declaration for Utility or Design Patent Application (37 CFR 1.63), Japanese Language—applications filed before September 16, 2012)
- PTO/SB/107 (Declaration for Utility or Design Patent Application (37 CFR 1.63), Russian Language—applications filed before September 16, 2012)
- PTO/SB/108 (Declaration for Utility or Design Patent Application (37 CFR 1.63), Swedish Language—applications filed before September 16, 2012)
- PTO/SB/109 (Declaration for Utility or Design Patent Application (37 CFR 1.63), Spanish Language—

applications filed before September 16, 2012)

- PTO/SB/110 (Declaration for Utility or Design Patent Application (37 CFR 1.63), Korean Language—applications filed before September 16, 2012)

Type of Request: Extension and revision of a currently approved information collection.

Number of Respondents: 633,209 respondents per year.

Average Hour per Response: The USPTO estimates that it takes the public between 45 minutes (.75 hours) and 40 hours to complete a single response, depending on the complexity of the submission. This includes the time to gather the necessary information, prepare the appropriate documents, and to submit the response to the USPTO.

Estimated Total Annual Respondent Burden Hours: 15,598,813 hours.

Estimated Total Annual Non-Hour Cost Burden: $1,205,915,848.

Needs and Uses: The United States Patent and Trademark Office (USPTO) is required by Title 35 of the United States Code (U.S.C.) to examine applications for patents. The USPTO administers the patent statutes relating to examination through various regulations in such as 37 Code of Federal Regulations (CFR) 1.16 through 1.84. Each patent applicant must provide sufficient information to allow the USPTO to properly examine the application to determine whether it meets the criteria set forth in the patent statutes and regulations for issuance as a patent. The patent statutes and regulations require that an application for patent include the following information:

(1) A specification containing a description of the invention and at least one claim defining the property right sought by the applicant;

(2) A drawing(s) or photograph(s), where necessary, for an understanding of the invention;

(3) An oath or declaration signed by the applicant; and

(4) A filing fee.

Various types of patent applications are covered under this information collection:

- New original utility, plant, design, and provisional applications;
- Continuation/divisional applications of international applications;
- Continued prosecution applications (design); and
- Continuation/divisional and continuation-in-part applications of utility, plant, and design applications.

In addition, this information collection covers certain other papers filed by applicants, such as, petitions to accept an unintentionally delayed priority or benefit claim, petitions to accept a filing by other than all of the inventors or a person not the inventor, and petitions requesting that applications filed under 37 CFR 1.495(b) be accorded a receipt date.

Affected Public: Private sector; individuals or households.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Commerce, USPTO information collections currently under review by OMB.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the information collection or the OMB Control Number 0651–0032.

Further information can be obtained by:

- *Email: InformationCollection@uspto.gov.* Include ''0651–0032 information request'' in the subject line of the message.
- *Mail:* Kimberly Hardy, Office of the Chief Administrative Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

Kimberly Hardy,

Information Collections Officer, Office of the Chief Administrative Officer, United States Patent and Trademark Office.

[FR Doc. 2020–26364 Filed 11–27–20; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Trademark Submissions Regarding Correspondence and Regarding Attorney Representation

The United States Patent and Trademark Office (USPTO) will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The USPTO invites comment on this information collection renewal, which helps the USPTO assess the impact of its information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on September 29, 2020 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: Patent and Trademark Office, Department of Commerce.

Title: Trademark Submissions Regarding Correspondence and Regarding Attorney Representation.

OMB Control Number: 0651–0056.

Form Number(s):

- PTO Form 2201 (TEAS Request for Withdrawal as Attorney of Record/Update of USPTO's Database After Power of Attorney Ends)
- PTO Form 2300 (TEAS Change Address or Representation Form)

Type of Request: Extension and revision of a currently approved information collection.

Number of Respondents: 204,323 respondents per year.

Average Hour per Response: The USPTO estimates that it will take the public between 12 minutes (0.2 hours) and 1 hour to complete a response, depending upon the complexity of the situation. This includes the time to gather the necessary information, prepare the appropriate documents, and submit the completed response to the USPTO.

Estimated Total Annual Respondent Burden Hours: 50,437 hours.

Estimated Total Annual Non-Hour Cost Burden: $1,369.

Needs and Uses: The USPTO administers the Trademark Act, 15 U.S.C. 1051 *et seq.,* which provides for the Federal registration of trademarks, service marks, collective trademarks and service marks, collective membership marks, and certification marks. Individuals and businesses that use or intend to use such marks in commerce may file an application to register their marks with the USPTO.

Such individuals and businesses may also submit various communications to the USPTO regarding their pending applications or registered trademarks, including providing additional information needed to process a pending application, filing amendments to the applications, or filing the papers necessary to keep a trademark in force. In the majority of circumstances, individuals and businesses retain attorneys to handle these matters. As such, these parties may also submit

communications to the USPTO regarding the appointment of attorneys to represent applicants or registrants in the application and post-registration processes or, in the case of applicants or registrants who are not domiciled in the United States, the appointment of domestic representatives on whom may be served notices of process in proceedings affecting the mark, the revocation of an attorney's or domestic representative's appointment, and requests for permission to withdraw from representation.

Affected Public: Private sector; individuals or households.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Commerce, USPTO information collections currently under review by OMB.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the information collection or the OMB Control Number 0651–0056.

Further information can be obtained by:

- *Email: InformationCollection@uspto.gov.* Include ''0651–0056 information request'' in the subject line of the message.
- *Mail:* Kimberly Hardy, Office of the Chief Administrative Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

Kimberly Hardy,

Information Collections Officer, Office of the Chief Administrative Officer, United States Patent and Trademark Office.

[FR Doc. 2020–26349 Filed 11–27–20; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Patent Processing

The United States Patent and Trademark Office (USPTO) will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The USPTO invites comment on this information collection renewal, which helps the USPTO assess the impact of its information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on September 29, 2020 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: United States Patent and Trademark Office, Department of Commerce.

Title: Patent Processing.

OMB Control Number: 0651–0031.

Form Number(s): (AIA = American Invents Act; SB = Specimen Book; PTOL = Patent and Trademark Office Legal)

- PTO/AIA/22 (Petition for Extension of Time under 37 CFR 1.136(a))
- PTO/AIA/24 (Express Abandonment under 37 CFR 1.138)
- PTO/AIA/24B (Petition for Express Abandonment to Obtain a Refund)
- PTO/AIA/33 (Pre-appeal Brief Request for Review)
- PTO/AIA/96 (Statement under 37 CFR 3.73(c))
- PTO/SB/08a and b (Information Disclosure Statement)
- PTO/SB/17i (Processing Fee under 37 CFR 1.17(i) Transmittal)
- PTO/SB/21 (Transmittal Form)
- PTO/SB/22 (Petition for Extension of Time under 37 CFR 1.136(a))
- PTO/SB/24 (Express Abandonment under 37 CFR 1.138)
- PTO/SB/24B (Petition for Express Abandonment to Obtain a Refund–applications filed on or before September 16, 2012)
- PTO/SB/25 (Terminal Disclaimer to Obviate a Provisional Double Patenting Rejection Over a Pending ''Reference'' Application)
- PTO/SB/26 (Terminal Disclaimer to Obviate a Double Patenting Rejection over a ''Prior'' Patent)
- PTO/SB/27 (Request for Expedited Examination of a Design Application)
- PTO/SB/30 (Request for Continued Examination (RCE) Transmittal)
- PTO/SB/33 (Pre-appeal Brief Request for Review—applications filed on or before September 16, 2012)
- PTO/SB/35 (Nonpublication Request under 35 U.S.C. 122(b)(2)(B)(i))
- PTO/SB/36 (Rescission of Previous Nonpublication Request (35 U.S.C. 122(b)(2)(B)(ii) and, if applicable, Notice of Foreign Filing (35 U.S.C. 122(b)(2)(B)(iii))
- PTO/SB/37 (Request for Suspension of Action or Deferral of Examination under 37 CFR 1.103(b), (c), or (d)—applications filed on or before September 16, 2012)
- PTO/SB/38 (Request to Retrieve Electronic Priority Application(s))
- PTO/SB/39 (Authorization or Rescission of Authorization to Permit Access to Application-as-filed by Participating Offices)
- PTO/SB/43 (Disclaimer in Patent Under 37 CFR 1.321(a))
- PTO/SB/63 (Terminal Disclaimer to Accompany Petition)
- PTO/SB/64 (Petition for Revival of an Application for Patent Abandoned Unintentionally)
- PTO/SB/64a (Petition for Revival of an Application for Patent Abandoned for Failure to Notify the Office of a Foreign or International Filing)
- PTO/SB/64PCT (Petition for Revival of an International Application for Patent Abandoned Unintentionally)
- PTO/SB/67 (Power to Access, Inspect, and Copy)
- PTO/SB/68 (Request for Access to an Abandoned Application Under 37 CFR 1.14)
- PTO/SB/91 (Deposit Account Order Form)
- PTO/SB/92 (Certificate of Mailing or Transmission)
- PTO/SB/96 (Statement under 37 CFR 3.73(c))
- PTO/SB/130 (Petition to Make Special Based on Age for Advancement of Examination under 37 CFR 1.102(c)(1))
- PTO/SB/413C (Request for First-Action Interview (Full Pilot Program))
- PTO–2053–A/B; PTO–2054–A/B; and PTO–2055–A/B (Copy of the Applicant or Patentee's Record of the Application)
- PTOL/413A (Applicant-Initiated Interview Request Form)

Type of Request: Extension and revision of a currently approved information collection.

Number of Respondents: 3,669,397 respondents per year.

Average Hours per Response: The USPTO estimates that it will take approximately 2 minutes (0.08 hours) to 8 hours to complete a single response. This includes the time to gather the necessary information, prepare the appropriate documents, and submit the completed response to the USPTO.

Estimated Total Annual Respondent Burden Hours: 3,187,341 hours.

Estimated Total Annual Non-Hour Cost Burden: $408,845,999.

Needs and Uses: The United States Patent and Trademark Office (USPTO) is required by 35 U.S.C. 131 to examine an

application for patent and, when appropriate, issue a patent. The USPTO is also required to publish patent applications, with certain exceptions, promptly after the expiration of a period of 18 months from the earliest filing date for which a benefit is sought under Title 35, U.S.C. (''eighteen-month publication''). Certain situations may arise which require that additional information be supplied in order for the USPTO to further process the patent or application. The USPTO administers the statutes through various sections of the rules of practice in 37 CFR part 1. The information in this collection can be used by the USPTO to continue the processing of the patent or application to ensure that applicants are complying with the patent regulations and to aid in the prosecution of the application.

Affected Public: Private sector; individuals or households.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Commerce, USPTO information collections currently under review by OMB.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the information collection or the OMB Control Number 0651–0031.

Further information can be obtained by:

- *Email: InformationCollection@uspto.gov.* Include ''0651–0031 information request'' in the subject line of the message.
- *Mail:* Kimberly Hardy, Office of the Chief Administrative Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

Kimberly Hardy,

Information Collections Officer, Office of the Chief Administrative Officer, United States Patent and Trademark Office.

[FR Doc. 2020–26359 Filed 11–27–20; 8:45 am]

BILLING CODE 3510–16–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Application Package for AmeriCorps VISTA Application and Reporting Forms

AGENCY: Corporation for National and Community Service (CNCS).

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, CNCS is proposing a revised information collection.

DATES: Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by January 29, 2021.

ADDRESSES: You may submit comments, identified by the title of the information collection activity, by any of the following methods:

(1) *By mail sent to:* Corporation for National and Community Service, Attention Kelly Daly, 250 E Street SW, Washington, DC 20525.

(2) By hand delivery or by courier to the CNCS mailroom at the mail address given in paragraph (1) above, between 9:00 a.m. and 4:00 p.m. Eastern Time, Monday through Friday, except federal holidays.

(3) Electronically through *www.regulations.gov.*

Comments submitted in response to this notice may be made available to the public through *regulations.gov*. For this reason, please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information. If you send an email comment, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. Please note that responses to this public comment request containing any routine notice about the confidentiality of the communication will be treated as public comment that may be made available to the public, notwithstanding the inclusion of the routine notice.

FOR FURTHER INFORMATION CONTACT: Kelly Daly, 202–606–6849, or by email at *kdaly@cns.gov.*

SUPPLEMENTARY INFORMATION: *Title of Collection:* AmeriCorps VISTA Application and Reporting Forms.

OMB Control Number: 3045–0038.

Type of Review: Revision.

Respondents/Affected Public: Organizations and State, Local or Tribal Governments.

Total Estimated Number of Annual Responses: 850.

Total Estimated Number of Annual Burden Hours: 20,450.

Abstract: AmeriCorps VISTA is revising its application and reporting forms to remove duplicative questions, improve readability, and reflect changes in reporting requirements. The VISTA Progress Report and Progress Report Supplement allow sponsors to report on their programmatic and performance progress. CNCS also seeks to continue using the currently approved information collection until the new information collection is approved by OMB. The currently approved information collection is due to expire on March 31, 2021.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. 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. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information. All written comments will be available for public inspection on *regulations.gov*.

Dated: November 20, 2020.

Desiree Tucker-Sorini,

Director, AmeriCorps VISTA.

[FR Doc. 2020–26252 Filed 11–27–20; 8:45 am]

BILLING CODE 6050–28–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Application Package for Renewal of Generic Information Collection for Pilot and Test Data

AGENCY: Corporation for National and Community Service.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Corporation for National and Community Service (operating as AmeriCorps) is proposing to renew an information collection.

DATES: Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by January 29, 2021.

ADDRESSES: You may submit comments, identified by the title of the information collection activity, by any of the following methods:

(1) *By mail sent to:* Corporation for National and Community Service; Attention Amy Borgstrom; 250 E Street SW, Washington, DC 20525.

(2) By hand delivery or by courier to the AmeriCorps mailroom at Room 8100 at the mail address given in paragraph (1) above, between 9:00 a.m. and 4:00 p.m. Eastern Time, Monday through Friday, except federal holidays.

(3) Electronically through *www.regulations.gov.*

Comments submitted in response to this notice may be made available to the public through *regulations.gov*. For this reason, please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information. If you send an email comment, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. Please note that responses to this public comment request containing any routine notice about the confidentiality of the communication will be treated as public comment that may be made available to the public notwithstanding the inclusion of the routine notice.

FOR FURTHER INFORMATION CONTACT: Amy Borgstrom, 202–606–6930, or by email at *aborgstrom@cns.gov.*

SUPPLEMENTARY INFORMATION:

Title of Collection: Generic Clearance for the Testing/Piloting of Survey Instruments.

OMB Control Number: 3045–0163.

Type of Review: Renewal.

Respondents/Affected Public: Individuals and Households; Businesses and Organizations; State, Local or Tribal Governments.

Total Estimated Number of Annual Respondents: 350.

Total Estimated Annual Frequency: Annual.

Total Estimated Average Response Time per Response: 7,500 minutes for 50 respondents to respond to test or pilot surveys. 300 minutes for 50 participants to participate in five focus groups. 3,000 minutes for 50 participants to participate in individual interviews.

Total Estimated Number of Annual Burden Hours: 10,800.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Abstract: AmeriCorps seeks to renew this generic information collection in order to conduct focus groups and pilot test planned surveys. The information collection activity will enable pilot testing of survey instruments in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. By pilot testing we mean information that provides useful insights on how respondents interact with the instrument but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences, and expectations regarding prospective studies. It will also allow feedback to contribute directly to the improvement of research program management.

AmeriCorps will only submit a collection for approval under this generic clearance if it meets the following conditions:

- The collections are voluntary;
- The collections are low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and are low-cost for both the respondents and the federal government;
- The collections are non-controversial and do not raise issues of concern to other Federal agencies;
- Any collection is targeted to the solicitation of opinions from respondents who have experience with the program or may have experience with the program in the near future;
- Personally identifiable information (PII) is collected only to the extent necessary and is not retained;
- Information gathered will be used only internally for general service improvement and program management purposes and is not intended for release outside of the agency;
- Information gathered will not be used for the purpose of substantially informing influential policy decisions; and
- Information gathered will yield qualitative information; the collections will not be designed or expected to yield statistically reliable results or used as though the results are generalizable to the population of study.

Feedback collected under this generic clearance provides useful information, but it does not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: The target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

As a general matter, information collections will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, or other matters that are commonly considered private.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. 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. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information. All written comments will be available for public inspection on *regulations.gov*.

Dated: November 24, 2020.

Mary Hyde,

Director, Office of Research and Evaluation.

[FR Doc. 2020–26356 Filed 11–27–20; 8:45 am]

BILLING CODE 6050–28–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Request To Accept/Decline, Transfer, or Revoke Transfer of a Segal Education Award

AGENCY: Corporation for National and Community Service.

ACTION: Notice of information collection; request for comment.

SUMMARY: The Corporation for National and Community Service (CNCS) has submitted a public information collection request (ICR) entitled Request to Accept/Decline, Transfer, or Revoke Transfer of a Segal Education Award for review and approval in accordance with the Paperwork Reduction Act.

DATES: Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by December 30, 2020.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Copies of this ICR, with applicable supporting documentation, may be obtained by calling the Corporation for National and Community Service, Nahid Jarrett at 202–246–2770 or by email to *njarrett@cns.gov.*

SUPPLEMENTARY INFORMATION: The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of CNCS, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions;
- Propose ways to enhance the quality, utility, and clarity of the information to be collected; and
- Propose ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments

A 60-day Notice requesting public comment was published in the **Federal Register** on September 01, 2020 at Vol. 85 FR 54357. This comment period ended November 2, 2020. Zero public comments were received for this Notice.

Title of Collection: Request to Accept/Decline, Transfer, or Revoke Transfer of a Segal Education Award.

OMB Control Number: 3045–0136.

Type of Review: Renewal.

Respondents/Affected Public: Individuals AmeriCorps members with eligible education awards and qualified recipients.

Total Estimated Number of Annual Responses: 900.

Total Estimated Number of Annual Burden Hours: 67.

Abstract: AmeriCorps members may offer to transfer all or part of their qualified education awards to certain family members. Provision is made to accept the transfer or not, to rescind acceptance, or revoke the transfer. These processes are implemented electronically where possible, but paper forms are available if necessary. Currently, CNCS is soliciting comments concerning its proposed renewal of the Award Transfer forms: Request to Transfer a Segal Education Award Amount, Accept/Decline Award Transfer Form, Request to Revoke Transfer of Education Award Form, and Rescind Acceptance of Award Transfer Form. These forms enable AmeriCorps members and recipients to meet the legal requirements of the award transfer process. CNCS seeks to renew the current information collection. CNCS also seeks to continue using the currently-approved information collection until the revised information collection is approved by OMB. The currently-approved information collection is due to expire on November 30, 2020.

Dated: November 20, 2020.

Jerry Prentice,

Director, National Service Trust.

[FR Doc. 2020–26319 Filed 11–27–20; 8:45 am]

BILLING CODE 6050–28–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Notification of Study Termination and Withdrawal of Notice of Intent To Prepare an Environmental Impact Statement for the San Francisco Bay to Stockton, California Navigation Study

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DOD.

ACTION: Notice of intent; withdrawal.

SUMMARY: The U.S. Army Corps of Engineers (USACE) is issuing this notice to advise Federal, State and local governmental agencies and the public that USACE is terminating the San Francisco Bay to Stockton, California Navigation Study and withdrawing its Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) for said study.

DATES: The current NOI to prepare an EIS, published in the **Federal Register** on December 4, 2017, indicated the reduction in scope of this project (to include only Pinole Shoal and the Bull's Head Reach portion of the Suisan Bay) from the original NOI that was published on March 4, 2016. Notice for the final report was published in the **Federal Register** on March 6, 2020.

ADDRESSES: U.S. Army Corps of Engineers, South Atlantic Division, 60

Forsyth Street Southwest, Atlanta, GA 30303.

FOR FURTHER INFORMATION CONTACT: Ms. Deborah Scerno at (404) 562–5227 or email at *Deborah.H.Scerno@usace.army.mil.*

SUPPLEMENTARY INFORMATION: The USACE prepared a draft and final Integrated General Reevaluation Report (GRR) and Environmental Impact Statement. The study area was a 13.2 mile length from Central San Francisco Bay to Avon (just east of the Benicia-Martinez Bridge), including the Pinole Shoal Channel, and the Bulls Head Reach portion of the Suisun Bay Channel. The channels in the study area are authorized to a depth of up to −45 feet mean lower low water (MLLW) but are currently only maintained to −35 feet MLLW. The recommended plan would have deepened the existing maintained channel depth of the Pinole Shoal Channel and the Bulls Head Reach portion of the Suisun Bay Channel from −35 feet MLLW to −38 feet MLLW (approximately 13.2 miles). A 2,600 foot-long sediment trap (width of 300 feet) would be constructed at Bulls Head Reach (between stations 62+00 and 88+00) to a depth of −42 feet MLLW, plus 2 feet of overdepth. In addition, the rock obstruction located to the west of Pinole Shoal would be modified from a peak of −39.7 feet MLLW to −43 feet MLLW. The Port of Stockton had been serving as the non-federal partner for the GRR/EIS; however on May 7, 2020, the Port Indicated that they would be unable to act as the cost-sharing sponsor for project design and implementation owing to the lack of nexus between Port facilities and the area of proposed channel improvements. Contra Costa County also informed USACE that they were unable to act as a cost-sharing sponsor for project design and implementation. Over the last few months, the USACE has confirmed that there is no other entity interested in supporting project implementation and consequently, the decision was made to terminate the study.

Dated: November 23, 2020.

Jason E. Kelly,

Colonel, U.S. Army, Commanding.

[FR Doc. 2020–26343 Filed 11–27–20; 8:45 am]

BILLING CODE 3720–58–P

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

Sunshine Act Meetings

TIME AND DATE: 11 a.m.–2 p.m., December 4, 2020.

PLACE: This meeting will be broadcast via a live internet video stream. Individuals interested in viewing the meeting may visit: *https://www.dnfsb.gov/public-hearings-meetings/public-meeting-december-4-2020.* On the day of the meeting, a link to view the video stream will be posted on that page. The page may also be accessed by visiting *dnfsb.gov* and clicking: Public Meeting—December 4, 2020.

STATUS: Open.

MATTERS TO BE CONSIDERED: In this open meeting, members of the Board's staff will brief the Board Members regarding the status of Recommendation 2020–1 regarding nuclear safety requirements at the Department of Energy. During and following the staff presentations, Board Members may deliberate on any appropriate follow-on actions for Recommendation 2020–1.

CONTACT PERSON FOR MORE INFORMATION: Tara Tadlock, Director of Board Operations, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue NW, Suite 700, Washington, DC 20004–2901, (800) 788–4016. This is a toll-free number.

Dated: November 25, 2020.

Thomas A. Summers,

Acting Chairman.

[FR Doc. 2020–26530 Filed 11–25–20; 4:15 pm]

BILLING CODE 3670–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2020–SCC–0038]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and approval; Comment Request; High School and Beyond 2021 (HS&B:21) Base-Year Full-Scale Study Data Collection

AGENCY: Institute of Education Sciences (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a change to a currently approved information collection.

DATES: Interested persons are invited to submit comments on or before December 30, 2020.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection request by selecting ''Department of Education'' under ''Currently Under Review,'' then check ''Only Show ICR for Public Comment'' checkbox.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Carrie Clarady, 202–245–6347.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: High School and Beyond 2021 (HS&B:21) Base-Year Full-Scale Study Data Collection.

OMB Control Number: 1850–0944.

Type of Review: No material or nonsubstantive change to a currently approved collection.

Respondents/Affected Public: Individuals and Households *Total Estimated Number of Annual Responses:* 121,952.

Total Estimated Number of Annual Burden Hours: 50,361.

Abstract: The High School and Beyond 2021 study (HS&B:21) will be the sixth in a series of longitudinal studies at the high school level conducted by the National Center for Education Statistics (NCES), within the

Institute of Education Sciences (IES) of the U.S. Department of Education. HS&B:21 will follow a nationally representative sample of ninth grade students from the start of high school in the fall of 2021 to the spring of 2024 when most will be in twelfth grade. A field test will be conducted one year prior to the full-scale study. The study sample will be freshened in 2024 to create a nationally representative sample of twelfth-grade students. A high school transcript collection and additional follow-up data collections beyond high school are also planned. In preparation for the HS&B:21 Base-Year Full-Scale study (BYFS), scheduled to take place in the fall of 2021, the Office of Management and Budget (OMB) approved (OMB# 1850–0944 v.1–5) a request to conduct the HS&B:21 Base-Year Field Test (BYFT) and the BYFS sampling and state, school district, school, and parent recruitment activities, both of which began in the fall of 2019. These activities include collecting student rosters and selecting the BYFS sample. BYFT activities ended in December 2019.

The study initially planned to conduct its BYFS data collection in the fall of 2020 and published all materials for a 60D review in February 2020. Due to the COVID–19 pandemic, it was decided to postpone this collection for one year and pause the review after the 60D period was completed in April 2020. OMB provided approval to adjust the schedule in June 2020 (OMB# 1850–0944 v.6). This submission for 30D review is to request approval for the Fall 2021 BYFS study data collection. A document describing all changes between the documents presented in the 60D review and those presented in the 30D review is attached to this package.

Part A of this submission presents information on the basic design of HS&B:21. Part B discusses the statistical methods employed. Part C presents justification for the questionnaire content. Appendix A provides the communication materials to be used during state, school district, school, and parent BYFS recruitment and data collection activities. Appendix B provides the full-scale data collection instruments. The primary contractor to NCES for this study is RTI International (Contract # 919900–18–R0018).

Dated: November 23. 2020.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2020–26269 Filed 11–27–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2020–SCC–0155]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and approval; Comment Request; Early Childhood Longitudinal Study, Kindergarten Class of 2022–23 (ECLS–K:2023) Kindergarten and First-Grade Field Test Data Collection, National Sampling, and National Recruitment

AGENCY: Institute of Education Sciences (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a revision of a currently approved information collection.

DATES: Interested persons are invited to submit comments on or before December 30, 2020.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection request by selecting ''Department of Education'' under ''Currently Under Review,'' then check ''Only Show ICR for Public Comment'' checkbox.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Carrie Clarady, 202–245–6347.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Early Childhood Longitudinal Study, Kindergarten Class of 2022–23 (ECLS–K:2023) Kindergarten and First-Grade Field Test Data Collection, National Sampling, and National Recruitment.

OMB Control Number: 1850–0750.

Type of Review: A revision of a currently approved information collection.

Respondents/Affected Public: Individuals and Households *Total Estimated Number of Annual Responses:* 20,895.

Total Estimated Number of Annual Burden Hours: 15,510.

Abstract: The Early Childhood Longitudinal Study (ECLS) program, conducted by the National Center for Education Statistics (NCES) within the Institute of Education Sciences (IES) of the U.S. Department of Education (ED), draws together information from multiple sources to provide rich, descriptive data on child development, early learning, and school progress. The ECLS program studies deliver national data on children's status at birth and at various points thereafter; children's transitions to nonparental care, early care and education programs, and school; and children's experiences and growth through the elementary grades. The Early Childhood Longitudinal Study, Kindergarten Class of 2022–23 (ECLS–K:2023) is the fourth cohort in the series of early childhood longitudinal studies. The study will advance research in child development and early learning by providing a detailed and comprehensive source of current information on children's early learning and development, transitions into kindergarten and beyond, and progress through school. The ECLS–K:2023 will provide data about the population of children who will be kindergartners in the 2022–23 school year, and will go beyond its predecessor kindergarten cohort studies by adding a round of data collection in the spring

prior to children's kindergarten year, known as the ''preschool round.'' Collecting parent data beginning in preschool will enable the study to measure influences on children's development before entry into formal schooling, including children's home environments and access to early care and education. The ECLS–K:2023 will focus on children's early school experiences continuing through the fifth grade, and will include collection of data from parents, teachers, and school administrators, as well as direct child assessments. This request is to conduct a field test of the ECLS–K:2023 preschool data collection activities from January through October 2020, to field test the preschool data collection materials and procedures. This ECLS–K:2023 preschool field test will be followed by the kindergarten-first grade field test (planned for August–December 2021), the spring preschool national data collection (January–June 2022), and the fall (August-December 2022) and spring (March–July 2023) kindergarten national data collections—which will be requested under separate clearance submissions.

Dated: November 23, 2020.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2020–26267 Filed 11–27–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2020–SCC–0142]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and approval; Comment Request; 2020/22 Beginning Postsecondary Students (BPS:20/22) Field Test

AGENCY: Institute of Education Sciences (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a reinstatement with change of a previously approved information collection.

DATES: Interested persons are invited to submit comments on or before December 30, 2020.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection request by selecting ''Department of Education'' under ''Currently Under Review,'' then check ''Only Show ICR for Public Comment'' checkbox.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Carrie Clarady, 202–245–6347.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: 2020/22 Beginning Postsecondary Students (BPS:20/22) Field Test.

OMB Control Number: 1850–0631.

Type of Review: A reinstatement with change of a previously approved information collection.

Respondents/Affected Public: Individuals and Households *Total Estimated Number of Annual Responses:* 7,568.

Total Estimated Number of Annual Burden Hours: 1,226.

Abstract: The 2020/22 Beginning Postsecondary Students Field Test (BPS:20/22) is conducted by the National Center for Education Statistics, part of the Institute of Education Sciences, within the Department of Education, and is part of the Beginning Postsecondary Students Longitudinal Study data collection program at *https://nces.ed.gov/surveys/bps/.* The Sample Collection will begin 03/01/21 and end 06/30/21.

BPS is designed to follow a cohort of students who enroll in postsecondary education for the first time during the same academic year, irrespective of the date of high school completion. The study collects data on students' persistence in and completion of postsecondary education programs; their transition to employment; demographic characteristics; and changes over time in their goals, marital status, income, and debt, among other indicators. Data from BPS are used to help researchers and policymakers better understand how financial aid influences persistence and completion, what percentages of students complete various degree programs, what are the early employment and wage outcomes for certificate and degree attainers, and why students leave school.

BPS:20/22 will be a nationally-representative sample of approximately 37,000 students who were first-time beginning students during the 2019–20 academic year. The BPS:20/22 field test will include approximately 3,700 students who first began in the 2018–19 academic year. These students will be asked to complete a survey and administrative data will also be collected for them. Administrative data matching will be conducted with sources including the National Student Loan Data System (NSLDS), containing federal loan and grant files; the Central Processing System (CPS), which houses and processes data contained in the Free Application for Federal Student Aid (FAFSA) forms; the National Student Clearinghouse (NSC) which provides enrollment and degree verification; vendors of national undergraduate, graduate, and professional student admission tests; and possible other administrative data sources such as the Veterans Benefits Administration (VBA). These data will be obtained through file matching/downloading.

This submission covers BPS:20/22 field test materials and procedures required for conducting the student survey and for matching data to administrative records. Following the field test study in 2021, NCES will provide the Office of Management and Budget (OMB) with a memorandum summarizing any changes planned for the full-scale data collection, and a revised OMB package. The materials that will be used in the BPS:20/22 full-scale study will be based upon the field test materials included in this submission. Additionally, this submission is designed to adequately justify the need for and overall practical

utility of the full study, presenting the overarching plan for all of the phases of the data collection and providing as much detail about the measures to be used as is available at the time of this submission. As part of this submission, NCES is publishing a notice in the **Federal Register** allowing first a 60- and then a 30-day public comment period. Field test materials, procedures, and results will inform the full-scale study. After completion of the field test, NCES will publish a notice in the **Federal Register** allowing additional 30-day public comment period on the final details of the BPS:20/22 full-scale study.

Dated: November 23, 2020.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2020–26268 Filed 11–27–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2020–SCC–0153]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Application for Grants Under the Predominantly Black Institutions Formula Grant Program

AGENCY: Office of Postsecondary Education (OPE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a reinstatement without change of a previously approved collection.

DATES: Interested persons are invited to submit comments on or before December 30, 2020.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection request by selecting ''Department of Education'' under ''Currently Under Review,'' then check ''Only Show ICR for Public Comment'' checkbox.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Bernadette Miles, 202–453–7892.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Application for Grants Under the Predominantly Black Institutions Formula Grant Program.

OMB Control Number: 1840–0812.

Type of Review: A reinstatement without change of a previously approved collection.

Respondents/Affected Public: Private Sector.

Total Estimated Number of Annual Responses: 11.

Total Estimated Number of Annual Burden Hours: 220.

Abstract: The Higher Education Opportunity Act of 2008 amended Title III, Part A of the Higher Education Act to include Section 318—the Predominantly Black Institutions (PBI) Program. The PBI Program makes 5-year grant awards to eligible colleges and universities to plan, develop, undertake and implement programs to enhance the institution's capacity to serve more low- and middle-income Black American students; to expand higher education opportunities for eligible students by encouraging college preparation and student persistence in secondary school and postsecondary education; and to strengthen the financial ability of the institution to serve the academic needs of these students.

Dated: November 24, 2020.

Kate Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2020–26326 Filed 11–27–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Native American Career and Technical Education Program (NACTEP)

AGENCY: Office of Career, Technical, and Adult Education, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education (Department) is issuing a notice inviting applications for new awards for fiscal year (FY) 2021 for the Native American Career and Technical Education Program (NACTEP), Assistance Listing number 84.101A. This notice relates to the approved information collection under OMB control number 1830–0542.

DATES:

Applications Available: November 30, 2020.

Deadline for Notice of Intent to Apply: Applicants are strongly encouraged, but not required, to submit a notice of intent to apply by December 30, 2020.

Date of Pre-Application Meeting: December 9, 2020.

Deadline for Transmittal of Applications: [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

Pre-Application Webinar Information: The Department will hold a pre-application meeting via webinar for prospective applicants on December 9, 2020. More information about the webinar can be found in the application package.

ADDRESSES:

For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768), and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf.*

FOR FURTHER INFORMATION CONTACT: Jenny Lambert, U.S. Department of Education, 400 Maryland Avenue SW, Potomac Center Plaza, Room 11–070, Washington, DC 20202. Telephone: (202) 245–6899. Email: *NACTEP@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: Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: NACTEP provides grants to improve career and technical education (CTE) programs that are consistent with the purposes of the Carl D. Perkins Career and Technical Education Act of 2006, as amended by the Strengthening Career and Technical Education for the 21st Century Act (the Act or Perkins V) and that benefit Native Americans and Alaska Natives.

Background: This notice invites applications for a NACTEP competition that implements the reauthorized section 116 of the Act. As under the prior law, section 116 of the Act continues to authorize the Secretary of Education (Secretary) to award grants to, or enter into cooperative agreements or contracts with, Indian Tribes, Tribal organizations, and Alaska Native entities to operate CTE projects that improve CTE for Native American and Alaska Native students.

Under section 116 of the Act, a Bureau-funded school (as defined in this notice) is not eligible to apply for NACTEP funds for its general education program. Its application must be to carry out a supplemental CTE program in its secondary school.

Statutory Changes Affecting NACTEP: For the convenience of applicants, we summarize in this notice some of the major statutory changes made to the Carl D. Perkins Career and Technical Education Act of 2006 by the Strengthening Career and Technical Education for the 21st Century Act that are relevant to NACTEP. This summary is not meant to be comprehensive of all Perkins V changes applicable to NACTEP.

(a) Purpose. Congress amended the statement of purpose of the law in the Act, most significantly by adding, as a new purpose, increasing employment opportunities for populations who are chronically unemployed or underemployed, including individuals with disabilities, individuals from economically disadvantaged families, out-of-workforce individuals, youth who are in, or have aged out of, the foster care system, and homeless individuals (20 U.S.C. 2301(8)). Other amendments to the purpose incorporate references to programs of study and the development of employability skills by students; delete the term ''tech-prep education''; and change a reference to ''high-demand occupations'' to ''in-demand occupation,'' a new term defined by the Act (20 U.S.C. 2302(26)).

(b) Definitions. Congress amended the definitions of certain terms that affect NACTEP. Most significant among these are changes to the definition of ''career and technical education'' in section 3(5) of the Act (20 U.S.C. 2302(5)). The new definition of CTE now includes that CTE programs may provide ''a recognized postsecondary credential,'' as defined in section 3 of the Workforce Innovation and Opportunity Act (WIOA),[1] and that CTE may include ''career exploration at the high school level or as early as the middle grades (as such term is defined in section 8101 of the Elementary and Secondary Education Act of 1965)''.[2] The amended definition of CTE also provides that, to the extent practicable, CTE should include coordination between secondary and postsecondary education programs through programs of study, which may include coordination through articulation agreements, early college high school programs, dual or concurrent enrollment program opportunities, or other credit transfer agreements that provide postsecondary credit or advanced standing.

Additionally, the definition of CTE now includes work-based learning. For NACTEP grantees, this means that students may be paid stipends not only for time they spend in class receiving instruction, but also for participating in unpaid work-based learning that is part of a CTE program that meets the Act's definition of CTE.

Congress also made significant changes to the definition of ''special populations'' (20 U.S.C. 2302 (48)). The Act now includes three additional subpopulations within this definition: homeless individuals described in section 725 of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a); youth who are in, or have aged out of, the foster care system; and youth with a parent who is a member of the armed forces (as defined in 10 U.S.C. 101(a)(4)) and who is on active duty (as defined in 10 U.S.C. 101(d)(1)). Also, the term ''displaced homemakers'' has been removed and replaced by the term ''out-of-workforce individuals,'' which includes: displaced homemakers, as defined in section 3 of WIOA (29 U.S.C. 3102); and unemployed or underemployed individuals who are experiencing difficulty in obtaining or upgrading employment who are either an individual who has worked primarily without remuneration to care for a home and family, and for that reason has diminished marketable skills, or is a parent whose youngest dependent child will become ineligible to receive assistance under the Temporary Assistance for Needy Families (TANF) program not later than two years after the date on which the parent applies for TANF assistance (20 U.S.C. 2302(36)). Additionally, the term ''individuals with limited English proficiency'' has been changed to ''English learners'' and the definition of this latter term has been aligned with the definition of this term in ESEA so that it now includes any secondary student who is an English learner as defined by section 8101 of ESEA (20 U.S.C. 2302 (22)). Finally, the Act now includes a definition of ''work-based learning'' (20 U.S.C. 2302(55)).

(c) Authorized activities. A new allowable use of funds in the Act permits NACTEP grant funds to be used to provide preparatory, refresher, and remedial education services that are designed to enable students to achieve success in CTE programs or programs of study (20 U.S.C. 2326(c)(2)).

Tribal Consultation: In accordance with the Department's commitment to engage in regular and meaningful consultation and collaboration with Indian Tribes, the Office of Career, Technical, and Adult Education (OCTAE) and the White House Initiative on American Indian and Alaska Native Education conducted a Tribal Consultation regarding NACTEP on April 27, 2020. Consistent with the Department's trust responsibility to Tribes and its Tribal Consultation Policy, views were sought from elected officials of federally recognized Tribes as well as stakeholders and educators from the Tribal community to inform the Department's policy decisions related to changes in the Act pertaining to allowable uses of funds, the definition of CTE, and student stipends. The consultation also included discussion of the independent evaluation requirement established by the notice of final requirements, definitions, and selection criteria for this program (Notice of Final Requirements), published in the **Federal Register** on February 26, 2013 (78 FR

[1] Section 3(52) of WIOA defines the term ''recognized postsecondary credential'' to mean ''a credential consisting of an industry-recognized certificate or certification, a certificate of completion of an apprenticeship, a license recognized by the State involved or Federal Government, or an associate or baccalaureate degree.''

[2] Section 8101(32) of the Elementary and Secondary Education Act of 1965, as amended (ESEA), defines the term ''middle grades'' to mean ''any of grades 5 through 8.''

12955), the integration of services, and improving CTE student outcomes.[3]

Requirements and Selection Criteria: This notice includes application and program requirements and selection criteria that are based on statutory requirements or the Notice of Final Requirements, but that are established in accordance with section 437(d)(1) of General Education Provisions Act (GEPA) in order to make some modifications to those requirements and selection criteria.

Priority: This priority is from the Secretary's notice of final supplemental priorities and definitions, published in the **Federal Register** on March 2, 2018 (83 FR 9096) (Supplemental Priorities).

Competitive Preference Priority: For FY 2021, and any subsequent year in which we make awards from the list of unfunded applications from this competition, this priority is a competitive preference priority. Under 34 CFR 75.105(c)(2)(i), we award up to an additional five points to an application, depending on how well the application meets this competitive preference priority. If an applicant chooses to address this competitive preference priority, the project narrative section of its application must identify its response to the competitive preference priority.

This priority is:

Promoting Science, Technology, Engineering, or Math (STEM) Education, With a Particular Focus on Computer Science (up to 5 points). Projects that are designed to improve student achievement or other educational outcomes in one or more of the following areas: Science, technology, engineering, math, or computer science (as defined in this notice). These projects must address increasing access to STEM coursework, including computer science, and hands-on learning opportunities, such as through expanded course offerings, dual-enrollment, high-quality online coursework, or other innovative delivery mechanisms.

Requirements: These application and program requirements are established in accordance with section 437(d)(1) of GEPA unless a specific statutory or regulatory citation for the requirement is provided.

The application requirements are:

(1) An eligible applicant (as determined by the Act) must include documentation in its application showing that it and, if appropriate, its consortium members are eligible to apply.

As defined in the Indian Self-Determination and Education Assistance Act (ISDEAA) (25 U.S.C. 5304(l)), the term ''Tribal organization'' means the recognized governing body of any Indian Tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: provided, that in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian Tribe, the approval of each such Indian Tribe shall be a prerequisite to the letting or making of such contract or grant. In accordance with this statutory definition, any Tribal organization proposing to provide NACTEP services for the benefit of more than one Indian Tribe must first obtain the approval of each Indian Tribe it proposes to serve and must submit documentation of such approval with its NACTEP application and that documentation of Tribal approval is a prerequisite to the awarding of a NACTEP grant to any Tribal organization proposing to serve more than one Indian Tribe.

(2) An applicant that is not proposing to provide CTE directly to its students and proposes instead to use NACTEP funds to pay one or more qualified education providers to provide CTE to its students must include with its application a signed memorandum of understanding (MOU) between the applicant and that entity. The MOU must describe the commitment between the applicant and each education provider and must include, at a minimum, a statement of the responsibilities of the applicant and the education provider, including a description of the CTE programming to be provided. The MOU must be signed by the appropriate individuals on behalf of each party, such as the authorizing official or president of a Tribe or Tribal organization, a Bureau-funded school, a college president, or a college dean.

(3) An applicant must indicate whether it intends to consolidate FY 2021 NACTEP funds into a current or future 477 plan as described in Program Requirement 5. Any request to consolidate NACTEP funds into a 477 plan must be made separately to the U.S. Department of Interior.

The program requirements are:

Requirement 1—Authorized Programs

(a) Section 116(e) of the Act requires the Secretary to ensure that activities funded under NACTEP ''will improve career and technical education programs'' (20 U.S.C. 2326(e)), as the term ''career and technical education'' is defined by the Act as amended by the Strengthening Career and Technical Education for the 21st Century Act (20 U.S.C. 2302 (5)). Therefore, under NACTEP, the Assistant Secretary will award grants to carry out projects that—

(1) Propose organized educational activities offering a sequence of courses that—

(A) Provide individuals with rigorous academic content and relevant technical knowledge and skills needed to prepare for further education and careers in current or emerging professions, which may include high-skill, high-wage, or in-demand industry sectors or occupations, which shall be, at the secondary level, aligned with the challenging State academic standards adopted by a State under section 1111(b)(1) of the ESEA;

(B) Provide technical skill proficiency or a recognized postsecondary credential, which may include an industry-recognized credential, a certificate, or an associate degree; and

(C) May include prerequisite courses that meet the requirements of this subparagraph;

(2) Include competency-based, work-based, or other applied learning that supports the development of academic knowledge, higher-order reasoning and problem-solving skills, work attitudes, employability skills, technical skills, and occupation-specific skills, and knowledge of all aspects of an industry, including entrepreneurship, of an individual;

(3) To the extent practicable, coordinate between secondary and postsecondary education programs through programs of study, which may include coordination through articulation agreements, early college high school programs, dual or concurrent enrollment program opportunities, or other credit transfer agreements that provide postsecondary credit or advanced standing; and

(4) May include career exploration at the high school level or as early as the middle grades (as such term is defined in section 8101 of ESEA).

(b) Special rule. Notwithstanding section 3(5)(A)(iii) of the Act, which excludes remedial courses from the definition of ''career and technical education,'' funds made available under NACTEP for CTE may be used to provide preparatory, refresher, and remedial education services that are designed to enable students to achieve success in CTE programs or programs of study.

[3] Notes from the Tribal consultation are available on the Department's website at *https://cte.ed.gov/cal/tribal-consultation-nactep-april-27-2020.*

(c) Assistance to Bureau-funded secondary schools. An Indian Tribe, a Tribal organization, or an Alaska Native entity that receives funds through a NACTEP grant or contract may use the funds to provide assistance to a secondary school operated or supported by the U.S. Department of the Interior to enable such school to carry out CTE programs. (Section 116(b)(3) of the Act)

Note: A Bureau-funded secondary school is not eligible to directly apply for NACTEP funds for its general education secondary school program. Its application must be to carry out a supplemental CTE program in its secondary school.

Requirement 2—Evaluation

To help ensure the high quality of NACTEP projects and the achievement of the goals and purposes of section 116 of the Act, each grantee must budget for and conduct an ongoing evaluation of its NACTEP project. An independent evaluator must conduct the evaluation. The evaluation must be appropriate for the project and be both formative and summative in nature.

Requirement 3—Student Stipends

In accordance with section 116(c)(3) of the Act, a portion of an award under this program may be used to provide stipends (as defined in this notice) to one or more students to help meet the students' costs of participation in a NACTEP project. A grantee must apply the following procedures for determining student eligibility for stipends and appropriate amounts to be awarded as stipends:

(1) To be eligible for a stipend a student must—

(i) Be enrolled in a CTE project funded under this program;

(ii) Be in regular attendance in a NACTEP project and meet the training institution's attendance requirement;

(iii) Maintain satisfactory progress in his or her program of study according to the training institution's published standards for satisfactory progress; and

(iv) Have an acute economic need that—

(A) Prevents participation in a CTE in a project funded under this program without a stipend; and

(B) Cannot be met through a work-study program.

(2) The amount of a stipend is the greater of either the minimum hourly wage prescribed by State or local law or the minimum hourly wage established under the Fair Labor Standards Act.

(3) A grantee may only award a stipend if the stipend combined with other resources the student receives does not exceed the student's financial need. A student's financial need is the difference between the student's cost of attendance and the financial aid or other resources available to defray the student's cost of participating in a NACTEP project.

(4) To calculate the amount of a student's stipend, a grantee would multiply the number of hours a student actually attends CTE instruction by the amount of the minimum hourly wage that is prescribed by State or local law, or by the minimum hourly wage that is established under the Fair Labor Standards Act.

Example: If a grantee uses the Fair Labor Standards Act minimum hourly wage of $7.25 and a student attends classes and/or participates in work-based learning (WBL) for 20 hours a week, the student's stipend would be $145 for the week during which the student attends classes ($7.25 × 20 = $145.00).

Note: In accordance with applicable Department statutory requirements and administrative regulations, grantees must maintain records that fully support their decisions to award stipends and the amounts that are paid, such as proof of a student's enrollment in a CTE program or program of study supported with NACTEP funds, stipend applications, timesheets showing the number of attendance hours confirmed in writing by an instructor, student financial status information, and evidence that a student would not be able to participate in the CTE program or program of study supported with NACTEP funds without a stipend. (Notice of Final Requirements).

(5) An eligible student may receive a stipend when taking a course for the first time. However, generally, a stipend may not be provided to a student who has already taken, completed, and had the opportunity to benefit from a course and is merely repeating the course.

(6) An applicant must include in its application the procedure it intends to use to determine student eligibility for stipends and stipend amounts, and its oversight procedures for the awarding and payment of stipends. (Notice of Final Requirements).

Requirement 4—Direct Assistance to Students

A grantee may provide direct assistance to students if the following conditions are met:

(1) The recipient of the direct assistance is an individual who is a member of a special population and who is participating in the grantee's NACTEP project.

(2) The direct assistance is needed to address barriers to the individual's successful participation in that project.

(3) The direct assistance is part of a broader, more generally focused program or activity to address the needs of an individual who is a member of a special population.

Note: Direct assistance to individuals who are members of special populations is not, by itself, a ''program or activity for special populations.''

(4) The grant funds used for direct assistance must be expended to supplement, and not supplant, assistance that is otherwise available from non-Federal sources. (20 U.S.C. 2391(a)). For example, generally, a postsecondary educational institution could not use NACTEP funds to provide child care for single parents if non-Federal funds previously were made available for this purpose, or if non-Federal funds are used to provide child care services for single parents participating in non-CTE programs and these services otherwise would have been available to CTE students in the absence of NACTEP funds.

(5) In determining how much of the NACTEP grant funds it will use for direct assistance to an eligible student, a grantee must consider whether the specific services to be provided are a reasonable and necessary cost of providing CTE programs for special populations. However, the Assistant Secretary does not envision a circumstance in which it would be a reasonable and necessary expenditure of NACTEP project funds for a grantee to use a majority of a project's budget to pay direct assistance to students, in lieu of providing the students served by the project with CTE. (Notice of Final Requirements).

Requirement 5—Integration of Services

Section 116(f) of the Act provides that a Tribe, Tribal organization, or Alaska Native entity receiving financial assistance under this program may integrate those funds with assistance received from related programs in accordance with the provisions of Public Law 115–93, the Indian Employment, Training and Related Services Consolidation Act of 2017 (25 U.S.C. 3401 *et seq.*). An entity wishing to integrate funds must have a plan that meets the requirements of the Indian Employment, Training and Related Services Consolidation Act of 2017 and is acceptable to the Secretary of the Interior and the Secretary of Education.

Note: Current NACTEP grantees that integrate NACTEP funds with other grant funds pursuant to an approved plan under section 477 of the Indian

Employment, Training and Related Services Consolidation Act of 2017 (a 477 plan) must apply for a new NACTEP grant under this competition by submitting an application that meets all of the requirements included in this notice.

Note: Any applicant who either currently has an approved 477 plan, or intends to submit a 477 application, that seeks to include FY 2021 NACTEP funds (if awarded) must indicate the intent to consolidate FY 2021 NACTEP funds into a current or future 477 plan in the NACTEP application as detailed in Application Requirement 3. Any request to consolidate NACTEP funds into a 477 plan must be made separately to the U.S. Department of Interior.

Note: In order for the Department to ensure that FY 2021 NACTEP funds are efficiently transferred to the Department of Interior for 477 plan purposes (as per 25 U.S.C. 3412(a)), the Department must receive a 477 plan application that seeks to include FY 2021 NACTEP funds no later than May 15, 2021.

For further information on the integration of grant funds under this and related programs, contact the Division of Workforce Development, Office of Indian Services, Bureau of Indian Affairs, U.S. Department of the Interior. Email: *BIA_477Program@bia.gov.*

Requirement 6: ISDEAA Statutory Hiring Preference

(1) Awards that are primarily for the benefit of Indians are subject to the provisions of section 7(b) of the Indian Self-Determination and Education Assistance Act (Pub. L. 93–638). That section requires that, to the greatest extent feasible, a grantee—

(i) Give to Indians preferences and opportunities for training and employment in connection with the administration of the grant; and

(ii) Give to Indian organizations and to Indian-owned economic enterprises, as defined in section 3 of the Indian Financing Act of 1974 (25 U.S.C. 1452(e)), preference in the award of contracts in connection with the administration of the grant.

(2) For purposes of Requirement 6, an Indian is a member of any federally recognized Indian Tribe. (25 U.S.C. 5307(b))

Definitions: These definitions are from the Act, the Supplemental Priorities, or the Notice of Final Requirements, or established in accordance with section 437(d)(1) of GEPA. The source of each definition is noted after the definition.

Acute economic need means an income that is at or below the national poverty level according to the latest available data from the U.S. Department of Commerce or the U.S. Department of Health and Human Services Poverty Guidelines. (Notice of Final Requirements).

Alaska Native or Native means a citizen of the United States who is a person of one-fourth degree or more Alaska Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community [4]) Eskimo, or Aleut blood, or a combination thereof. The term includes—

(a) Any Native, as so defined, either or both of whose adoptive parents are not Natives; and

(b) In the absence of proof of a minimum blood quantum, any citizen of the United States who is regarded as an Alaska Native by the Native village or Native group of which he or she claims to be a member and whose father or mother is (or, if deceased, was) regarded as Native by any village or group. Any decision of the Secretary of the Interior regarding eligibility for enrollment will be final. (20 U.S.C. 2326(a)(1); 43 U.S.C. 1602(b)).

Alaska Native entity means an entity such as an Alaska Native village, group, or regional or village corporation. (section 437(d)(1) of GEPA).

Alaska Native group means any Tribe, band, clan, village, community, or village association of Natives in Alaska composed of less than twenty-five Natives, who comprise a majority of the residents of the locality. (43 U.S.C. 1602(d)).

Alaska Native village means any Tribe, band, clan, group, village, community, or association in Alaska listed in sections 1610 and 1615 of the Alaska Native Claims Settlement Act, or that meets the requirements of chapter 33 of the Alaska Native Claims Settlement Act, and that the Secretary of the Interior determines was, on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary of the Interior, who shall make findings of fact in each instance), composed of twenty-five or more Natives. (43 U.S.C. 1602(c)).

Alaska regional corporation means an Alaska Native regional corporation established under the laws of the State of Alaska in accordance with the provisions of chapter 33 of the Alaska Native Claims Settlement Act. (43 U.S.C. 1602(g)).

Alaska village corporation means an Alaska Native village corporation organized under the laws of the State of Alaska as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of an Alaska Native village, in accordance with the terms of chapter 33 of the Alaska Native Claims Settlement Act. (43 U.S.C. 1602(j)).

Bureau means the Bureau of Indian Affairs of the U.S. Department of the Interior. (25 U.S.C. 2021(2)).

Bureau-funded school means—

(a) A Bureau-operated elementary or secondary day or boarding school or Bureau-operated dormitory for students attending a school other than a Bureau school. (25 U.S.C. 2021(3) and (4));

(b) An elementary school, secondary school, or dormitory that receives financial assistance for its operation under a contract, grant, or agreement with the Bureau under section 102, 103(a), or 208 of the ISDEAA (25 U.S.C. 5321, 5322(a), or 5355) or under the Tribally Controlled Schools Act of 1988 (25 U.S.C. 2504 *et seq.*). (25 U.S.C. 2021(3) and (6)); or

(c) A school for which assistance is provided under the Tribally Controlled Schools Act of 1988 (25 U.S.C. 2501 *et seq.*). (25 U.S.C. 2021(3)).

Career and technical education (CTE) means organized educational activities that—

(a) Offer a sequence of courses that—

(1) Provides individuals with rigorous academic content and relevant technical knowledge and skills needed to prepare for further education and careers in current or emerging professions, which may include high-skill, high-wage, or in-demand industry sectors or occupations, which shall be, at the secondary level, aligned with the challenging State academic standards adopted by a State under section 1111(b)(1) of the ESEA;

(2) Provides technical skill proficiency or a recognized postsecondary credential, which may include an industry-recognized credential, a certificate, or an associate degree; and

(3) May include prerequisite courses (other than a remedial course) [5] that meet the requirements of this paragraph (a);

(b) Include competency-based, work-based, or other applied learning that supports the development of academic

[4] The correct name of this community is Metlakatla Indian Community. It is misspelled in the Alaska Native Claims Settlement Act, which is the source of this definition.

[5] Section 116(c)(2) of the Act provides that, notwithstanding the exclusion of remedial courses from the Act's definition of CTE, funds made available under NACTEP ''may be used to provide preparatory, refresher, and remedial education services that are designed to enable students to achieve success in career and technical education programs or programs of study.''

knowledge, higher-order reasoning and problem-solving skills, work attitudes, employability skills, technical skills, and occupation-specific skills, and knowledge of all aspects of an industry, including entrepreneurship, of an individual;

(c) To the extent practicable, coordinate between secondary and postsecondary education programs through programs of study, which may include coordination through articulation agreements, early college high school programs, dual or concurrent enrollment program opportunities, or other credit transfer agreements that provide postsecondary credit or advanced standing; and

(d) May include career exploration at the high school level or as early as the middle grades (as such term is defined in section 8101 of the ESEA). (20 U.S.C. 2302(5)).

Computer science means the study of computers and algorithmic processes and includes the study of computing principles and theories, computational thinking, computer hardware, software design, coding, analytics, and computer applications.

Computer science often includes computer programming or coding as a tool to create software, including applications, games, websites, and tools to manage or manipulate data; or development and management of computer hardware and the other electronics related to sharing, securing, and using digital information.

In addition to coding, the expanding field of computer science emphasizes computational thinking and interdisciplinary problem-solving to equip students with the skills and abilities necessary to apply computation in our digital world.

Computer science does not include using a computer for everyday activities, such as browsing the internet; use of tools like word processing, spreadsheets, or presentation software; or using computers in the study and exploration of unrelated subjects. (Supplemental Priorities).

CTE concentrator means—

(a) At the secondary school level, a student served by an eligible recipient who has completed at least 2 courses in a single career and technical education program or program of study; and

(b) At the postsecondary level, a student enrolled in an eligible recipient who has—

(1) Earned at least 12 credits within a career and technical education program or program of study; or

(2) Completed such a program if the program encompasses fewer than 12 credits or the equivalent in total. (20 U.S.C. 2302(12))

Direct assistance to students means tuition, dependent care, transportation, books, and supplies that are necessary for a student to participate in a CTE program or program of study supported with NACTEP funds. (Notice of Final Requirements).

In-demand industry sector or occupation means—

(a) An industry sector that has a substantial current or potential impact (including through jobs that lead to economic self-sufficiency and opportunities for advancement) on the State, regional, or local economy, as appropriate, and that contributes to the growth or stability of other supporting businesses, or the growth of other industry sectors; or

(b) An occupation that currently has or is projected to have a number of positions (including positions that lead to economic self-sufficiency and opportunities for advancement) in an industry sector so as to have a significant impact on the State, regional, or local economy, as appropriate. (29 U.S.C. 3102).

Indian means a person who is a member of an Indian Tribe. (25 U.S.C. 5304(d)).

Indian Tribe means any Indian Tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. (25 U.S.C. 5304(e)).

Institution of higher education means—

(a) An educational institution in any State that—

(1) Admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate or persons who meet the requirements of section 1091(d) of this title;

(2) Is legally authorized within such State to provide a program of education beyond secondary education;

(3) Provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree, or awards a degree that is acceptable for admission to a graduate or professional degree program, subject to review and approval by the Secretary;

(4) Is a public or other nonprofit institution; and

(5) Is accredited by a nationally recognized accrediting agency or association or, if not so accredited, is an institution that has been granted pre-accreditation status by such an agency or association that has been recognized by the Secretary of Education for the granting of pre-accreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

(b) The term also includes—

(1) Any school that provides not less than a 1-year program of training to prepare students for gainful employment in a recognized occupation and that meets the provisions of paragraphs (1), (2), (4), and (5) of paragraph (a); and

(2) A public or nonprofit private educational institution in any State that, in lieu of the requirement in paragraph (a)(1) of this definition, admits as regular students individuals who are beyond the age of compulsory school attendance in the State in which the institution is located or, (B) who will be dually or concurrently enrolled in the institution and a secondary school. (20 U.S.C. 1001(a) and (b)).

Professional development means activities that—(a) are an integral part of eligible agency, eligible recipient, institution, or school strategies for providing educators (including teachers, principals, other school leaders, administrators, specialized instructional support personnel, career guidance and academic counselors, and paraprofessionals) with the knowledge and skills necessary to enable students to succeed in career and technical education, to meet challenging State academic standards under section 1111(b)(1) of ESEA, or to achieve academic skills at the postsecondary level; and

(b) Are sustained (not stand-alone, 1-day, or short-term workshops), intensive, collaborative, job-embedded, data-driven, and classroom-focused, to the extent practicable evidence-based, and may include activities that—-

(1) Improve and increase educators'—

(A) Knowledge of the academic and technical subjects;

(B) Understanding of how students learn; and

(C) Ability to analyze student work and achievement from multiple sources, including how to adjust instructional strategies, assessments, and materials based on such analysis;

(2) Are an integral part of eligible recipients' improvement plans;

(3) Allow personalized plans for each educator to address the educator's specific needs identified in observation or other feedback;

(4) Support the recruitment, hiring, and training of effective educators, including educators who became certified through State and local alternative routes to certification;

(5) Advance educator understanding of—

(A) Effective instructional strategies that are evidence-based; and

(B) Strategies for improving student academic and technical achievement or substantially increasing the knowledge and teaching skills of educators;

(6) Are developed with extensive participation of educators, parents, students, and representatives of Indian Tribes (as applicable), of schools and institutions served under the Act;

(7) Are designed to give educators of students who are English learners in career and technical education programs or programs of study the knowledge and skills to provide instruction and appropriate language and academic support services to those students, including the appropriate use of curricula and assessments;

(8) As a whole, are regularly evaluated for their impact on increased educator effectiveness and improved student academic and technical achievement, with the findings of the evaluations used to improve the quality of professional development;

(9) Are designed to give educators of individuals with disabilities in career and technical education programs or programs of study the knowledge and skills to provide instruction and academic support services to those individuals, including positive behavioral interventions and supports, multi-tier system of supports, and use of accommodations;

(10) Include instruction in the use of data and assessments to inform and instruct classroom practice;

(11) Include instruction in ways that educators may work more effectively with parents and families;

(12) Provide follow-up training to educators who have

participated in activities described in this definition that are designed to ensure that the knowledge and skills learned by the educators are implemented in the classroom;

(13) Promote the integration of academic knowledge and skills and relevant technical knowledge and skills, including programming jointly delivered to academic and career and technical education teachers; or

(14) Increase the ability of educators providing career and technical education instruction to stay current with industry standards. (20 U.S.C. 2302(40)).

Program of study means a coordinated, nonduplicative sequence of academic and technical content at the secondary and postsecondary level that—

(A) Incorporates challenging State academic standards, including those adopted by a State under section 1111(b)(1) of ESEA;

(B) Addresses both academic and technical knowledge and skills, including employability skills;

(C) Is aligned with the needs of industries in the economy of the State, region, Tribal community, or local area;

(D) Progresses in specificity (beginning with all aspects of an industry or career cluster and leading to more occupation-specific instruction);

(E) Has multiple entry and exit points that incorporate credentialing; and

(F) Culminates in the attainment of a recognized postsecondary credential. (20 U.S.C. 2302 (41)).

Recognized postsecondary credential means a credential consisting of an industry-recognized certificate or certification, a certificate of completion of an apprenticeship, a license recognized by the State involved or Federal Government, or an associate or baccalaureate degree. (29 U.S.C. 3102(52)).

Secondary school means a nonprofit institutional day or residential school, including a public secondary charter school, that provides secondary education, as determined under State law, except that the term does not include any education beyond grade 12. (20 U.S.C.7801(45)).

Special populations means—

(a) Individuals with disabilities;

(b) Individuals from economically disadvantaged families, including low-income youth and adults;

(c) Individuals preparing for non-traditional fields; (d) Single parents, including single pregnant women;

(e) Out-of-workforce individuals;

(f) English learners;

(g) Homeless individuals described in section 725 of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a);

(h) Youth who are in, or have aged out of, the foster care system; and

(i) Youth with a parent who—

(i) Is a member of the armed forces (as such term is defined in section 101(a)(4) of title 10, United States Code); and

(ii) Is on active duty (as such term is defined in section 101(d)(1) of such title). (20 U.S.C. 2302(48)).

Stipend means a subsistence allowance for a student that is necessary for the student to participate in a CTE program or program of study supported with NACTEP funds. (Notice of Final Requirements).

Support services means services related to curriculum modification, equipment modification, classroom modification, supportive personnel (including paraprofessionals and specialized instructional support personnel), and instructional aids and devices. (20 U.S.C. 2302(50)).

Tribal organization means the recognized governing body of any Indian Tribe; any legally established organization of Indians that is controlled, sanctioned, or chartered by such governing body or that is democratically elected by the adult members of the Indian community to be served by such organization and that includes the maximum participation of Indians in all phases of its activities: Provided, that, in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian Tribe, the approval of each such Indian Tribe shall be a prerequisite to the letting or making of such contract or grant. (25 U.S.C. 5304(l)).

Tribally controlled college or university means an institution of higher education that is formally controlled, or has been formally sanctioned, or chartered, by the governing body of an Indian tribe or tribes, except that no more than one such institution shall be recognized with respect to any such tribe. (25 U.S.C. 1801(a)(4)).

Work-based learning means sustained interactions with industry or community professionals in real workplace settings, to the extent practicable, or simulated environments at an educational institution that foster in-depth, firsthand engagement with the tasks required of a given career field, that are aligned to curriculum and instruction. (20 U.S.C. 2302 (55)).

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed priorities, requirements, and definitions. Section 437(d)(1) of GEPA, however, allows the Secretary to exempt from rulemaking requirements regulations governing the first grant competition under a new or substantially revised program authority. This is the first grant competition for this substantially revised program under section 116 of the Carl D. Perkins Career and Technical Education Act of 2006, as amended by the Strengthening Career and Technical Education for the 21st Century Act, 20 U.S.C. 2326, and therefore qualifies for this exemption. In

order to ensure timely grant awards, the Secretary has decided to forgo public comment on certain requirements, definitions, and selection criteria under section 437(d)(1) of GEPA. These requirements, definitions, and selection criteria will apply to the FY 2021 grant competition and any subsequent year in which we make awards from the list of unfunded applications from this competition.

Program Authority: 20 U.S.C. 2301, *et seq.,* particularly 2326(a)–(g).

Note: Projects must be awarded and operated in a manner consistent with the nondiscrimination requirements contained in the U.S. Constitution and the Federal civil rights laws.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 75, 77, 79, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget (OMB) Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) Notice of Final Requirements. (e) Supplemental Priorities.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian Tribes.

Note: The regulations in 34 CFR 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $15,932,000 for the first 12 months of the project period. Funding for years two, three, four and five is subject to the availability of funds and to a grantee meeting the requirements of 34 CFR 75.253.

Contingent upon the availability of funds and the quality of applications, we may make additional awards later in FY 2021 or in subsequent years from the list of unfunded applications from this competition.

Estimated Range of Awards: $451,000 to $551,000.

Estimated Average Size of Awards: $458,000.

Estimated Number of Awards: 35.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* (a) The following entities are eligible to apply under this competition:

(1) A federally recognized Indian Tribe.

(2) A Tribal organization.

(3) An Alaska Native entity.

(4) A Bureau-funded school, except for a Bureau-funded school proposing to use its award to support general education secondary school programs.

(b) Any Tribe, Tribal organization, Alaska Native entity, or eligible Bureau-funded school may apply individually or as part of a consortium with one or more eligible Tribes, Tribal organizations, Alaska Native entities, or eligible Bureau-funded schools. (Eligible applicants seeking to apply for funds as a consortium must meet the requirements in 34 CFR 75.127–75.129, which apply to group applications.)

Note: If you are a nonprofit organization, under 34 CFR 75.51, you may demonstrate your nonprofit status by providing: (1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code; (2) a statement from a State taxing body or the State attorney general certifying that the organization is a nonprofit organization operating within the State and that no part of its net earnings may lawfully benefit any private shareholder or individual; (3) a certified copy of the applicant's certificate of incorporation or similar document if it clearly establishes the nonprofit status of the applicant; or (4) any item described above if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

2. a. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

b. *Supplement-Not-Supplant:* This competition involves supplement-not-supplant funding requirements. In accordance with section 211(a) of the Act (20 U.S.C. 2391(a)), funds under this program may not be used to supplant non-Federal funds used to carry out CTE activities.

We caution applicants not to plan to use funds under NACTEP to replace otherwise available non-Federal funding for direct assistance to students and family assistance programs. For example, NACTEP funds must not be used to supplant Tribal and other non-Federal funds with Federal funds in order to pay the costs of students' tuition, dependent care, transportation, books, supplies, and other costs associated with participation in a CTE program.

Funds under NACTEP should not be used to replace Federal student financial aid. The Act does not authorize the Secretary to fund projects that serve primarily as entities through which students may apply for and receive tuition and other financial assistance.

c. *Indirect Cost Rate Information:* This program uses a restricted indirect cost rate. For more information regarding indirect costs, or to obtain a negotiated indirect cost rate, please see *www2.ed.gov/about/offices/list/ocfo/intro.html.*

d. *Administrative Cost Limitation:* This program does not include any program-specific limitation on administrative expenses. All administrative expenses must be reasonable and necessary and conform to Cost Principles described in 2 CFR part 200 subpart E of the Uniform Guidance.

e. *Limitation on Services:* Section 215 of the Act (20 U.S.C. 2395) forbids the use of Perkins funds for the education of students prior to the middle grades. The term middle grades refers to grades 5 through 8, as defined in section 8101 of ESEA.

3. *Subgrantees:* Under 34 CFR 75.708 (b) and (c) a grantee under this competition may award subgrants—to directly carry out project activities described in its application—to the following types of entities: Institutions of higher education, nonprofit organizations, Tribal organizations, Bureau-funded schools operating a secondary school CTE program, or Alaska Native entities. The grantee may award subgrants to entities it has identified in an approved application or that it selects through a competition under procedures established by the grantee.

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768) and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf,* which contain requirements and information on how to submit an application.

2. *Submission of Proprietary Information:* Given the types of projects that may be proposed in applications for

the NACTEP program, your application may include business information that you consider proprietary. In 34 CFR 5.11 we define ''business information'' and describe the process we use in determining whether any of that information is proprietary and, thus, protected from disclosure under Exemption 4 of the Freedom of Information Act (5 U.S.C. 552, as amended).

Because we plan to make successful applications available to the public on the Department's website, you may wish to request confidentiality of business information.

Consistent with Executive Order 12600, please designate in your application any information that you believe is exempt from disclosure under Exemption 4. In the appropriate Appendix section of your application, under ''Other Attachments Form,'' please list the page number or numbers on which we can find this information. For additional information please see 34 CFR 5.11(c).

3. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

4. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

5. *Recommended Page Limit:* The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to 35 pages and (2) use the following standards:

- A ''page'' is 8.5″ × 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger, and no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the recommended page limit does apply to all of the application narrative.

6. *Notice of Intent to Apply:* The Department will be able to review grant applications more efficiently if we know the approximate number of applicants that intend to apply. Therefore, we strongly encourage each potential applicant to notify us of their intent to submit an application. To do so, please email the program contact person listed under **FOR FURTHER INFORMATION CONTACT** with the subject line ''Intent to Apply,'' and include the applicant's name and a contact person's name and email address. Applicants that do not submit a notice of intent to apply are not bound to apply or bound by the information provided.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are from the Notice of Final Requirements, the Act, 34 CFR 75.210, or are being established for the FY 2021 grant competition and any subsequent year in which we make awards from the list of unfunded applications from this competition in accordance with section 437(d)(1) of GEPA, 20 U.S.C. 1232(d)(1). The source of each criterion is noted after each criterion.

The maximum score for each criterion is indicated in parentheses.

(a) *Need for project* (Up to 10 points). In determining the need for the proposed project, we consider the following factors:

(1) The extent to which the proposed project involves, coordinates with, or encourages Tribal economic development plans. (Section 116(e)(1) of the Act). (Up to 5 points).

(2) The extent of the need for the activities to be carried out by the proposed project, as evidenced by local labor market demand or occupational trends data, Tribal economic development plans, or recommendations from accrediting agencies. (Section 437(d)(1) of GEPA). (Up to 5 points).

(b) *Quality of the project design* (Up to 40 points). In determining the quality of the design of the proposed project, we consider the following factors:

(1) The extent to which the proposed project activities will create opportunities for students to receive a recognized postsecondary credential; become employed in high-skill, high-wage, and in-demand industry sectors or occupations; or both. (Section 437(d)(1) of GEPA). (Up to 20 points).

(2) The extent to which the proposed project will successfully address the needs of the target population or other identified needs, as evidenced by the applicant's description of programs and activities that align with the target population's needs. (Section 437(d)(1) of GEPA). (Up to 10 points).

(3) The extent to which the proposed project will be coordinated with similar or related efforts, and with community, State, or Federal resources, where such opportunities and resources exist. (Section 437(d)(1) of GEPA). (Up to 5 points).

(4) The extent to which the training or professional development services to be provided by the proposed project are of sufficient quality, intensity, and duration to lead to improvements in practice among the recipients of those services. (34 CFR 75.210). (Up to 5 points).

(c) *Adequacy of resources* (Up to 15 points). In determining the adequacy of resources for the proposed project, we consider the following factors:

(1) The adequacy of support, including facilities, equipment, supplies, and other resources, from the applicant organization(s) and the Tribal entity or entities to be served. (Notice of Final Requirements). (Up to 2 points).

(2) The extent to which the budget is adequate and costs are reasonable in relation to the objectives of the proposed project. (Notice of Final Requirements). (Up to 5 points).

(3) The relevance and demonstrated commitment of the applicant, education providers, members of the consortium, local employers, or Tribal entities to be served by the project (*e.g.,* through signed MOUs, letters of support and commitment, or commitments to employ project participants, as appropriate). (Section 437(d)(1) of GEPA). (Up to 3 points).

(4) The extent to which the project will use instructors who are licensed or certified to teach in the field in which they will provide instruction. (Section 437(d)(1) of GEPA). (Up to 5 points).

(d) *Quality of the management plan* (Up to 25 points). In determining the quality of the management plan for the proposed project, we consider the following factors:

(1) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined project objectives, staff responsibilities, timelines, and the milestones. (Section 437(d)(1) of GEPA). (Up to 10 points).

(2) The extent to which the applicant encourages 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. (Notice of Final Requirements). (Up to 5 points).

(3) The extent to which the time commitments of the project director and other key project personnel are appropriate and adequate to meet the objectives of the proposed project. (Notice of Final Requirements). (Up to 5 points).

(4) The qualifications, including relevant training, expertise, and experience, of the project director, key personnel, and project consultants. (Notice of Final Requirements). (Up to 5 points).

(e) *Quality of the project evaluation* (Up to 10 points). In determining the quality of the evaluation, we consider the following factors:

(1) The extent to which the proposed methods of evaluation are thorough, feasible, and include the use of objective performance measures that are clearly related to the intended outcomes of the project and the Government Performance and Results Act of 1993 (GPRA) performance measures. (Section 437(d)(1) of GEPA). (Up to 5 points).

(2) The extent to which the methods of evaluation will provide performance feedback and continuous improvement toward achieving intended outcomes. (Notice of Final Requirements). (Up to 5 points).

2. *Additional Selection Factor:* In accordance with the requirement in section 116(e) of the Act, we have included the following additional selection factor from the Notice of Final Requirements:

We will award five points to applications from Tribally controlled colleges or universities that—

(a) Are accredited or are candidates for accreditation by a nationally recognized accreditation organization as an institution of postsecondary CTE; or

(b) Operate CTE programs that are accredited or are candidates for accreditation by a nationally recognized accreditation organization and issue certificates for completion of CTE programs (20 U.S.C. 2326(e)).

3. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

4. *Risk Assessment and Special Conditions:* Consistent with 2 CFR 200.205, before awarding grants under this competition, the Department conducts a review of the risks posed by applicants. Under 2 CFR 3474.10, the Secretary may impose special conditions and, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

5. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.205(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management (SAM). You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

VI. Award Administration Information

1. *Appeal process:* Any applicant denied funding under this NACTEP competition may request a hearing to review the Secretary's decision not to make the award. The Secretary will implement the appeal process in accordance with the procedures in 34 CFR 401.1. In accordance with those procedures, any applicant denied funding will have 30 calendar days to make a written request to the Secretary for a hearing to review the Secretary's decision. (25 U.S.C. 5321(b); 34 CFR 401.1).

2. *Indian Self-Determination Contracts:* Section 116(b)(2) of the Act provides that grants or contracts awarded under section 116 of the Act are subject to the terms and conditions of section 102 of the ISDEAA (25 U.S.C. 5321) and must be conducted in accordance with the provisions of sections 4, 5, and 6 of the Act of April 16, 1934 (25 U.S.C. 5345–5347) (Johnson-O'Malley Act), that are relevant to the programs administered under section 116(b) of the Act. The Act of April 16, 1934 authorizes the Secretary of the Interior to enter into contracts for the education of Indians and other purposes. Section 102 of the ISDEAA authorizes Indian Tribes to request self-determination contracts from the Department of Interior. Accordingly, an Indian Tribe or Tribal organization that has applied to the Secretary for funding under NACTEP and has been notified of its selection to be a funding recipient may submit a request to both the Secretary of Education (via the contact person listed under **FOR FURTHER INFORMATION CONTACT**) and the relevant Department of Interior contact person to operate its NACTEP project through a section 102 Indian self-determination contract.

After successful applicants are selected under this NACTEP competition, the Secretary will review any requests to operate a project under an Indian self-determination contract pursuant to the ISDEAA. If a request for an Indian self-determination contract is approved, the Indian Tribe or Tribal organization submitting the request will be required, to the extent possible, to operate its project in accordance with the ISDEAA, relevant provisions in sections 4, 5, and 6 of the Act of April 16, 1934 (25 U.S.C. 5345–5347), the Act, and the non-statutory program requirements specified in this notice.

The CTE programs provided through an Indian self-determination contract would have to be substantively the same as were proposed in the initial NACTEP application and approved by the Department. Any Indian Tribe or Tribal organization that is selected to receive funding under this competition, but whose request to operate the project under an Indian self-determination contract is denied, may appeal the denial to the Secretary. If you have questions about ISDEAA self-determination contracts, please contact

the person listed under **FOR FURTHER INFORMATION CONTACT**. (Section 437(d)(1) of GEPA).

3. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

4. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

5. *Open Licensing Requirement:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee or subgrantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. The dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

6. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

(c) Under 34 CFR 75.250(b), the Secretary may provide a grantee with additional funding for data collection analysis and reporting. In this case the Secretary establishes a data collection period.

7. *Performance Measures:* The Department has established the following performance measures for purposes of GPRA and for Department reporting under 34 CFR 75.110, which it will use to evaluate the overall performance of the grantee's project, as well as NACTEP as a whole:

(a) At the secondary level: An increase in—

(1) The percentage of CTE concentrators who graduate high school, as measured by—

(A) The four-year adjusted cohort graduation rate (defined in section 8101 of ESEA); and

(B) At the grantee's discretion, the extended-year adjusted cohort graduation rate (defined in section 8101 of ESEA);

(2) The percentage of CTE concentrators graduating from high school having attained postsecondary credits in the relevant CTE program earned through a dual or concurrent enrollment program or another credit transfer agreement;

(3) The percentage of CTE concentrators graduating from high school having participated in work-based learning;

(4) The percentage of CTE concentrators graduating from high school having attained a recognized postsecondary credential; and

(5) The percentage of CTE concentrators who, after exiting from secondary education, are in postsecondary education or advanced training, military service, or a service program, or are employed.

(b) At the postsecondary level: An increase in—

(1) The percentage of CTE concentrators who remain enrolled in postsecondary education, are in advanced training, military service, or a service program, or are employed; and

(2) The percentage of CTE concentrators who receive a recognized postsecondary credential.

Project-Specific Performance Measures: In addition to these measures, applicants may propose project-specific performance measures and performance targets consistent with the objectives of the proposed project. Examples of such project-specific performance measures could include student recruitment, student participation in work-based learning at the postsecondary level, and teacher and faculty participation in professional development.

Note: All grantees will be expected to submit a semi-annual and an annual performance report addressing these performance measures, to the extent that these performance measures apply to each grantee's NACTEP project.

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: Whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Other Information

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* Braille, large print, audiotape, or compact disc), to the extent reasonably practicable.

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.

Scott Stump,

Assistant Secretary for Career, Technical, and Adult Education.

[FR Doc. 2020–26112 Filed 11–27–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

President's Council of Advisors on Science and Technology

AGENCY: Office of Science, Department of Energy.

ACTION: Notice of Open Virtual Meeting.

SUMMARY: This notice announces an open teleconference meeting of the President's Council of Advisors on Science and Technology (PCAST), and describes the functions of the Council. The Federal Advisory Committee Act (FACA) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: December 18, 2020; 12:30 p.m. to 4:30 p.m. (Eastern Time).

ADDRESSES: The meeting will be held virtually. Information to participate can be found on the website closer to the meeting date at *https://science.osti.gov/About/PCAST/Meetings.*

FOR FURTHER INFORMATION CONTACT: Sarah Domnitz, Deputy Executive Director, PCAST, (202) 881–8056 or email: *PCAST@ostp.eop.gov.*

SUPPLEMENTARY INFORMATION: PCAST is an advisory group of the nation's leading scientists and engineers, appointed by the President to augment the science and technology advice available to him from inside the White House, cabinet departments, and other Federal agencies. See the Executive Order at *whitehouse.gov.* PCAST is consulted on and provides analyses and recommendations concerning a wide range of issues where understanding of science, technology, and innovation may bear on the policy choices before the President. PCAST is chaired by Dr. Kelvin Droegemeier, Director, Office of Science and Technology Policy, Executive Office of the President, The White House. The Designated Federal Officer is Edward McGinnis, Executive Director. Information about PCAST can be found at: *https://science.osti.gov/About/PCAST.*

Tentative Agenda: Discussion and consideration for approval of PCAST's report on potential approaches to establishing Industries of the Future Institutes. Presentation and consideration for approval of PCAST's congressionally-mandated periodic review of the Networking and Information Technology Research and Development (NITRD) Program.

Public Comments: It is the policy of the PCAST to accept written public comments no longer than 10 pages and to accommodate oral public comments whenever possible. The PCAST expects that public statements presented at its meetings will not be repetitive of previously submitted oral or written statements.

The public comment period for this meeting will take place on December 18, 2020, at a time specified in the meeting agenda. This public comment period is designed only for substantive commentary on PCAST's work, not for business marketing purposes.

Oral Comments: To be considered for the public speaker list at the meeting, interested parties should register to speak at *PCAST@ostp.eop.gov,* no later than 12:00 p.m. Eastern Time on December 11, 2020. To accommodate as many speakers as possible, the time for public comments will be limited to two (2) minutes per person, with a total public comment period of up to 10 minutes. If more speakers register than there is space available on the agenda, PCAST will select speakers on a first-come, first-served basis from those who applied. Those not able to present oral comments may always file written comments with the committee.

Written Comments: Although written comments are accepted continuously, written comments should be submitted to *PCAST@ostp.eop.gov* no later than 12:00 p.m. Eastern Time on December 11, 2020 so that the comments may be made available to the PCAST members prior to this meeting for their consideration.

Please note that because PCAST operates under the provisions of FACA, all public comments and/or presentations will be treated as public documents and will be made available for public inspection, including being posted on the PCAST website.

Signed in Washington, DC on November 23, 2020.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2020–26295 Filed 11–27–20; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Energy Information Administration

Agency Information Collection Proposed Extension

AGENCY: Energy Information Administration (EIA), Department of Energy (DOE).

ACTION: Notice and request for comments.

SUMMARY: EIA invites public comment on the proposed three year extension, without changes, to Form EIA–63C, *Densified Biomass Fuel Report* as required under the Paperwork Reduction Act of 1995. The report is part of EIA's comprehensive energy data program. Form EIA–63C collects monthly data on the manufacture, shipment, exports, energy characteristics, and sales of densified biomass fuels and other densified biomass fuel products data from facilities that manufacture densified biomass fuel products (pellet fuels), for energy applications.

DATES: EIA must receive all comments on this proposed information collection no later than January 29, 2021. If you anticipate any difficulties in submitting your comments by the deadline, contact the person listed in the **ADDRESSES** section of this notice as soon as possible.

ADDRESSES: Send comments to Sara Hoff by email at *Biomass2021@eia.gov.*

FOR FURTHER INFORMATION CONTACT: Connor Murphy, EI–23, U.S. Energy Information Administration, telephone (202) 287–5982, email *Connor.Murphy@eia.gov.* The form and instructions are available at *https://www.eia.gov/survey/#eia-63.*

SUPPLEMENTARY INFORMATION: This information collection request contains:

(1) *OMB Control Number:* 1905–0209;

(2) *Information Collection Request Title:* Densified Biomass Fuel Report;

(3) *Type of Request:* Renewal;

(4) *Purpose:* Form EIA–63C is part of EIA's comprehensive energy data program. The survey collects information on the manufacture, shipment, exports, energy characteristics, and sales of pellet fuels and other densified biomass fuel products data from facilities that manufacture densified biomass fuel products, primarily pellet fuels, for energy applications. The data collected on Form EIA–63C are a primary source of information for the nation's growing production of biomass products for heating and electric power generation, and for use in both domestic and foreign markets.

(5) *Annual Estimated Number of Respondents:* 106;

(6) *Annual Estimated Number of Total Responses:* 1041;

(7) *Annual Estimated Number of Burden Hours:* 1,433;

(8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* The cost of the burden hours is estimated to be $114,841 (1,433 burden hours times $80.14 per hour). EIA estimates that there are no additional costs to respondents associated with the survey other than the costs associated with the burden hours.

Comments are invited on whether or not: (a) The proposed collection of information is necessary for the proper performance of agency functions, including whether the information will have a practical utility; (b) EIA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used, is accurate; (c) EIA can improve the quality, utility, and clarity of the information it will collect; and (d) EIA can minimize the burden of the collection of information on respondents, such as automated collection techniques or other forms of information technology.

Statutory Authority: 15 U.S. C. 772(b) and 42 U.S.C. 7101 *et seq.*

Signed in Washington, DC, on November 23, 2020.

Samson A. Adeshiyan,

Director, Office of Statistical Methods and Research, U. S. Energy Information Administration.

[FR Doc. 2020–26298 Filed 11–27–20; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2738–007.
Applicants: The Empire District Electric Company.
Description: Notice of Non-Material Change in Status of The Empire District Electric Company.
Filed Date: 11/20/20.
Accession Number: 20201120–5298.
Comments Due: 5 p.m. ET 11/12/20.

Docket Numbers: ER15–2028–007.
Applicants: Southwest Power Pool, Inc.
Description: Compliance filing: Compliance Filing in Response to Order issued in ER15–2028–005 (NIMECA) to be effective 10/1/2015.
Filed Date: 11/23/20.
Accession Number: 20201123–5015.
Comments Due: 5 p.m. ET 12/14/20.

Docket Numbers: ER15–2028–008.
Applicants: Southwest Power Pool, Inc.
Description: Compliance filing: Compliance Filing in Response to Order issued in ER15–2028–005 (NIMECA) to be effective 10/1/2015.
Filed Date: 11/23/20.
Accession Number: 20201123–5018.
Comments Due: 5 p.m. ET 12/14/20.

Docket Numbers: ER21–450–000.
Applicants: San Diego Gas & Electric.
Description: TO5 Formula Depreciation Rate Change For Common Plant and Electric General Plant of San Diego Gas & Electric Company.
Filed Date: 11/20/20.
Accession Number: 20201120–5290.
Comments Due: 5 p.m. ET 12/11/20.

Docket Numbers: ER21–451–000.
Applicants: New York Independent System Operator, Inc., Niagara Mohawk Power Corporation.
Description: § 205(d) Rate Filing: SGIA (SA 2573) between NYISO, National Grid, and Grissom Solar to be effective 11/9/2020.
Filed Date: 11/23/20.
Accession Number: 20201123–5004.
Comments Due: 5 p.m. ET 12/14/20.

Docket Numbers: ER21–452–000.
Applicants: New York Independent System Operator, Inc., Niagara Mohawk Power Corporation.
Description: § 205(d) Rate Filing: SGIA (SA 2574) among the NYISO, National Grid, and Regan Solar, LLC to be effective 11/9/2020.
Filed Date: 11/23/20.
Accession Number: 20201123–5006.
Comments Due: 5 p.m. ET 12/14/20.

Docket Numbers: ER21–453–000.
Applicants: Wisconsin Electric Power Company.
Description: Compliance filing: Compliance Filing to be effective 5/29/2019.
Filed Date: 11/23/20.
Accession Number: 20201123–5013.
Comments Due: 5 p.m. ET 12/14/20.

Docket Numbers: ER21–454–000.
Applicants: Southern California Edison Company.
Description: § 205(d) Rate Filing: TOT Revisions to Incorporate Letter Agreements to be effective 1/23/2021.
Filed Date: 11/23/20.
Accession Number: 20201123–5014.
Comments Due: 5 p.m. ET 12/14/20.

Docket Numbers: ER21–455–000.
Applicants: Southern California Edison Company.
Description: § 205(d) Rate Filing: WDAT Revisions to Incorporate Curtailment and Qualifying Facilities to be effective 1/23/2021.
Filed Date: 11/23/20.
Accession Number: 20201123–5030.
Comments Due: 5 p.m. ET 12/14/20.

Docket Numbers: ER21–456–000.
Applicants: Southern California Edison Company.
Description: § 205(d) Rate Filing: WDAT Revisions to Incorporate Letter Agreements to be effective 1/23/2021.
Filed Date: 11/23/20.
Accession Number: 20201123–5029.
Comments Due: 5 p.m. ET 12/14/20.

Docket Numbers: ER21–457–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 1636R24 Kansas Electric Power Cooperative, Inc. NITSA and NOA to be effective 2/1/2021.
Filed Date: 11/23/20.
Accession Number: 20201123–5049.
Comments Due: 5 p.m. ET 12/14/20.

Docket Numbers: ER21–458–000.
Applicants: Transource Oklahoma, LLC.
Description: § 205(d) Rate Filing: Transource Kansas LLC Notice of Succession to Transource Oklahoma LLC to be effective 11/24/2020.
Filed Date: 11/23/20.
Accession Number: 20201123–5070.
Comments Due: 5 p.m. ET 12/14/20.

Docket Numbers: ER21–459–000.
Applicants: Tri-State Generation and Transmission Association, Inc.
Description: Tariff Cancellation: Notice of Cancellation of Rate Schedule FERC Nos. 201 through 204 to be effective 8/31/2020.
Filed Date: 11/23/20.
Accession Number: 20201123–5078.
Comments Due: 5 p.m. ET 12/14/20.

Take notice that the Commission received the following qualifying facility filings:

Docket Numbers: QF19–1331–001.
Applicants: Clean Fuel Dane, LLC.
Description: Refund Report of Clean Fuel Dane, LLC.
Filed Date: 11/23/20.
Accession Number: 20201123–5074.
Comments Due: 5 p.m. ET 12/14/20.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but

intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 23, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–26308 Filed 11–27–20; 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: RP21–228–000.
Applicants: Sierrita Gas Pipeline LLC.
Description: Compliance filing Operational Purchase and Sales Report.
Filed Date: 11/19/20.
Accession Number: 20201119–5013.
Comments Due: 5 p.m. ET 12/1/20.

Docket Numbers: RP21–229–000.
Applicants: Southern Natural Gas Company, L.L.C.
Description: Compliance filing SCRM Filing Nov 2020.
Filed Date: 11/19/20.
Accession Number: 20201119–5017.
Comments Due: 5 p.m. ET 12/1/20.

Docket Numbers: RP21–230–000.
Applicants: Algonquin Gas Transmission, LLC.
Description: § 4(d) Rate Filing: Negotiated Rates—Various Releases eff 12–1–2020 to be effective 12/1/2020.
Filed Date: 11/19/20.
Accession Number: 20201119–5018.
Comments Due: 5 p.m. ET 12/1/20.

Docket Numbers: RP21–231–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: § 4(d) Rate Filing: Negotiated Rate Agreement Update (Pioneer Jan–Mar 2021) to be effective 11/19/2020.
Filed Date: 11/19/20.
Accession Number: 20201119–5036.
Comments Due: 5 p.m. ET 12/1/20.

Docket Numbers: RP21–232–000.
Applicants: Cheniere Corpus Christi Pipeline, LP.
Description: Compliance filing CCPL Stage 3 Compliance Filing in Docket No. CP18–513 to be effective 2/1/2021.
Filed Date: 11/19/20.
Accession Number: 20201119–5044.
Comments Due: 5 p.m. ET 12/1/20.

Docket Numbers: RP21–233–000.
Applicants: Algonquin Gas Transmission, LLC.
Description: § 4(d) Rate Filing: Negotiated Rates—Boston Gas Releases eff 12–1–2020 to be effective 12/1/2020.
Filed Date: 11/19/20.
Accession Number: 20201119–5053.
Comments Due: 5 p.m. ET 12/1/20.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 23, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–26306 Filed 11–27–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER21–445–000]

Hill Top Energy Center LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Hill Top Energy Center 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 14, 2020.

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 may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: November 23, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–26305 Filed 11–27–20; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2018–0258; FRL–10015–32]

Pesticides; Updated Draft Guidance for Pesticide Registrants on Plant Regulator Products and Claims, Including Plant Biostimulants; Notice of Availability and Request for Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is announcing the availability of and seeking public comment on an updated draft guidance document entitled ''Guidance for Plant Regulator Products and Claims, including Plant Biostimulants,'' which was originally issued for public review and comment in March 2019. Guidance documents are issued by the Office of Pesticide Programs (OPP) to inform pesticide registrants and other interested persons about important policies, procedures, and registration related decisions, and serve to provide guidance to pesticide registrants and OPP personnel. EPA updated the original draft guidance document in response to the public comments received on the original draft guidance document. EPA is seeking an additional round of public comment on this updated draft guidance document, which is intended to provide guidance on identifying product claims that are considered to be plant regulator claims by the Agency, thereby subjecting the products to regulation as pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Examples are provided of both claims that are considered plant regulator claims and claims that are not considered plant regulator claims. This draft guidance document also contains a narrative discussion regarding current and previously registered plant regulator active ingredients and their modes of action. This draft guidance does not address or attempt to provide a regulatory definition for ''plant biostimulant'' or for ''nutritional chemical'' or to change any existing regulatory definitions. After considering the comments received on this draft updated guidance, EPA intends to issue a final guidance document.

DATES: Comments must be received on or before December 30, 2020.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2018–0258, though the *Federal eRulemaking Portal* at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Due to the public health concerns related to COVID–19, the EPA Docket Center (EPA/DC) and Reading Room is closed to visitors with limited exceptions. The staff continues to provide remote customer service via email, phone, and webform. For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Jeannine Kausch, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (703) 347–8920; email: *kausch.jeannine@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. What action is the Agency taking?

EPA is announcing the availability of and seeking public comment on the updated draft guidance document, entitled ''Guidance for Plant Regulator Label Claims, Including Plant Biostimulants,'' which was originally issued for public review and comment in the **Federal Register** issue of March 27, 2019 (84 FR 11538, FRL–9986–27). This document is intended to provide guidance to EPA personnel and decisionmakers, and to pesticide registrants. EPA invites comment from prospective guidance users and other stakeholders concerning this updated draft guidance document.

B. What is the Agency's authority for taking this action?

This updated draft guidance document is issued under FIFRA, 7 U.S.C. 136–136y. EPA regulations regarding pesticide registration and exemptions from registration are contained in 40 CFR parts 150 through 189.

C. Does this action apply to me?

This action is directed to the public in general. However, this action may be of particular interest to those persons who are producers or registrants of pesticide products making labeling claims that are considered to be plant regulator claims by the Agency, thereby subjecting the products to regulation under FIFRA as pesticides. The North American Industrial Classification System (NAICS) codes are provided to assist you and others in determining if this action might apply to certain entities. Potentially affected entities may include, but are not limited to:

- Pesticide and Other Agricultural Chemical Manufacturing (NAICS 32532), *e.g.,* pesticide manufacturers or formulators of pesticide products, pesticide importers or any person or company who seeks to register a pesticide.
- Pesticide, Fertilizer, and Other Agricultural Chemical Manufacturing (NAICS 325300), *e.g.,* establishments primarily engaged in manufacturing agricultural chemicals, including nitrogenous and phosphoric fertilizer materials, mixed fertilizers, and agricultural and household pest control chemicals.

Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

D. What are the potential incremental economic impacts of taking this action?

The Agency anticipates that this guidance will reduce uncertainty, in both the regulated community and regulatory agencies, as to whether specific products are or are not subject to registration as a pesticide under FIFRA. Reducing uncertainty may reduce costs, not necessarily monetary costs, but in the effort to bring a product to market; in some situations, uncertainty could deter firms from developing products. To the extent this guidance improves the understanding as to what products must be registered and what products do not need to be registered, the effort firms expend to determine the appropriate regulatory path is reduced.

E. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI

must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *https://www.epa.gov/dockets/commenting-epa-dockets.*

II. Overview

A. Intended Purpose of the Guidance

EPA intends to provide guidance to the pesticide registrant concerning plant regulator label claims, including plant biostimulant claims. Plant biostimulants (PBS) are a growing category of products containing naturally-occurring substances and microbes that are used to stimulate plant growth by enhancing water and nutrient use efficiency, and reducing abiotic stress. The increasing popularity of PBS arises from their ability to enhance agricultural productivity by stimulating natural processes in the plant and in soil using substances and microbes already present in the environment. PBS can promote greater water and nutrient use efficiency, but do not provide any nutritionally-relevant fertilizer benefit to the plant. PBS products are becoming attractive for use in sustainable agriculture production systems and integrated pest management programs, which in turn can reduce the use of irrigation water, as well as agrochemical supplements and fertilizers.

One question to consider is whether a product physiologically influences the growth and development of plants in such a way as to be considered plant regulators by the Agency and thereby triggering regulation under FIFRA as a pesticide. FIFRA section 2(u) defines plant regulators as pesticides, so they are subject to federal registration as pesticides under FIFRA, and FIFRA section 2(v) provides a definition of a plant regulator, as well as for those substances that may be excluded from the definition. Based on the plant regulator definition contained in FIFRA section 2(v), many plant biostimulant products and substances may be excluded or exempt from regulation under FIFRA depending upon their intended uses as plant nutrients (*e.g.,* fertilizers), plant inoculants, soil amendments, and vitamin-hormone products. A key consideration is what claims are being made on product labels. This document is intended to provide guidance on identifying products and product claims that are considered to be plant regulator claims by the Agency, thereby subjecting the products to regulation under FIFRA as pesticides. Examples are provided of claims that are considered plant regulator claims and claims that are not considered plant regulator claims.

B. The March 2019 Draft Guidance

In recognition of the growing categories of products generally known as plant biostimulants, EPA identified the need to provide guidance on identifying products and product claims that are considered to be plant regulator products and plant regulator claims by the Agency, thereby subjecting the products to regulation as pesticides under FIFRA. EPA discussed its approach with stakeholders, including the Association of American Plant Food Control Officials (AAPFCO), the Biological Products Industry Alliance (BPIA), the United States Biostimulants Coalition (USBC), and the State FIFRA Issues Research and Evaluation Group (SFIREG). In the **Federal Register** of March 27, 2019 (84 FR 11538, FRL–9986–27), EPA announced the availability of and sought public comment on a draft guidance document that was developed based on those discussions. The Agency extended the comment period twice and received 161 comments, of which 18 were requests for an extension of the comment period. The Agency has considered the public comments received and has prepared a response to comment document that is available in the docket under Docket ID No. EPA–HQ–OPP–2018–0258.

B. The Updated Draft Guidance

Given the diversity of public comments on the original draft guidance document, EPA has developed responses to comments received and updated the draft guidance accordingly. Although much of the guidance remains the same, examples of some targeted changes involve the incorporation of suggested edits to the product claims tables and the replacement of Table 4 with a narrative. EPA believes that allowing for additional public feedback will be useful in determining whether added clarification addresses the comments received on the original draft guidance document.

III. Do guidance documents contain binding requirements?

While the requirements in the statutes and Agency regulations are binding on EPA and the applicants, guidance documents are not binding on either EPA or pesticide registrants, and EPA may depart from the guidance where circumstances warrant and without prior notice. Likewise, pesticide registrants may assert that the guidance is not appropriate generally or not applicable to a specific pesticide or situation.

IV. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

The updated draft guidance was determined to be significant due to interagency equities and interests. As such, the updated draft guidance was submitted to the Office of Management and Budget (OMB) for review under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011). Any changes made in response to OMB recommendations have been documented in the docket.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This updated draft guidance document is not subject to the requirements for regulatory actions specified in Executive Order 13771 (82 FR 9339, February 3, 2017).

C. Paperwork Reduction Act (PRA)

This updated draft guidance does not create paperwork burdens that require additional approval by OMB under the PRA, 44 U.S.C. 3501 *et seq.* The information collection activities associated with pesticide registration are already approved by OMB under OMB Control No. 2070–0060. The corresponding information collection request (ICR) document is entitled ''Application for New and Amended Pesticide Registration'' (EPA ICR No. 0277.16). Clarifying which products are subject to pesticide regulations is not expected to have more than a de minimis impact on the number of products regulated annually and is not, therefore, expected to impact the estimated burdens. In addition, since EPA provides the language for and approves pesticide labeling, OMB has determined that pesticide labeling requirements generally qualify for the labeling exception.

Authority: 7 U.S.C. 136 *et seq.*

Dated: November 19, 2020.

Alexandra Dapolito Dunn,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2020–26299 Filed 11–27–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OGC–2020–0520; FRL 10016–54–OGC]

Proposed Stipulated Partial Settlement Agreement, Endangered Species Act Claims

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed stipulated partial settlement agreement; request for public comment.

SUMMARY: In accordance with the Environmental Protection Agency (EPA) Administrator's October 16, 2017, Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements, notice is hereby given of a proposed stipulated partial settlement agreement in the case of *Natural Resources Defense Council* v. *Wheeler, et al.,* in the United States District Court for the District of Columbia (1:17–CV–02034). The Plaintiff filed its original case on October 3, 2017, alleging that EPA violated Section 7(a)(2) of the Endangered Species Act (ESA) by failing to consult on the effects to listed species of certain pesticide product registrations containing one of three pesticide active ingredients—acetamiprid (Claim One), dinotefuran (Claim Two), and imidacloprid (Claim Three). EPA and Natural Resources Defense Council (NRDC) are proposing to reach a settlement in the form of a Partial Stipulated Settlement Agreement. Defendant-Intervenor indicated that it takes no position on this proposed partial agreement. Among other provisions, the proposed partial stipulated settlement agreement between EPA and NRDC calls for EPA to complete an endangered species effects determination with respect to imidacloprid (Claim Three) by June 30, 2022. And, as appropriate, EPA will initiate consultation with the National Marine Fisheries Service and/or the Fish and Wildlife Service (Services).

DATES: Written comments on the proposed stipulated partial settlement agreement must be received by *December 30, 2020.*

ADDRESSES: Submit your comments, identified by Docket ID number EPA–HQ–OGC–2020- 0520 online at *www.regulations.gov* (EPA's preferred method). For comments submitted at *www.regulations.gov,* follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *www.regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA generally will not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Michele Knorr, Pesticides and Toxic Substances Law Office (2333A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone: (202) 564–5631; email address: *knorr.michele@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Stipulated Settlement Agreement

On October 3, 2017, Plaintiff (a non-governmental environmental organization) filed a complaint in the United States District Court in the District of Columbia asserting three claims against EPA for allegedly violating section 7(a)(2) of the ESA by failing to initiate and reinitiate consultation with the Services. Specifically, Plaintiffs alleged that the EPA failed to consult on the effects to listed species of 95 pesticide product registrations containing one of three pesticide active ingredients—acetamiprid (Claim One), dinotefuran (Claim Two), and imidacloprid (Claim Three). On February 8, 2018, the parties in this case entered into a stipulation of partial dismissal of any and all claims related to 36 pesticide product registrations identified in the complaint. The Court approved this stipulation of partial dismissal, leaving 59 pesticide product registrations at issue. Of the 59 product registrations remaining, 46 of them contain the active ingredient imidacloprid. Following the stipulated dismissal, EPA filed a motion to dismiss the case based on standing. After an adverse decision on the motion to dismiss, the parties had several settlement discussions. At the end of these discussions the Plaintiff and EPA reached a partial agreement in this case. Specifically, Paragraph 1 of the proposed stipulated partial settlement provides that EPA would agree to complete ESA section 7(a)(2) effects determination, compiled into a biological evaluation, for imidacloprid by June 30, 2022, and, as appropriate, request initiation of any ESA section 7(a)(2) consultation with the Services. The date for the effects determination aligns with the same deadline for two other neonicotinoid chemicals—clothianidin and thiamethoxam—that were agreed upon in a settlement in *Ellis* v. *Keigwin,* No. 3:13–CV–1266 (N.D. Cal). Paragraph 3 would include provisions for modifying the final biological evaluation deadlines. The stipulated partial settlement agreement would also require that within 10 business days after the Court enters any Order approving this proposed agreement that the Plaintiff, EPA, and Intervenor-Defendant to meet and confer regarding the remaining two claims in the complaint concerning certain pesticide products containing acetamiprid or dinotefuran.

Consistent with current practice, the agreement would also include statements of EPA's intent to take certain actions in addition to the deadlines associated with specific biological evaluations, including: (1) To complete a draft biological evaluation no later than one year prior to the deadline for the final biological evaluation, as well as to provide notice and a 60-day opportunity for public comment on any such draft, and (2) conduct the effects determination on a nationwide-scale.

For a period of thirty (30) days following the date of publication of this notice, the Agency will accept written comments relating to the proposed stipulated partial settlement from persons who are not named as parties to the litigation in question. EPA or the Department of Justice may withdraw or withhold consent to the proposed stipulated partial settlement if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the ESA or the Federal Insecticide, Fungicide, and Rodenticide Act. Unless EPA or the Department of Justice determines that consent should be withdrawn, the terms of the proposed stipulation and stipulated notice of dismissal will be affirmed.

II. Additional Information About Commenting on the Proposed Stipulation and Stipulated Notice of Dismissal.

A. How can I get a copy of the proposed stipulated partial settlement agreement?

The official public docket for this action (identified by EPA–HQ–OGC–2020–0520) contains a copy of the proposed stipulated partial settlement agreement. The EPA is temporarily suspending its Docket Center and Reading Room for public visitors, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov/* as there may be a delay in processing mail and faxes. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at *https://www.epa.gov/dockets.*

The EPA continues to carefully and continuously monitor information from the Centers for Disease Control and Prevention (CDC), local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID–19.

The electronic version of the public docket for this action contains a copy of the proposed stipulated partial settlement agreement, and is available through *https://www.regulations.gov.* You may use *www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select ''search.'' It is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing online at *www.regulations.gov* without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in the electronic public docket.

EPA's policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Please refer to the information above about the current status of the EPA Docket Center.

B. How and to whom do I submit comments?

You may submit comments as provided in the **ADDRESSES** section. Please ensure that your comments are submitted within the specified comment period.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment and with any disk or CD ROM you submit. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the *www.regulations.gov* website to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an ''anonymous access'' system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (email) system is not an ''anonymous access'' system. If you send an email comment directly to the Docket without going through *www.regulations.gov,* your email address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Joseph E. Cole,

Associate General Counsel.

[FR Doc. 2020–26311 Filed 11–27–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OGC–2020–0561; FRL–10016–63–OGC]

Proposed Settlement Agreements, Clean Water Act and Endangered Species Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for public comment.

SUMMARY: In accordance with the Environmental Protection Agency (EPA) Administrator's October 16, 2017, Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements, notice is hereby given of a proposed stipulated order of partial dismissal to address several claims in a lawsuit filed by Northwest Environmental Advocates in the U.S. District Court for the District of Idaho. On September 24, 2013 the Northwest Environmental Advocates and the Idaho Conservation League (collectively ''Plaintiffs'') filed an amended complaint bringing claims against the EPA alleging, among other things, that it failed to perform duties mandated by the Endangered Species Act (ESA) to consult with the Fish & Wildlife Service and the National Marine Fisheries Service (collectively ''the Services'') regarding its actions under the Clean Water Act (CWA) and that EPA failed to complete various mandatory duties under the CWA with respect to various new and revised water quality standards adopted by the Idaho Department of Environmental Quality. EPA seeks public input on the proposed stipulated order of partial dismissal prior to its final decision-making to settle the litigation.

DATES: Written comments on the proposed settlement agreements must be received by *December 30, 2020.*

ADDRESSES: You may send comments, identified by Docket ID No. EPA–HQ–OGC–2020–0561, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Office of the General Counsel Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery/Courier:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30

a.m. to 4:30 p.m., Monday through Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets*

FOR FURTHER INFORMATION CONTACT: Thomas Glazer, Water Law Office (2355A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone: (202) 564–0908; email address: *glazer.thomas@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Stipulated Partial Dismissal

On June 15, 2013, Plaintiffs filed suit in the federal district court for the District of Idaho against the Services. The original complaint alleged that the Services unreasonably delayed or unlawfully withheld completion of ESA consultation with EPA regarding new and revised water quality standards that were submitted in 1996 and/or 1997. On September 24, 2013, Plaintiffs filed an amended complaint adding various CWA and ESA claims against EPA regarding dozens of Idaho water quality standard submissions dating back to 1994. Broadly speaking, Plaintiffs' claims fell into two categories: claims that EPA failed to consult with the Services on various water quality standard approval actions and claims that EPA failed to complete its mandatory duties under the CWA with respect to various new and revised water quality standards adopted by the State. In April 2015, the Services entered a stipulated dismissal with Plaintiffs, by which they agreed to complete certain ESA obligations. This left EPA as the sole defendant in the case.

On February 28, 2019, the court partially granted EPA's motion to dismiss a number of claims on statute of limitations grounds, dismissing all ESA failure-to-consult claims regarding EPA actions that predated September 24, 2007—6 years prior to filing the amended complaint. The court declined to dismiss any CWA mandatory duty claims, finding that the statute of limitations did not require dismissal because Plaintiffs had alleged an ongoing failure to act by EPA. This left seven discrete claims against EPA alleging a failure to undertake various duties pursuant to the ESA and CWA with regard to Idaho water quality standards.

The parties have negotiated a settlement framework in the form of a stipulated order of partial dismissal. The court would enter the order and retain jurisdiction to construe, carry out, enforce, modify, or resolve any dispute regarding the terms and conditions of the order. EPA and Plaintiffs negotiated a three-year timeline for EPA to complete an effects determination pursuant to 50 CFR 402.14(a) for its May 22, 2008 approval of Idaho's revisions to its salmonid spawning timing procedure and, as appropriate, to request initiation of any necessary ESA section 7 consultation with the Services. The State has been informed of the timeline and will be an applicant in any ESA consultation. The Order would also resolve Plaintiffs' claim for attorney's fees with an agreement to pay $37,000.

For a period of thirty (30) days following the date of publication of this notice, the Agency will accept written comments relating to the obligations of EPA for resolution of the claims contained in the proposed stipulated order of partial dismissal from persons who are not named as original parties or intervenors to the litigation in question. EPA or the Department of Justice may withdraw or withhold consent to the proposed stipulated order of partial dismissal if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the CWA or ESA. Unless EPA or the Department of Justice determines that consent to this proposed stipulated order of partial dismissal should be withdrawn, the terms of the proposed stipulated order of partial dismissal will be affirmed and entered with the court.

II. Public Participation

Written Comments

Submit your comments, identified by Docket ID No. EPA–HQ–OGC–2020–0561, at *https://www.regulations.gov* (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

The EPA is temporarily suspending its Docket Center and Reading Room for public visitors, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov/* as there may be a delay in processing mail and faxes. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at *https://www.epa.gov/dockets.*

The EPA continues to carefully and continuously monitor information from the Centers for Disease Control and Prevention (CDC), local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID–19.

Dated: November 17, 2020.

Steven Neugeboren,

Associate General Counsel.

[FR Doc. 2020–26310 Filed 11–27–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2018–0654; FRL–10016–99–ORD]

Availability of the ORD Staff Handbook for Developing IRIS Assessments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public comment period.

SUMMARY: The Environmental Protection Agency (EPA) is announcing a 90-day public comment period associated with release of the ORD Staff Handbook for Developing Integrated Risk Information System (IRIS) Assessments, or IRIS Handbook. The IRIS Handbook provides operating procedures for developing assessments including problem formulation approaches and methods for conducting systematic review, dose response analysis, and developing toxicity values. EPA is releasing this document and the charge questions for public comment in advance of a National Academy of Sciences, Engineering, and Medicine (NASEM) peer review. Comments received will be summarized and provided to the committee conducting the peer review. This document was prepared by the Center for Public Health and Environmental Assessment (CPHEA) within EPA's Office of Research and Development (ORD).

DATES: The 90-day public comment period begins November 30, 2020, and ends March 1, 2021.

ADDRESSES: The IRIS Handbook will be available via the internet on the IRIS website at *https://www.epa.gov/iris* and in the public docket at *https://www.regulations.gov,* Docket ID: EPA–HQ–ORD–2018–0654.

FOR FURTHER INFORMATION CONTACT: For information on the public comment period, contact the ORD Docket at the EPA Headquarters Docket Center; telephone: 202–566–1752; facsimile: 202–566–9744; or email: *Docket_ORD@epa.gov.*

For technical information on the IRIS Handbook, contact Dr. James Avery, CPHEA; telephone: 202–564–1494; or email: *avery.james@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background Information on the IRIS Handbook

The ''ORD Staff Handbook for Developing IRIS Assessments,'' or ''IRIS Handbook,'' provides operating procedures for developing assessments to the scientists in the IRIS Program. The IRIS Handbook implements recommendations and input from the National Academy of Sciences, Engineering and Medicine (NASEM), EPA Agency reviewers, other Federal Agencies, EPA's Science Advisory Board, and workshops involving input from experts in systematic review. The steps in the overall IRIS process have not changed (*https://www.epa.gov/iris/basic-information-about-integrated-risk-information-system#process*). The IRIS Handbook is designed so that it can be updated, as needed, to allow for incorporation of method refinements, advances in assessment science, and any updates in EPA guidance (see *https://yosemite.epa.gov/sab/sabproduct.nsf/02ad90b136fc21ef85256eba00436459/df0f42c34645448685258570005adfff!OpenDocument&TableRow=2.3#2*).

II. Information Regarding the Peer Review

EPA is announcing that NASEM will conduct an external peer review of the IRIS Handbook. Information regarding this peer review will be provided through the IRIS website (*https://www.epa.gov/iris*) and via EPA's IRIS listserv. To register for the IRIS listserv, visit the IRIS website (*https://www.epa.gov/iris*) or *https://www.epa.gov/iris/forms/staying-connected-integrated-risk-information-system#connect.*

III. How To Submit Technical Comments to the Docket at *http://www.regulations.gov*

Submit your comments, identified by Docket ID No. EPA–HQ–ORD–2018–0654 for the IRIS Handbook, by one of the following methods:

- *https://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: Docket_ORD@epa.gov.*
- *Fax:* 202–566–9744. Due to COVID–19, there may be a delay in processing comments submitted by fax.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center (ORD Docket), Mail Code: 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460. The phone number is 202–566–1752. Due to COVID–19, there may be a delay in processing comments submitted by mail.

Note: The EPA Docket Center and Reading Room is currently closed to public visitors to reduce the risk of transmitting COVID–19. Docket Center staff will continue to provide remote customer service via email, phone, and webform. The public can submit comments via *www.regulations.gov* or email. No hand deliveries are currently being accepted.

Instructions: Direct your comments to docket number EPA–HQ–ORD–2018–0654 for the IRIS Handbook. Please ensure that your comments are submitted within the specified comment period. Comments received after the closing date will be marked ''late,'' and may only be considered if time permits. It is EPA's policy to include all comments it receives in the public docket without change and to make the comments available online at *www.regulations.gov,* including any personal information provided, unless a comment includes information claimed to be Confidential Business Information (CBI) or other information for which disclosure is restricted by statute. Do not submit information through *www.regulations.gov* or email that you consider to be CBI or otherwise protected. The *www.regulations.gov* website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *www.epa.gov/epahome/dockets.htm.*

Docket: Documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other materials, such as copyrighted material, are publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the ORD Docket in the EPA Headquarters Docket Center.

Wayne Cascio,

Director, Center for Public Health & Environmental Assessment.

[FR Doc. 2020–26314 Filed 11–27–20; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

Sunshine Act Meetings; Notice of an Open Meeting of the Board of Directors of the Export-Import Bank of the United States

TIME AND DATE: Thursday, December 10, 2020 at 10:00 a.m.

PLACE: The meeting will be held via teleconference.

STATUS: The meeting will be open to public observation by teleconference only.

MATTERS TO BE CONSIDERED:

1. Review of EXIM's Medium- and Long-Term (MLT) Reachback Policy
2. Local Cost Support for Short Term (ST) Insurance and Working Capital Transactions

CONTACT PERSON FOR MORE INFORMATION: Joyce B. Stone (202–257–4086). Members of the public who wish to attend the meeting via audio only teleconference should register via *https://attendee.gotowebinar.com/register/7605082646858648589* by noon Wednesday, December 9, 2020. Individuals will be directed to a Webinar registration page and provided call-in information.

Joyce B. Stone,

Assistant Corporate Secretary.

[FR Doc. 2020–26417 Filed 11–25–20; 11:15 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1168; FRS 17263]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before January 29, 2021. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1168.

Title: Application for Mobility Fund Phase I Support, FCC Form 680.

Form Number: FCC Form 680.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities, not-for-profit institutions, and state, local or tribal governments.

Number of Respondents and Responses: 10 respondents and 10 responses.

Estimated Time per Response: 1.5 hours.

Frequency of Response: On occasion reporting requirement.

Obligation To Respond: Required to obtain or retain benefits. Statutory authority for this information collection 47 U.S.C. 154, 254 and 303(r).

Total Annual Burden: 15 hours.

Total Annual Cost: No cost.

Nature and Extent of Confidentiality: Information collected will be made available for public inspection, and the Commission is not requesting that respondents submit confidential information to the Commission on FCC Form 680. However, to the extent that a respondents seeks to have certain information collected on FCC Form 680 withheld from public inspection, the respondent may request confidential treatment of such information pursuant to section 0.459 of the Commission's rules, 47 CFR Section 0.459.

Privacy Act Impact Assessment: No impact(s).

Needs and Uses: The Commission will use the information collected on FCC Form 680 to determine whether a winning bidder is qualified to receive Mobility Fund Phase I and Tribal Mobility Fund Phase I support. On November 18, 2011, the Commission released an order comprehensively reforming and modernizing the universal service and intercarrier compensation systems to ensure that robust, affordable voice and broadband service, both fixed and mobile, are available to Americans throughout the nation. *Connect America Fund et al.,* Order and Further Notice of Proposed Rulemaking, FCC 11–161 (*USF/ICC Transformation Order*). In the *USF/ICC Transformation Order,* the Commission, among other things, created the Mobility Fund to ensure the availability of mobile broadband networks in areas where a private-sector business case is lacking. Phase I of the Mobility Fund provided one-time universal service support for the deployment of networks for mobile voice and broadband service, and a separate, complementary Tribal Mobility Fund Phase I provided one-time universal service support to accelerate the availability of mobile voice and broadband service on Tribal lands.

The Commission adopted rules to implement the reforms it adopted in the *USF/ICC Transformation Order,* including the rules in sections 1.21004(a), 54.1004, 54.1005, 54.1006, 54.1007, and 54.1008 which contain information collection requirements used to determine whether a winning bidder of Mobility Fund Phase I support and Tribal Mobility Fund Phase I support is qualified to receive such support.

Section 1.21004(a) of the Commission's rules requires each winning bidder in an auction for universal service support to apply for the support it won by the applicable deadline. Sections 54.1005(b) and 54.1006 require a winning bidder to submit, using FCC Form 680, ownership information, proof of its status as an Eligible Telecommunications Carrier, a description of its spectrum access, a detailed project description, any guarantee of performance that the Commission may require, and various certifications. Sections 54.1004(d)(3) and 54.1008(d) require a winning bidder to certify in its application that it has substantively engaged appropriate Tribal officials. In addition, sections 54.1007(a) and (b) require a winning bidder to obtain and submit to the Commission an irrevocable standby letter of credit, which the winning bidder must maintain until at least 120 days after the winning bidder receives its final distribution of support.

The information collection requirements ensure that a winning bidder submits an application for the

universal service support it won, and the Commission uses the information submitted in the application to determine whether the applicant is legally, technically, and financially qualified to receive such support. The requirement that a winning bidder obtain, submit, and maintain a letter of credit will secure a return of universal service funds from a winning bidder that defaults on its obligations and will protect the integrity of the universal service programs. Without such information, the Commission could not determine whether to disburse universal service support to a winning bidder or protect the government's interest in the funds allocated for Mobility Fund Phase I and Tribal Mobility Fund Phase I.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2020–26260 Filed 11–27–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1210; FRS 17265]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before January 29, 2021. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email *PRA@fcc.gov* and to *Nicole.Ongele@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele, (202) 418–2991.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1210.

Title: Wireless E911 Location Accuracy Requirements (PS Docket No. 07–114).

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit, State, Local or Tribal Government, and Federal Government.

Number of Respondents and Responses: 4,567 respondents; 35,531 responses.

Estimated Time per Response: 2–10 hours.

Frequency of Response: Recordkeeping, on occasion; one-time; quarterly and semi-annual reporting requirements, and third-party disclosure requirements.

Obligation To Respond: Mandatory. Statutory authority for this information collection is contained in 47 U.S.C. 1, 2, 4(i), 7, 10, 201, 214, 222, 251(e), 301, 302, 303, 303(b), 303(r), 307, 307(a), 309, 309(j)(3), 316, 316(a), and 332 of the Communications Act of 1934, as amended.

Total Annual Burden: 139,461 hours.

Total Annual Cost: No Cost.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: The Commission is requesting that respondents submit confidential information to the Commission in the context of the test bed. Nationwide Commercial Mobile Radio Service (CMRS) providers must make data from the test bed available to small and regional CMRS providers so that the smaller providers can deploy technology throughout their networks that is consistent with a deployment that was successfully tested in the test bed. CMRS providers also may request confidential treatment of live 911 call data reports, but the Commission reserves the right to release aggregate or anonymized data on a limited basis to facilitate compliance with its rules.

Needs and Uses: This notice pertains to multiple information collections relating to the Commission's wireless E911 indoor location accuracy regulations. As described below, OMB previously approved the information collections associated with OMB Control No 3060–1210. This notice seeks comment on proposed modifications to those information collections pursuant to the *Sixth Report and Order and Order on Reconsideration* in this proceeding, PS Docket 07–114.

New or modified collections. Section 9.10(i)(4)(iv) requires all CMRS providers to certify ''that neither they nor any third party they rely on to obtain dispatchable location information will use dispatchable location information or associated data for any non-911 purpose, except with prior express consent or as otherwise required by law.'' In addition, ''[t]he certification must state that CMRS providers and any third party they rely on to obtain dispatchable location information will implement measures sufficient to safeguard the privacy and security of dispatchable location information.'' Under 47 CFR 9.10(i)(4)(v), all CMRS providers must certify ''that neither they nor any third party they rely on to obtain z-axis information will use z-axis information or associated data for any non-911 purpose, except with prior express consent or as otherwise required by law.'' Further, ''[t]he certification must state that CMRS providers and any third party they rely on to obtain z-axis information will implement measures sufficient to safeguard the privacy and security of z-axis location information.'' The Commission obtained OMB approval for the information collections contained in these certifications after adopting the Fourth Report and Order and Fifth Report and Order under OMB Control No. 3060–1210. The Sixth Report and Order modified these information collections slightly by deleting references to the National Emergency Address Database (NEAD), which has been discontinued and will not be available to CMRS providers. The Commission does not expect these changes to the certification requirements to result in any increase or decrease in the burden estimates for these collections as previously approved by OMB.

Section 9.10(i)(3)(ii) requires CMRS providers that serve any of the six Test Cities identified by ATIS (Atlanta, Denver/Front Range, San Francisco, Philadelphia, Chicago, and Manhattan Borough of New York City) or portions thereof to collect and report aggregate data on the location technologies used for live 911 calls. As discussed below, in 2018, the Commission developed a reporting template to assist CMRS providers in collecting, formatting, and submitting aggregate live 911 call data in accordance with the requirements in the rules. After adopting the Fifth Report and Order, the Commission indicated that it would modify the live call template to include vertical location. We now propose to modify the form to include z-axis (vertical) location information from live calls in addition to horizontal location information. Specifically, we propose to revise the template to include fields for reporting the percentage of total 911 calls that result in dispatchable location or z-axis location information by morphology and position technology and for reporting z-axis deployment options used for 911 calls.

Section 9.10(j)(4) requires CMRS providers to supply confidence and uncertainty (C/U) information with wireless E911 calls that have dispatchable location or z-axis information and to do so in accordance with the timelines for vertical location accuracy compliance. As noted below, OMB previously approved and renewed a C/U data requirement for horizontal location information under OMB Control No. 3060–1204. (See also OMB Control No. 3060–1147.) The Fifth Report and Order extended the C/U requirements to include vertical location information, and OMB approved that modification. The Sixth Report and Order revised 47 CFR 9.10(j)(4) to add a requirement that where floor-level information is available to CMRS providers, they must provide C/U data for the z-axis (vertical) information included with such floor-level information.

Under Section 9.10(k), CMRS providers must record information on all live 911 calls, including the C/U data that they provide to PSAPs under Section 9.10(j) of the rules. In addition, Section 9.10(k) requires CMRS providers to make this information available to PSAPs upon request and to retain it for a period of two years. The Commission obtained OMB approval for the information collections contained in Section 9.10(k) after adopting the Fourth Report and Order. The Sixth Report and Order amended Section 9.10(k) to make explicit that the requirements in the rule extend to C/U data for dispatchable location and floor-level information, as well as for z-axis information. This eliminated a potential gap in the rule, which previously referred only to z-axis information.

Section 9.10(i)(2)(ii)(J)(*4*) provides that a CMRS provider will be deemed to have met its z-axis technology deployment obligation so long as it either pre-installs or affirmatively pushes the location technology to end users so that they receive a prompt or other notice informing them that the application or service is available and what they need to do to download and enable the technology on their phone. A CMRS provider will be deemed in compliance with its z-axis deployment obligation if it makes the technology available to the end user in this manner even if the end user declines to use the technology or subsequently disables it. This is a new collection adopted by the Commission in the Sixth Report and Order.

Previously approved collections. Section 9.10(i)(2)(ii)(A) requires that within three years of the effective date of the rule, CMRS providers shall deliver uncompensated barometric pressure data from any device capable of delivering such data to PSAPs. This requirement is necessary to ensure that PSAPs are receiving all location information possible to be used for dispatch. This requirement is also necessary to ensure that CMRS providers implement a vertical location solution in the event that the proposed ''dispatchable location'' solution does not function as intended by the three-year mark and beyond.

Section 9.10(i)(2)(ii)(B) requires that the four nationwide providers submit to the Commission for review and approval a reasonable metric for z-axis (vertical) location accuracy no later than 3 years from the effective date of rules. This requirement is critical to ensure that the vertical location framework adopted in the Fourth Report and Order is effectively implemented.

Section 9.10(i)(2)(iii) requires CMRS providers to certify compliance with the Commission's rules at various benchmarks throughout implementation of improved location accuracy. This requirement is necessary to ensure that CMRS providers remain ''on track'' to reach the location accuracy benchmarks.

Section 9.10(i)(2)(iv) provides that PSAPs may seek Commission enforcement of the location accuracy requirements within their geographic service area, but only so long as they have implemented policies that are designed to obtain all location information made available by CMRS providers when initiating and delivering 911 calls to the PSAP. Prior to seeking Commission enforcement, a PSAP must provide the CMRS provider with 30 days written notice, and the CMRS provider shall have an opportunity to address the issue informally. If the issue has not been addressed to the PSAP's satisfaction within 90 days, the PSAP may seek enforcement relief.

Section 9.10(i)(3)(i) requires that within 12 months of the effective date, the four nationwide CMRS providers must establish the test bed described in the Fourth Report and Order, which will validate technologies intended for indoor location. The test bed is necessary for the compliance certification framework adopted in the Fourth Report and Order.

Section 9.10(i)(3)(ii) requires that beginning 18 months from the effective date of the rules, CMRS providers providing service in any of the six Test Cities identified by ATIS (Atlanta, Denver/Front Range, San Francisco, Philadelphia, Chicago, and Manhattan Borough of New York City) or portions thereof must collect and report aggregate data on the location technologies used for live 911 calls. Nationwide CMRS providers must submit call data on a quarterly basis; non-nationwide CMRS providers need only submit this data every six months. Non-nationwide providers that do not provide service in any of the Test Cities may satisfy this requirement by collecting and reporting data based on the largest county within the carrier's footprint. This reporting requirement is necessary to validate and verify the compliance certifications made by CMRS providers.

The Commission developed a reporting template to assist CMRS providers in collecting, formatting, and submitting aggregate live 911 call data in accordance with the requirements in the rules. The template will also assist the Commission in evaluating the progress CMRS providers have made toward meeting the 911 location accuracy benchmarks. The template is an Excel spreadsheet and will be available for downloading on the Commission's website. The Commission may also develop an online filing mechanism for these reports in the future.

Section 9.10(i)(3)(iii) requires CMRS providers to retain testing and live call data gathered pursuant to this section for a period of 2 years.

Section 9.10(i)(4)(i) provides that no later than 18 months from the effective date of the adoption of the rule, nationwide CMRS providers shall report to the Commission their initial plans for meeting the indoor location accuracy

requirements of paragraph (i)(2) of Section 9.10. Non-nationwide CMRS providers will have an additional 6 months to submit their implementation plan.

Section 9.10(i)(4)(ii) requires that no later than 18 months from the effective date, each CMRS provider shall submit to the Commission a report on its progress toward implementing improved indoor location accuracy. Non-nationwide CMRS providers will have an additional 6 months to submit their progress reports. All CMRS providers shall provide an additional progress report no later than 36 months from the effective date of the adoption of this rule. The 36-month reports shall indicate what progress the provider has made consistent with its implementation plan.

Section 9.10(i)(4)(iii) requires that prior to activation of the NEAD but no later than 18 months from the effective date of the adoption of this rule, the nationwide CMRS providers shall file with the Commission and request approval for a security and privacy plan for the administration and operation of the NEAD.

Section 9.10(i)(4)(iv) requires CMRS providers to certify ''that neither they nor any third party they rely on to obtain dispatchable location information will use dispatchable location information or associated data for any non-911 purpose, except with prior express consent or as otherwise required by law.'' In addition, ''[t]he certification must state that CMRS providers and any third party they rely on to obtain dispatchable location information will implement measures sufficient to safeguard the privacy and security of dispatchable location information.'' As noted above, the Commission is revising this requirement to account for the fact that the NEAD has been discontinued.

Section 9.10(i)(4)(v) requires that prior to use of z-axis information to meet the Commission's location accuracy requirements, CMRS providers must certify ''that neither they nor any third party they rely on to obtain z-axis information will use z-axis information or associated data for any non-911 purpose, except with prior express consent or as otherwise required by law.'' Further, ''[t]he certification must state that CMRS providers and any third party they rely on to obtain z-axis information will implement measures sufficient to safeguard the privacy and security of z-axis location information.'' This requirement is necessary to ensure the privacy and security of any personally identifiable information that may be collected by the CMRS provider. As noted above, the Commission is revising this requirement to account for the fact that the NEAD has been discontinued.

Section 9.10(j) requires CMRS providers to provide standardized confidence and uncertainty (C/U) data for all wireless 911 calls, whether from outdoor or indoor locations, on a per-call basis upon the request of a PSAP. This requirement makes the use of C/U data easier for PSAPs.

Section 9.10(j)(4) also requires that upon meeting the timeframes pursuant to paragraphs (i)(2)(ii)(C) and (D) of this section, CMRS providers shall provide with wireless 911 calls that have dispatchable location or z-axis (vertical) information the C/U data required under paragraph (j)(1) of this section. Where available to the CMRS provider, floor level information must be provided with associated C/U data in addition to z-axis location information.

Section 9.10(k) requires CMRS providers to record information on all live 911 calls, including but not limited to the positioning source method used to provide a location fix associated with the call, as well as confidence and uncertainty data. This information must be made available to PSAPs upon request, as a measure to promote transparency and accountability for this set of rules.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2020–26261 Filed 11–27–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

[OMB No. 3064–0083; −0085; −0099; −0137; −0148; −0149; −0182; −0194]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Agency Information Collection Activities: Submission for OMB Review; Comment Request.

SUMMARY: The FDIC, as part of its obligations under the Paperwork Reduction Act of 1995, invites the general public and other Federal agencies to take this opportunity to comment on the renewal of the existing information collections described below. The FDIC published notices in the **Federal Register** requesting comment for 60 days on a proposal to renew these information collections. The FDIC hereby gives notice of its plan to submit to OMB a request to approve the renewal of these information collections, and again invites comment on the renewal.

DATES: Comments must be submitted on or before December 30, 2020.

ADDRESSES: Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- *https://www.FDIC.gov/regulations/laws/federal.*
- *Email: comments@fdic.gov.* Include the name and number of the collection in the subject line of the message.
- *Mail:* Manny Cabeza (202–898–3767), Regulatory Counsel, MB–3128, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 17th Street building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION, CONTACT: Manny Cabeza, Regulatory Counsel, 202–898–3767, *mcabeza@fdic.gov,* MB–3128, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

SUPPLEMENTARY INFORMATION: The FDIC published notices in the **Federal Register** requesting comment for 60 days on a proposal to renew the following information collections.[1] The FDIC is submitting to OMB a request to approve the proposed renewal of the following information collections:

1. *Title:* Recordkeeping and Disclosure Requirements in Connection with Regulation M (Consumer Leasing).

OMB Number: 3064–0083.

Form Number: None.

Affected Public: State nonmember banks and state savings associations engaging in consumer leasing.

[1] 85 FR 55287 Sept 4, 2020; and 85 FR 59797 Sept 23, 2020

SUMMARY OF ANNUAL BURDEN

Information collection description	Type of burden	Obligation to respond	Estimated number of respondents	Estimated frequency of responses	Estimated time per response	Estimated annual burden (hours)
Recordkeeping and Disclosure Requirements in Connection with Regulation M (Consumer Leasing).	Recordkeeping	Mandatory	52	On Occasion	0.375	1,950
Recordkeeping and Disclosure Requirements in Connection with Regulation M (Consumer Leasing).	Third-Party Disclosure.	Mandatory	52	On Occasion	0.375	1,950

Total Estimated Annual Burden: 3,900 hours.

General Description of Collection: Regulation M (12 CFR 1013), issued by the Bureau of Consumer Financial Protection, implements the consumer leasing provisions of the Truth in Lending Act. Regulation M requires lessors of personal property to provide consumers with meaningful disclosures about the costs and terms of the leases for personal property. Lessors are required to retain evidence of compliance with Regulation M for twenty-four months. There is no change in the methodology or substance of this information collection. The estimated annual burden is unchanged.

2. *Title:* Record Keeping, Reporting and Disclosure Requirements in Connection with the Equal Credit Opportunity Act Regulation B.

OMB Number: 3064–0085.

Form Number: None.

Affected Public: Insured state nonmember banks and state savings associations.

Burden Estimate:

SUMMARY OF ANNUAL BURDEN

Information collection description	Type of burden	Obligation to respond	Estimated number of respondents	Estimated average annual frequency of responses	Estimated total annual responses	Estimated time per response	Estimated annual burden (hours)
Credit Reporting History (1002.10)	Reporting	Mandatory	3,309	850	2,812,650	2 minutes	93,755
Total Reporting Burden							*93,755*
Disclosure for Optional Self-Test (1002.5)	Third-Party Disclosure	Voluntary	972	2,500	2,430,000	1 minute	40,500
Notifications (1002.9)	Third-Party Disclosure	Mandatory	3,309	1,715	5,674,935	2 minutes	189,165
Appraisal Report Upon Request (1002.12(a)(1)).	Third-Party Disclosure	Mandatory	3,309	190	628,710	1 minute	10,479
Notice of Right to Appraisal (1002.14(a)(2)).	Third-Party Disclosure	Mandatory	3,309	1,650	5,459,850	1 minute	90,998
Total Third-Party Disclosure Burden							*331,142*
Record Retention (Applications, Actions, Pre-Screened Solicitations)(1002.12).	Recordkeeping	Mandatory	3,309	360	1,191,240	1 minute	19,854
Record Retention (Self-Testing)(1002.12)	Recordkeeping	Mandatory	972	1	972	2 hours	1,944
Record Retention (Self-Testing Self-Correction) (1002.15).	Recordkeeping	Mandatory	243	1	243	8 hours	1,944
Total Recordkeeping Burden							*23,742*

Total Estimated Annual Burden: 448,639 hours.

General Description of Collection: Regulation B (12 CFR part 1002) issued by the Consumer Financial Protection Bureau, prohibits creditors from discriminating against applicants on any bases specified by the Equal Credit Opportunity Act; imposes, reporting, record keeping and disclosure requirements; establishes guidelines for gathering and evaluating credit information; and requires creditors to give applicants certain written notices. There is no change in the method or substance of the collection. The overall reduction in burden hours is a result of economic fluctuation. In particular, the number of respondents has decreased while the reporting frequency and the estimated time per response remain the same.

3. *Title:* Application for Waiver of Prohibition on Acceptance of Brokered Deposits.

OMB Number: 3064–0099.

Form Number: None.

Affected Public: Insured state nonmember banks and state savings associations.

Burden Estimate:

SUMMARY OF ANNUAL BURDEN

Information collection description	Type of burden	Obligation to respond	Estimated number of respondents	Estimated frequency of responses	Estimated time per response (hours)	Estimated annual burden (hours)
Application for Waiver of Prohibition on Acceptance of Brokered Deposits.	Reporting	Mandatory	17	On Occasion	6	102

Total Estimated Annual Burden: 102 hours.

General Description of Collection: Section 29 of the Federal Deposit Insurance Act prohibits undercapitalized insured depository institutions from accepting, renewing, or rolling over any brokered deposits. Adequately capitalized institutions may do so with a waiver from the FDIC, while well-capitalized institutions may accept, renew, or roll over brokered deposits without restriction. This information collection captures the burden associated with preparing and filing an application for a waiver of the prohibition on the acceptance of brokered deposits.

4. *Title:* Interagency Guidance on Asset Securitization Activities.

OMB Number: 3064–0137.

Form Number: None.

Affected Public: Insured State Nonmember Banks and State Savings Associations.

Burden Estimate:

SUMMARY OF ANNUAL BURDEN

Information collection description	Type of burden	Obligation to respond	Estimated number of respondents	Estimated frequency of responses	Estimated time per response (hours)	Estimated annual burden (hours)
Documentation of Fair Value	Recordkeeping	Mandatory	20	On Occasion	4	80
Asset Securitization Policies—New Entrant.	Recordkeeping	Mandatory	6	On Occasion	32	192
Asset Securitization Policies—Upgrades of Policies.	Recordkeeping	Mandatory	2	On Occasion	3	6
MIS Improvements—New Entrant	Recordkeeping	Mandatory	6	On Occasion	21	126
MIS Improvements—Systems Upgrades.	Recordkeeping	Mandatory	2	On Occasion	5	10

Total Estimated Annual Burden: 414.

General Description of Collection: The Interagency Guidance on Asset Securitization Activities informs bankers and examiners of safe and sound practices regarding asset securitization. The information collections contained in the Interagency Guidance are needed by institutions to manage their asset securitization activities in a safe and sound manner. Bank management uses this information as the basis for the safe and sound operation of their asset securitization activities and to ensure that they minimize operational risk in these activities. There is no change in the method or substance of the information collection. The overall 257-hour increase in estimated annual burden (from 157 hours in 2017 to 414 hours currently) is the result of economic fluctuation. In particular, the number of respondents has increased while the reporting frequency and the estimated time per response remain the same.

5. *Title:* Interagency Statement on Sound Practices Concerning Complex Structured Finance Transactions.

OMB Number: 3064–0148.

Form Number: None.

Affected Public: Insured state nonmember banks and state savings associations.

Burden Estimate:

SUMMARY OF ANNUAL BURDEN

Information collection description	Type of burden	Obligation to respond	Estimated number of respondents	Estimated frequency of responses	Estimated time per response (hours)	Estimated annual burden (hours)
Complex Structured Finance Transactions	Recordkeeping	Mandatory	4	On Occasion	25	100

Total Estimated Annual Burden: 100 hours.

General Description of Collection: The Interagency Statement on Sound Practices Concerning Complex Structured Finance Transactions describes the types of internal controls and risk management procedures that the Agencies believe are particularly effective in assisting financial institutions to identify, evaluate, assess, document, and control the full range of credit, market, operational, legal and reputational risks. A financial institution that engages in complex structured finance transactions should maintain a set of formal, written, firm-wide policies and procedures that are designed to allow the institution to identify and assess these risks. There is no change in the methodology or substance of this information collection. The estimated annual burden is unchanged.

6. *Title:* Affiliate Marketing/Consumer Opt-out Notices.

OMB Number: 3064–0149.

Form Number: None.

Affected Public: Insured state nonmember banks and state savings associations that have affiliates and consumers that have a relationship with the foregoing.

Burden Estimate:

SUMMARY OF ANNUAL BURDEN

Information collection description	Type of burden	Obligation to respond	Estimated number of respondents	Estimated frequency of responses	Estimated time per response	Estimated annual burden (hours)
Affiliate Marketing Disclosure—Implementation	Third-Party Disclosure	Mandatory	8	Annually	6 hours	144
Consumer Opt Out Notices	Third-Party Disclosure	Voluntary	857,027	Annually	5 minutes	71,419
Affiliate Marketing Disclosure—Ongoing	Third-Party Disclosure	Mandatory	990	Annually	2 hours	1,980

Total Estimated Annual Burden: 73, 543 hours

General Description of Collection: Section 214 of the FACT Act requires financial institutions that wish to share information about consumers with their affiliates, to inform such consumers that they have the opportunity to opt out of such marketing solicitations. The disclosure notices and consumer responses thereto comprise the elements of this collection of information.

7. *Title:* Retail Foreign Exchange Transactions.

OMB Number: 3064–0182.

Form Number: None.

Affected Public: Insured state nonmember banks and state savings associations.

Burden Estimate:

SUMMARY OF ANNUAL BURDEN

Information collection description	Type of burden	Obligation to respond	Estimated number of respondents	Frequency of response	Estimated total annual responses	Estimated time per response (hours)	Estimated annual burden (hours)
Reporting Requirements	Reporting	Mandatory	1	On Occasion	1	16	16
Total Reporting Burden							*16*
Third-Party Disclosure Requirements.	Third-Party Disclosure.	Mandatory	1	On Occasion	1	166	166
Total Third-Party Disclosure Burden.							*166*
Recordkeeping Requirements.	Record-keeping.	Mandatory	1	On Occasion	1	1,332	1,332
Total Recordkeeping Burden:.							*1,332*

Total Estimated Annual Burden: 1,514 hours.

General Description of Collection: This information collection implements section 742(c)(2) of the Dodd-Frank Act (7 U.S.C. 2(c)(2)(E) and FDIC regulations governing retail foreign exchange transactions as set forth at 12 CFR part 349, subpart B. The regulation allows banking organizations under FDIC supervision to engage in off-exchange transactions in foreign currency with retail customers provided they comply with various reporting, recordkeeping and third-party disclosure requirements specified in the rule. If an institution elects to conduct such transactions, compliance with the information collection is mandatory.

Reporting Requirements—Part 349, subpart B requires that, prior to initiating a retail foreign exchange business; a banking institution must provide the FDIC with a notice certifying that the institution has written policies and procedures, and risk measurement and management systems and controls in place to ensure that retail foreign exchange transactions are conducted in a safe and sound manner. The institution must also provide information about how it intends to manage customer due diligence, new product approvals and haircuts applied to noncash margin.

Recordkeeping Requirements—Part 349 subpart B requires that institutions engaging in retail foreign exchange transactions keep full, complete and systematic records of account, financial ledger, transaction, memorandum orders and post execution allocations of bunched orders. In addition, institutions are required to maintain records regarding their ratio of profitable accounts, possible violations of law, records of noncash margin and monthly statements and confirmations issued.

Disclosure Requirements—The regulation requires that, before opening an account that will engage in retail foreign exchange transactions, a banking institution must obtain from each retail foreign exchange customer an acknowledgement of receipt and understanding of a written disclosure specified in the rule and of disclosures about the banking institution's fees and other charges and of its profitable accounts ratio. The institution must also provide monthly statements to each retail foreign exchange customer and must send confirmation statements following every transaction.

The customer dispute resolution provisions of the regulation require certain endorsements, acknowledgements and signature language as well as the timely provision of a list of persons qualified to handle a customer's request for arbitration.

There is no change in the method or substance of the collection. At present no FDIC-supervised institution is engaging in activities that would make them subject to the information collection requirements. The agency is keeping the estimated number of respondents to one (1) as a placeholder in case an institution elects to engage in covered activities in the future. There has been no change in the frequency of response or in the estimated number of hours required to respond.

8. *Title:* Covered Financial Company Asset Purchaser Eligibility Certification.

OMB Number: 3064–0194.

Form Number: 7300/10.

Affected Public: Any individual or entity that is a potential purchaser of assets from (1) the FDIC as receiver for a Covered Financial Company (CFC); or (2) a bridge financial company (BFC) which requires the approval of the FDIC, as receiver for the predecessor CFC and as the sole shareholder of the BFC (*e.g.,* the BFC's sale of a significant business line).

Burden Estimate:

SUMMARY OF ANNUAL BURDEN

Information collection description	Type of burden	Obligation to respond	Estimated number of respondents	Estimated frequency of responses	Estimated time per response (minutes)	Estimated annual burden (hours)
Covered Financial Company Asset Sales Purchaser Eligibility Certification.	Reporting	Mandatory	10	On Occasion	30 Minutes	5

Total Estimated Annual Burden: 5 hours.

General Description of Collection: Assets held by the FDIC in the course of liquidating any covered financial company must not be sold to persons who contributed to the demise of a covered financial company in specified ways (*e.g.,* individuals who profited or engaged in wrongdoing at the expense of the failed institution, or seriously mismanaged the failed institution). 12 CFR part 380 requires prospective purchasers to complete and submit a Purchaser Eligibility Certification (PEC) to the FDIC. The PEC is a self certification by a prospective purchaser that it does not fall into any of the categories of individuals or entities that are prohibited by statute or regulation from purchasing the assets of covered financial companies. The PEC will be required in connection with the sale of assets by the FDIC, as receiver for a CFC, or the sale of assets by a BFC which requires the approval of the FDIC, as receiver for the predecessor CFC and as the sole shareholder of the BFC. There is no change in the methodology or substance of this information collection. The estimated annual burden is unchanged.

Request for Comment

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; 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. All comments will become a matter of public record.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on November 24, 2020.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2020–26323 Filed 11–25–20; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington DC 20551–0001, not later than December 15, 2020.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *The Trevor C. McNeill Revocable Trust B, Trevor McNeill, as trustee, Dallas, Texas;* to acquire voting shares of Bank of Wyandotte, Wyandotte, Oklahoma.

Board of Governors of the Federal Reserve System, November 24, 2020.

Michele Taylor Fennel,

Deputy Associate Secretary of the Board.

[FR Doc. 2020–26351 Filed 11–27–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Closed Meeting

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces 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, and the Determination of the Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, CDC, pursuant to Public Law 92–463.

Name of Committee: Safety and Occupational Health Study Section (SOHSS), National Institute for Occupational Safety and Health (NIOSH).

Date: February 17–18, 2021.

Time: 11:00 a.m.–5:00 p.m., EST.

Place: Teleconference.

Agenda: The meeting will convene to address matters related to the conduct of Study Section business and for the study section to consider safety and occupational health-related grant applications.

FOR FURTHER INFORMATION CONTACT: Michael Goldcamp, Ph.D., Scientific Review Officer, NIOSH, 1095 Willowdale Road, Morgantown, WV 26506, (304) 285–5951; *MGoldcamp@cdc.gov.*

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2020–26256 Filed 11–27–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

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, and the Determination of the Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, CDC, pursuant to Public Law 92–463. 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: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—RFA–CK–21–001, US Travelers Health Research, Surveillance, Communication, and Outreach Network; RFA–CK–21–002, Emerging Infections Network—Research for Preventing, Detecting, and Managing Travelers who Acquire Infectious Diseases Abroad; and RFA–CK–21–003, Monitoring Cause-specific School Absenteeism for Estimating Community-wide Influenza and SARS-CoV–2 Transmission.

Date: February 10–11, 2021.

Time: 10:00 a.m.–5:00 p.m., EST.

Place: Teleconference, Centers for Disease Control and Prevention, Room 1080, 8 Corporate Square Boulevard, Atlanta, GA 30329.

Agenda: To review and evaluate grant applications.

For Further Information Contact: Gregory Anderson, M.S., M.P.H., Scientific Review Officer, CDC, 1600 Clifton Road NE, Mailstop US8–1, Atlanta, Georgia 30329–4027, (404) 718–8833, *GAnderson@cdc.gov.*

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2020–26258 Filed 11–27–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Solicitation of Nominations for Appointment to the Clinical Laboratory Improvement Advisory Committee (CLIAC)

ACTION: Notice.

SUMMARY: The Centers for Disease Control and Prevention (CDC) is seeking nominations for membership on the CLIAC. The CLIAC consists of 20 experts including the Chair who represents a diverse membership across laboratory specialties, professional roles (laboratory management, technical specialists, physicians, nurses) and practice settings (academic, clinical, public health), and includes a consumer representative.

DATES: Nominations for membership on the CLIAC must be received no later than March 1, 2021. Packages received after this time will not be considered for the current membership cycle.

ADDRESSES: All nominations should be mailed to Nancy Anderson, MMSc, MT(ASCP), CLIAC Secretary, Senior Advisor for Clinical Laboratories, Division of Laboratory Systems, Center for Surveillance, Epidemiology and Laboratory Services, Office of Public Health Scientific Services, Centers for Disease Control and Prevention, 1600 Clifton Road NE, Mailstop V24–3, Atlanta, Georgia 30329–4018; telephone (404) 498–2741; or via email at *CLIAC@cdc.gov.*

FOR FURTHER INFORMATION CONTACT: Heather Stang, MS, Deputy Branch Chief, Quality and Safety Systems Branch, Division of Laboratory Systems, Center for Surveillance, Epidemiology and Laboratory Services, Office of Public Health Scientific Services, Centers for Disease Control and Prevention, 1600 Clifton Road, NE, Mailstop V24–3, Atlanta, Georgia 30329–4018; telephone (404) 498–2769; *HStang@cdc.gov.*

SUPPLEMENTARY INFORMATION: The Committee also includes three ex officio members (or designees), including the Director, CDC; the Administrator, Centers for Medicare and Medicaid Services (CMS); and the Commissioner, Food and Drug Administration (FDA). A nonvoting representative from the Advanced Medical Technology Association (AdvaMed) serves as the industry liaison. The Designated Federal Official (DFO) or their designee and the Executive Secretary are present at all meetings to ensure meetings are within applicable statutory, regulatory, and HHS General Administration manual directives.

Nominations are being sought for individuals who have the expertise and qualifications necessary to contribute to the accomplishments of the committee's objectives. Nominees will be selected based on expertise in the fields of microbiology (including bacteriology, mycobacteriology, mycology, parasitology, and virology), immunology (including histocompatibility), chemistry, hematology, pathology (including histopathology and cytology), or genetic testing (including cytogenetics); from representatives in the fields of medical technology, bioinformatics, public health, and clinical practice; and from consumer representatives. Federal employees will not be considered for membership. Members may be invited to serve for up to four-year terms.

Selection of members is based on candidates' qualifications to contribute to the accomplishment of CLIAC objectives (*https://www.cdc.gov/cliac/*).

The U.S. Department of Health and Human Services policy stipulates that committee membership be balanced in terms of points of view represented, and the committee's function. Appointments shall be made without discrimination on the basis of age, race, ethnicity, gender, sexual orientation, gender identity, HIV status, disability, and cultural, religious, or socioeconomic status. Nominees must be U.S. citizens, and cannot be full-time employees of the U.S. Government. Current participation on federal workgroups or prior experience serving on a federal advisory committee does not disqualify a candidate; however, HHS policy is to avoid excessive individual service on advisory committees and multiple committee memberships. Committee members are Special Government Employees (SGEs), requiring the filing of financial disclosure reports at the beginning and annually during their terms. CDC reviews potential candidates for CLIAC membership each year and provides a slate of nominees for consideration to the Secretary of HHS for final selection. HHS notifies selected candidates of their appointment near the start of the term in July, or as soon as the HHS selection process is completed. Note that the need for different expertise varies from year to year and a candidate who is not selected in one year may be reconsidered in a subsequent year. Candidates should submit the following items:

■ Current curriculum vitae, including complete contact information (telephone numbers, mailing address, email address)

■ At least one letter of recommendation from person(s) not employed by the U.S. Department of Health and Human Services. (Candidates may submit letter(s) from current HHS employees if they wish, but at least one letter must be submitted by a person not employed by an HHS agency (*e.g.,* CDC, NIH, FDA, etc.).

Nominations may be submitted by the candidate, or by the person/organization recommending the candidate.

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been

delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2020–26257 Filed 11–27–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare and Medicaid Services

[Document Identifiers: CMS–304/–304a, CMS–367a—d, and CMS–368/–R–144]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare and Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (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 January 29, 2021.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development Attention: Document Identifier/OMB Control Number _____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' website address at website address at *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html*

2. 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**).

CMS–304/–304a Reconciliation of State Invoice (ROSI) and Prior Quarter Adjustment Statement (PQAS)

CMS–367a–d Medicaid Drug Rebate Program Labeler Reporting Format

CMS–368/–R–144 Medicaid Drug Rebate Program State Reporting Forms

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. Effective July 1, 2021, the Medicaid Drug Rebate Program (MDRP) is updating to a new Medicaid Drug Programs (MDP) system which will now accept a delimited text file format, Comma Separated Values (.CSV), in addition to the current Text (.TXT) file format. We have also increased several file format data field sizes in order to accommodate the higher priced drugs that are entering the market. These changes in conjunction with numerous edits to verbiage are applicable to Forms CMS–304 and –304a. Separately, we are also updating corresponding collection of information requests (OMB 0938–0578 and OMB 0938–0582) so that all the MDP file formats, field sizes, and verbiage will align across the MDRP. *Form Number:* CMS–304 and –304a (OMB control number: 0938–0676); *Frequency:* Quarterly; *Affected Public:* Private sector (Business or other for-profits); *Number of Respondents:* 749; *Total Annual Responses:* 5,841; *Total Annual Hours:* 248,584. (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 Program Labeler Reporting Format; *Use:* Labelers transmit drug product and pricing data to CMS within 30 days after the end of each calendar month and quarter. CMS calculates the unit rebate amount (URA) and the unit rebate offset amount (UROA) for each new drug application (NDC) and distributes to all State Medicaid agencies. States use the URA to invoice the labeler for rebates and the UROA to report onto CMS–64. The monthly data is used to calculate Federal Upper Limit (FUL) prices for applicable drugs and for states that opt to use this data to establish their pharmacy reimbursement methodology. Effective July 1, 2021, the MDRP is updating to a new Medicaid Drug Programs (MDP) system which will now accept a delimited text file format, Comma Separated Values (.CSV), in addition to the current Text

(.TXT) file format. We have also increased several file format data field sizes in order to accommodate the higher priced drugs that are entering the market. These changes in conjunction with numerous edits to verbiage are applicable to Forms CMS–367a (Quarterly Pricing), CMS–367b (Monthly Pricing), CMS–367c (Product Data), and CMS–367d (Manufacturer Contact Form). Separately, we are also updating corresponding collection of information requests (OMB 0938–0582 and OMB 0938–0676) so that all the MDP file formats, field sizes, and verbiage will align across the MDRP. *Form Number:* CMS–367a, b, c, and d (OMB control number: 0938–0578); *Frequency:* Monthly, quarterly, and on occasion; *Affected Public:* Private sector (Business or other for-profits); *Number of Respondents:* 749; *Total Annual Responses:* 14,980; *Total Annual Hours:* 558,979. (For policy questions regarding this collection contact Andrea Wellington at 410–786–3490.)

3. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Medicaid Drug Rebate Program State Reporting Forms; *Use:* Form CMS 368 is a report of contact for the State to name the individuals involved in the Medicaid Drug Rebate Program (MDRP) and is required only in those instances where a change to the originally submitted data is necessary. The ability to require the reporting of any changes to these data is necessary to the efficient operation of these programs. Form CMS–R–144 is required from States quarterly to report utilization for any drugs paid for during that quarter. Effective July 1, 2021, the MDRP is updating to a new Medicaid Drug Programs (MDP) system which will now accept a delimited text file format, Comma Separated Values (.CSV), in addition to the current Text (.TXT) file format. We have also increased several file format data field sizes in order to accommodate the higher priced drugs that are entering the market. These changes in conjunction with numerous edits to verbiage are applicable to Form CMS–R–144. Separately, we are also updating corresponding collection of information requests (OMB 0938–0578 and OMB 0938–0676) so that all the MDP file formats, field sizes, and verbiage will align across the MDRP. Form CMS–368 has been revised by removing the DUR State Contact information and description ''Drug Utilization Review (DUR) Program.'' This information is now accounted for under OMB 0938–0659. *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:* 290; *Total Annual Hours:* 13,669. (For policy questions regarding this collection contact Andrea Wellington at 410–786–3490.)

Dated: November 18, 2020.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2020–25890 Filed 11–27–20; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Understanding Children's Transitions From Head Start to Kindergarten (New Collection)

AGENCY: Office of Planning, Research, and Evaluation; Administration for Children and Families; HHS.

ACTION: Request for public comment.

SUMMARY: The Administration for Children and Families (ACF) at the U.S. Department of Health and Human Services (HHS) seeks approval to conduct semi-structured, qualitative interviews with Head Start staff (grantee administrators, managers/coordinators, center directors, teachers, staff), parents, affiliated community providers, and partner local education agency staff (administrators, elementary school principals, staff, and kindergarten teachers) at six sites. A comparative case study design will explore varying strategies and approaches to supporting children's transitions from Head Start to kindergarten.

DATES: *Comments due within 30 days of publication.* OMB must make a decision about the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

SUPPLEMENTARY INFORMATION:

Description: The proposed case studies intend to study the transition strategies and approaches employed, across various levels, both within and across the Head Start (HS) and elementary school systems. The case studies focus on how relationships across systems support coordinated transition practices, which are hypothesized to lead to the most positive outcomes for children, families, and teachers. Qualitative data collection protocols will explore how the supports for and implementation of transition approaches vary amongst HS grantees/delegates, HS centers, elementary schools, and Local Education Agencies (LEAs) within the same communities, including contextual factors that support or hinder meaningful collaboration.

Respondents: Head Start administrators, Local Education Agency administrators, Head Start center directors, elementary school principals, Head Start teachers, kindergarten teachers, elementary school staff, Head Start managers & coordinators, Head Start parents/families (pre- and post-kindergarten transition), Community Service Providers.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents (total over request period)	Number of responses per respondent (total over request period)	Avg. burden per response (in hours)	Total burden/ annual burden (in hours)
Initial outreach and recruitment scripts for Programs and Schools (Head Start grantee and delegate agency administrator, Local Education Agency administrator, Head Start Center Director, elementary principal)	36	1.3	1.3	47
Initial Outreach and Recruitment Scripts for Head Start Families	72	1	0.25	18
Administrator Interview Protocol (Head Start grantee and delegate agency administrator, Local Education Agency administrator)	30	1	1	30
Site Leadership Interview Protocol (Head Start Center Director, elementary principal)	12	1	1.25	15
Teacher & Staff Interview Protocol (Head Start teacher, kindergarten teacher, elementary staff)	30	1	.80s	24
Head Start Manager/Coordinator Interview Protocol	12	1	1.25	15
Head Start Family Background Questionnaire	48	1	.25	12
Head Start Family Focus Group Protocol	48	1	1.25	60
Kindergarten Family Interview Protocol	12	1	.75	9
Community Partner Interview Protocol	6	1	1	6
Social Network Instrument	90	1	.25	23

Estimated Total Annual Burden Hours: 259.

Authority: 42 U.S.C. 9835 and 42 U.S.C. 9844.

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2020–26335 Filed 11–27–20; 8:45 am]

BILLING CODE 4184–22–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Human Services Programs in Rural Contexts Study

AGENCY: Office of Planning, Research, and Evaluation, Administration for Children and Families, U.S. Department of Health and Human Services.

ACTION: Request for public comment.

SUMMARY: The Administration for Children and Families (ACF) at the U.S. Department of Health and Human Services is proposing to collect data on the challenges and unique opportunities of administering human services programs in rural contexts. Case studies of 12 communities, in combination with analysis of administrative data and qualitative comparative analysis of the qualitative data, will provide ACF with a rich description of human services programs in rural contexts and provide ACF opportunities for strengthening human services programs' capacity to promote the economic and social wellbeing of individuals, families, and communities in rural contexts.

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: Copies of the proposed collection of information can be obtained and comments may be forwarded by emailing *OPREinfocollection@acf.hhs.gov.* Alternatively, copies can also be obtained by writing to the Administration for Children and Families, Office of Planning, Research, and Evaluation, 330 C Street SW, Washington, DC 20201, Attn: OPRE Reports Clearance Officer. All requests, emailed or written, should be identified by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: ACF proposes to conduct key informant interviews during site visits to 12 rural communities. While ACF intends to conduct on-site visits, if the current COVID–19 pandemic makes it too difficult to travel safely, we will conduct these interviews virtually. This study will involve four data collection instruments:

- *Site Visit Planning Template.* Each Project Director (or their designee) will complete a Site Visit Planning Template to assist the study team in scheduling site visit interviews.
- *Three Site Visit Discussion Guides.* To systematically capture data on challenges and unique opportunities, the study team will conduct interviews with (1) project directors and leaders from human services organizations, (2) staff from the human services and partner organizations, and (3) staff from nonprofit and partner organizations that support individuals who utilize human services.

Respondents: Human services project directors and leadership staff, human services program staff, and staff from nonprofit organizations and partners that provide support to individuals who utilize human services.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents (total over request period)	Number of responses per respondent (total over request period)	Average burden per response (in hours)	Total burden (in hours)	Annual burden (in hours)
In-Person Site Visit Planning Template (Instrument 1a); or Virtual Site Visit Planning Template (Instrument 1b)	12	1	2	24	12

ANNUAL BURDEN ESTIMATES—Continued

Instrument	Number of respondents (total over request period)	Number of responses per respondent (total over request period)	Average burden per response (in hours)	Total burden (in hours)	Annual burden (in hours)
Project Directors and Leaders Site Visit Discussion Guide (Instrument 2)	60	1	2	120	60
Staff Site Visit Discussion Guide (Instrument 3)	108	1	1.5	162	81
Nonprofit or Partner Organizations Site Visit Discussion Guide (Instrument 4)	72	1	1	72	36

Estimated Total Annual Burden Hours: 189.

Comments: The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the agency's functions, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of information collection on respondents, including through using automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Authority: 42 U.S.C. 613, 42 U.S.C. 1397, 42 U.S.C. 711, and 42 U.S.C. 603(a)(2).

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2020–26248 Filed 11–27–20; 8:45 am]

BILLING CODE 4184–09–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request; Healthy Marriage and Responsible Fatherhood Performance Measures and Additional Data Collection (New Collection)

AGENCY: Office of Planning, Research, and Evaluation, Administration for Children and Families, HHS.

ACTION: Request for public comment.

SUMMARY: The Administration for Children and Families (ACF), Office of Family Assistance (OFA), has had administrative responsibility for federal funding of programs that strengthen families through healthy marriage and relationship education and responsible fatherhood programming since 2006 through the Healthy Marriage (HM) and Responsible Fatherhood (RF) Grant Programs. ACF required the 2015 cohort of HMRF grantees—which received 5-year grants in September 2015—to collect and report performance measures about program operations, services, and clients served (OMB #0970–0460). A performance measures data collection system called nFORM (Information, Family Outcomes, Reporting, and Management) was implemented with the 2015 cohort to improve the efficiency of data collection and reporting and the quality of data. This system allows for streamlined and standardized submission of grantee performance data through regular progress reports and supports grantee-led and federal research projects. ACF will continue performance measure and other data collection activities for the HMRF grant program with a new cohort of grantees who received 5-year awards in September 2020. ACF is requesting comment on a new data collection to support these activities with the 2020 HMRF grantee cohort. ACF has made changes to the previous cohort's data collection instruments and performance reports for use in the new cohort. This new grantee cohort is expected to begin collecting performance measure data and reporting to ACF in April 2021.

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: Copies of the proposed collection of information can be obtained and comments may be forwarded by emailing *OPREinfocollection@acf.hhs.gov.* Alternatively, copies can also be obtained by writing to the Administration for Children and Families, Office of Planning, Research, and Evaluation, 330 C Street SW, Washington, DC 20201, Attn: OPRE Reports Clearance Officer. All requests, emailed or written, should be identified by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: ACF proposes to collect a set of performance measures from all HMRF grantees. These measures collect standardized information in the following areas:

- Applicant characteristics;
- Program operations;
- Service delivery; and
- Participant outcomes:
  - Entrance survey, with five versions: (1) HM Program Entrance Survey for Adult-Focused Programs, (2) HM Program Entrance Survey for Youth-Focused Programs, (3) RF Program Entrance Survey for Community-Based Fathers, (4) RF Program Entrance Survey for Community-Based Mothers, and (5) RF Program Entrance Survey for Reentering Fathers.
  - Exit survey, with five versions: (1) HM Program Exit Survey for Adult-Focused Programs, (2) HM Program Exit Survey for Youth-Focused Programs, (3) RF Program Exit Survey for Community-Based Fathers, (4) RF Program Exit Survey for Community-Based Mothers, and (5) RF Program Exit Survey for Reentering Fathers.

The measures used by the 2015 grantee cohort were developed in 2014 after extensive review of the research literature and grantees' past measures. The performance measures, data collection instruments, and data collection system were revised in 2020 based on a targeted analysis of existing measures, feedback from key stakeholders, and discussions with ACF staff and the 2015 cohort of grantees.

ACF required the 2015 cohort of grantees to submit data on these standardized measures on a quarterly basis and proposes the same requirement for the 2020 cohort. In addition to the performance measures mentioned above, ACF proposes to repeat collection for these data submissions:

- Semi-annual Performance Progress Report (PPR), with two versions: (1) Performance Progress Report for HM

Programs, and (2) Performance Progress Report for RF Programs; and

• Quarterly Performance Report (QPR), with two versions: (1) Quarterly Performance Progress Report for HM Programs, and (2) Quarterly Performance Progress Report for RF Programs.

Grantees in the new cohort will also be required to engage in continuous quality improvement (CQI) planning and implementation using a proposed CQI plan template developed by ACF. The estimated burden for completing and updating this template is included in the table below.

Respondents: Respondents include HM and RF grantee staff and program applicants and participants (participants are called ''clients'').

ANNUAL BURDEN ESTIMATES

Instrument	Respondent	Number of respondents (total over request period)	Annual number of respondents	Number of responses per respondent (total over request period)	Average burden per response (in hours)	Total burden (in hours)	Annual burden (in hours)
1: Applicant Characteristics	Program applicants	273,839	91,280	1	0.25	68,460	22,820
	Program staff	408	408	224	0.10	27,384	9,128
2: Program Operations	Program staff	136	136	12	0.32	526.32	175.44
3: Service Delivery Data	Program staff	2,040	2,040	126	0.50	128,706	42,902
4: Entrance and Exit Surveys	Program clients (entrance)	257,409	85,803	1	0.42	108,111.78	36,037.26
	Program clients (exit)	169,965	56,655	1	0.42	71,385	23,795
	Program staff (entrance and exit on paper).	32	32	1,169	0.10	11,220	3,740
5: Semi-annual Performance Progress Report (PPR).	Program staff	136	136	6	3	2,448	816
6: Quarterly Performance Report (QPR).	Program staff	136	136	6	1	816	272
7: CQI Plan	Program staff	136	136	3	4	1,632	544

Estimated Total Annual Burden Hours: 140,230.

Comments: The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) 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. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Authority: Sec. 403. [42 U.S.C. 603].

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2020–26266 Filed 11–27–20; 8:45 am]

BILLING CODE 4184–73–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–1337]

John Kapoor: Final Debarment Order

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is issuing an order under the Federal Food, Drug, and Cosmetic Act (FD&C Act) permanently debarring John Kapoor from providing services in any capacity to a person that has an approved or pending drug product application. FDA bases this order on a finding that John Kapoor was convicted of a felony under Federal law for conduct that relates to the regulation of a drug product under the FD&C Act. John Kapoor was given notice of the proposed permanent debarment and an opportunity to request a hearing to show why he should not be debarred. Mr. Kapoor, through counsel, submitted a letter to FDA, which commented on some of the factual circumstances surrounding the case. In the letter, he also stated that he did not intend to request a hearing nor, however, would he acquiesce to debarment. As of August 26, 2020 (30 days after receipt of the notice), Mr. Kapoor has not requested a hearing. His failure to request a hearing constitutes a waiver of his right to a hearing concerning this action.

DATES: This order is applicable November 30, 2020.

ADDRESSES: Submit applications for special termination of debarment to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500, or *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Jaime Espinosa, (ELEM–4029) Division of Enforcement, Office of Strategic Planning and Operational Policy, Office of Regulatory Affairs, Food and Drug Administration, 12420 Parklawn Dr., Rockville, MD 20857, *debarments@fda.hhs.gov,* 240–402–8743.

SUPPLEMENTARY INFORMATION:

I. Background

Section 306(a)(2)(B) of the FD&C Act (21 U.S.C. 335a(a)(2)(B)) requires debarment of an individual from providing services in any capacity to a person that has an approved or pending drug product application if FDA finds that the individual has been convicted of a felony under Federal law for conduct relating to the regulation of any drug product under the FD&C Act. On January 23, 2020, Mr. Kapoor was convicted as defined in section 306(l)(1) of the FD&C Act when judgment was entered against him in the U.S. District Court for the District of Massachusetts, after a jury verdict, to one count of Racketeering Conspiracy in violation of 18 U.S.C. 1962(d). The pattern of racketeering activity he was convicted of included engaging in multiple acts of mail fraud (18 U.S.C. 1341) and wire fraud (18 U.S.C. 1343).

The factual basis for this conviction is as follows: Mr. Kapoor was the founder and majority owner of Insys Therapeutics Inc. (Insys), a Delaware Corporation, with headquarters in Chandler, Arizona. In addition, he held executive management positions at Insys, including Executive Chairman of the Board of Directors and, for a time,

Chief Executive Officer (CEO). Insys developed and owned a drug called SUBSYS, a liquid formulation of fentanyl to be applied under the tongue. FDA approved SUBSYS for the management of breakthrough pain in adult cancer patients who are already receiving and are already tolerant to opioid therapy for their underlying persistent cancer pain. From 2012 and continuing through 2015, Mr. Kapoor oversaw a conspiracy whereby employees of Insys bribed medical practitioners in various states to get those practitioners to increase prescribing SUBSYS to their patients. Mr. Kapoor, along with his co-conspirators, measured the effect of these bribes on each practitioner's prescribing habits and on the revenue that each bribed practitioner generated for Insys. Mr. Kapoor, along with his co-conspirators, reduced or eliminated bribes paid to those practitioners who failed to meet the minimum prescription requirements or failed to generate enough revenue to justify additional bribes.

To further this conspiracy, Mr. Kapoor oversaw a scheme whereby Insys executives conspired to mislead and defraud health insurance providers to ensure those providers approved payment for SUBSYS. Insys achieved this goal by establishing the ''Insys Reimbursement Center,'' which was designed to shift the burden of seeking prior authorization for SUBSYS from practitioners to Insys. This allowed Insys to determine what medical information was presented to insurers. Mr. Kapoor and his co-conspirators directed Insys employees to mislead insurers to obtain payment authorization.

As a result of this conviction, FDA sent Mr. Kapoor by certified mail on July 16, 2020, a notice proposing to permanently debar him from providing services in any capacity to a person that has an approved or pending drug product application. The proposal was based on a finding, under section 306(a)(2)(B) of the FD&C Act, that Mr. Kapoor was convicted of a felony under Federal law for conduct relating to the regulation of a drug product under the FD&C Act. The proposal also offered Mr. Kapoor an opportunity to request a hearing, providing him 30 days from the date of receipt of the letter in which to file the request, and advised him that failure to request a hearing constituted an election not to use the opportunity for a hearing and a waiver of any contentions concerning this action. Mr. Kapoor received the proposal on July 27, 2020. Mr. Kapoor, through counsel, submitted a letter to FDA dated August 12, 2020, which commented on some of the factual circumstances surrounding the case. In the letter, he also stated that he did not intend to request a hearing nor, however, would he acquiesce to debarment. Since he did not request a hearing within the timeframe prescribed by regulation, Mr. Kapoor has waived his opportunity for a hearing and any contentions concerning his debarment (21 CFR part 12).

II. Findings and Order

Therefore, the Assistant Commissioner, Office of Human and Animal Food Operations, under section 306(a)(2)(B) of the FD&C Act, under authority delegated to the Assistant Commissioner, finds that Mr. Kapoor has been convicted of a felony under Federal law for conduct otherwise relating to the regulation of a drug product under the FD&C Act.

As a result of the foregoing finding, Mr. Kapoor, is permanently debarred from providing services in any capacity to a person with an approved or pending drug product application, effective (see **DATES**) (see sections 306(a)(2)(B) and (c)(2)(A)(ii) of the FD&C Act). Any person with an approved or pending drug product application who knowingly employs or retains as a consultant or contractor, or otherwise uses the services of Mr. Kapoor, in any capacity during his debarment, will be subject to civil money penalties (section 307(a)(6) of the FD&C Act (21 U.S.C. 335b(a)(6))). If Mr. Kapoor provides services in any capacity to a person with an approved or pending drug product application during his period of debarment, he will be subject to civil money penalties (section 307(a)(7) of the FD&C Act). In addition, FDA will not accept or review any abbreviated new drug application from Mr. Kapoor during his period of debarment, other than in connection with an audit under section 306 of the FD&C Act (section 306(c)(1)(B) of the FD&C Act). Note that, for purposes of section 306 of the FD&C Act, a ''drug product'' is defined as a drug subject to regulation under section 505, 512, or 802 of the FD&C Act (21 U.S.C. 355, 360b, or 382) or under section 351 of the Public Health Service Act (42 U.S.C. 262) (see section 201(dd) of the FD&C Act (21 U.S.C. 321(dd))).

Any application by Mr. Kapoor for special termination of debarment under section 306(d)(4) of the FD&C Act should be identified with Docket No. FDA–2020–N–1337 and sent to the Dockets Management Staff (see **ADDRESSES**). The public availability of information in these submissions is governed by 21 CFR 10.20.

Publicly available submissions will be placed in the docket and will be viewable at *https://www.regulations.gov* or at the Dockets Management Staff (see **ADDRESSES**) between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

Dated: November 23, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–26262 Filed 11–27–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2019–N–4248]

Barry J. Cadden: Final Debarment Order

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is issuing an order under the Federal Food, Drug, and Cosmetic Act (FD&C Act) permanently debarring Barry J. Cadden from providing services in any capacity to a person that has an approved or pending drug product application. FDA bases this order on a finding that Mr. Cadden was convicted of a felony under Federal law for conduct that relates to the regulation of a drug product under the FD&C Act. Mr. Cadden was given notice of the proposed permanent debarment and an opportunity to request a hearing to show why he should not be debarred. As of July 9, 2020 (30 days after receipt of the notice), Mr. Cadden had not responded. Mr. Cadden's failure to respond and request a hearing constitutes a waiver of his right to a hearing concerning this action.

DATES: This order is applicable November 30, 2020.

ADDRESSES: Submit applications for special termination of debarment to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500, or at *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Jaime Espinosa, Division of Enforcement, Office of Strategic Planning and Operational Policy, Office of Regulatory Affairs, Food and Drug Administration, 12420 Parklawn Dr., Rockville, MD 20857, *debarments@fda.hhs.gov,* or at 240–402–8743.

SUPPLEMENTARY INFORMATION:

I. Background

Section 306(a)(2)(B) of the FD&C Act (21 U.S.C. 335a(a)(2)(B)) requires debarment of an individual from providing services in any capacity to a person that has an approved or pending drug product application if FDA finds that the individual has been convicted of a felony under Federal law for conduct relating to the regulation of any drug product under the FD&C Act. On June 27, 2017, Mr. Cadden was convicted as defined in section 306(l)(1) of the FD&C Act when judgment was entered against him in the U.S. District Court for the District of Massachusetts, after a jury verdict, for one count of racketeering in violation of 18 U.S.C. 1962(c), one count of racketeering conspiracy in violation of 18 U.S.C. 1962(d), 52 counts of mail fraud in violation of 18 U.S.C. 1341, and three counts of introduction of misbranded drugs into interstate commerce with the intent to defraud and mislead-no prescriptions in violation of 21 U.S.C. 353(b)(1), 331(a), and 333(a)(2).

As contained in counts 1–2, 4–39, 41–56, 95, and 99–100 of the indictment, filed on December 16, 2014, Mr. Cadden was an owner and director of the New England Compounding Center (NECC), which held itself out as a compounding-only pharmacy, and he served as NECC's president, head pharmacist, and Manager of Record. In addition, Mr. Cadden was an owner and director of Medical Sales Management, Inc. (MSM), and served as MSM's Treasurer. MSM provided sales and administrative services to NECC for which MSM was paid a service fee. MSM's sales representatives sold drugs on behalf of NECC to customers throughout the country. In those capacities, Mr. Cadden instructed the MSM sales force to falsely represent to customers that NECC was providing the highest quality compounded medications, when in fact Mr. Cadden, among other things, failed to properly sterilize drug products consistent with applicable U.S. Pharmacopeia standards, failed to test purportedly sterile drugs, authorized the shipping of drugs before test results confirming their sterility were returned, never notified customers of nonsterile results, and compounded drugs with expired ingredients. Additionally, Mr. Cadden directed and authorized the shipping and mailing, in interstate commerce, of contaminated methylprednisolone acetate to NECC customers nationwide. Mr. Cadden also caused drugs to be introduced and delivered into interstate commerce without the valid prescription of a practitioner licensed by law to administer drugs, which act resulted in the drugs being misbranded. Further, Mr. Cadden defrauded the United States by interfering with and obstructing the lawful governmental functions of FDA by claiming to be a pharmacy dispensing drugs pursuant to valid, patient-specific prescriptions. In fact, NECC routinely dispensed drugs in bulk without valid, patient-specific prescriptions.

As a result of this conviction, FDA sent Mr. Cadden, by certified mail on June 2, 2020, a notice proposing to permanently debar him from providing services in any capacity to a person that has an approved or pending drug product application. The proposal was based on a finding, under section 306(a)(2)(B) of the FD&C Act, that Mr. Cadden was convicted of felonies under Federal law for conduct relating to the regulation of a drug product under the FD&C Act. The proposal also offered Mr. Cadden an opportunity to request a hearing, providing him 30 days from the date of receipt of the letter in which to file the request, and advised him that failure to request a hearing constituted an election not to use the opportunity for a hearing and a waiver of any contentions concerning this action. Mr. Cadden received the proposal on June 9, 2020. Mr. Cadden did not request a hearing within the timeframe prescribed by regulation and has, therefore, waived his opportunity for a hearing and any contentions concerning his debarment (21 CFR part 12).

II. Findings and Order

Therefore, the Assistant Commissioner, Office of Human and Animal Food Operations, under section 306(a)(2)(B) of the FD&C Act, under authority delegated to the Assistant Commissioner, finds that Barry J. Cadden, has been convicted of a felony under Federal law for conduct otherwise relating to the regulation of a drug product under the FD&C Act.

As a result of the foregoing finding, Barry J. Cadden, is permanently debarred from providing services in any capacity to a person with an approved or pending drug product application, effective (see **DATES**) (see sections 306(a)(2)(B) and 306(c)(2)(A)(ii) of the FD&C Act). Any person with an approved or pending drug product application who knowingly employs or retains as a consultant or contractor, or otherwise uses the services of Barry J. Cadden, in any capacity during his debarment, will be subject to civil money penalties (section 307(a)(6) of the FD&C Act (21 U.S.C. 335b(a)(6))). If Mr. Cadden provides services in any capacity to a person with an approved or pending drug product application during his period of debarment, he will be subject to civil money penalties (section 307(a)(7) of the FD&C Act). In addition, FDA will not accept or review any abbreviated new drug applications from Mr. Cadden during his period of debarment, other than in connection with an audit under section 306 of the FD&C Act (section 306(c)(1)(B) of the FD&C Act). Note that, for purposes of section 306 of the FD&C Act, a ''drug product'' is defined as a drug subject to regulation under section 505, 512, or 802 of the FD&C Act (21 U.S.C. 355, 360b, 382) or under section 351 of the Public Health Service Act (42 U.S.C. 262) (section 201(dd) of the FD&C Act (21 U.S.C. 321(dd))).

Any application by Mr. Cadden for special termination of debarment under section 306(d)(4) of the FD&C Act should be identified with Docket No. FDA–2019–N–4248 and sent to the Dockets Management Staff (see **ADDRESSES**). The public availability of information in these submissions is governed by 21 CFR 10.20.

Publicly available submissions will be placed in the docket and will be viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

Dated: November 23, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–26255 Filed 11–27–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–1255]

Tuan Anh Tran: Final Debarment Order

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is issuing an order under the Federal Food, Drug, and Cosmetic Act (FD&C Act) debarring Tuan Anh Tran for a period of 5 years from importing or offering for import any drug into the United States. FDA bases this order on a finding that Mr. Tran engaged in a pattern of importing or offering for import misbranded drugs (*i.e.,* in an amount, frequency, or dosage that is inconsistent with his personal or household use) that are not designated in an authorized electronic data interchange system as products

regulated by FDA. Mr. Tran was given notice of the proposed debarment and an opportunity to request a hearing to show why he should not be debarred. As of September 14, 2020 (30 days after receipt of the notice), Mr. Tran had not responded. Mr. Trans's failure to respond and request a hearing constitutes a waiver of his right to a hearing concerning this matter.

DATES: This order is applicable November 30, 2020.

ADDRESSES: Submit applications for termination of debarment to the Dockets Management Staff, Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500, or at *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Jaime Espinosa, Division of Enforcement (ELEM–4029), Office of Strategic Planning and Operational Policy, Office of Regulatory Affairs, Food and Drug Administration, 12420 Parklawn Dr., Rockville, MD 20857, 240–402–8743, or at *debarments@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 306(b)(1)(D) of the FD&C Act (21 U.S.C. 335a(b)(1)(D)) permits debarment of an individual from importing or offering for import any drug into the United States if FDA finds, as required by section 306(b)(3)(D) of the FD&C Act, that the individual has engaged in a pattern of importing or offering for import misbranded drugs (*i.e.,* in an amount, frequency, or dosage that is inconsistent with personal or household use by the importer), and the shipments are not designated in an entry in an authorized electronic data exchange system as products regulated by FDA.

After an investigation, FDA discovered that Mr. Tran has engaged in numerous instances of importing or offering for import misbranded drugs; all the parcels containing the misbranded drugs serving as the basis for this action were intercepted by FDA at the John F. Kennedy International Mail Facility and were addressed to Mr. Tran at one of two addresses connected to him.

On or about April 12, 2019, Mr. Tran offered for import three parcels. The product contained in the first parcel was 210 packets (pieces) of Kamagra Sildenafil Oral Jelly and was a misbranded drug because the product was a prescription drug product that failed to contain the ''Rx-only'' symbol on its label. The product was refused entry on May 17, 2019. The product contained in the second parcel was 245 packets (pieces) of Kamagra Sildenafil Oral Jelly and was a misbranded drug because the product was a prescription drug product that failed to contain the ''Rx-only'' symbol on its label. The product was refused entry on May 17, 2019. The product contained in the third parcel was 245 packets (pieces) of Kamagra Sildenafil Oral Jelly and was a misbranded drug because the product was a prescription drug product that failed to contain the ''Rx-only'' symbol on its label. The product was refused entry on May 17, 2019.

On or about September 13, 2019, Mr. Tran offered for import four parcels. The product contained in the first parcel was 312 Kamagra Sildenafil Citrate Chewable Tablets and was a misbranded drug because it was a prescription drug product that failed to contain the ''Rx-only'' symbol on its label. The product was refused entry on October 22, 2019. The product contained in the second parcel was 312 Kamagra Sildenafil Citrate Chewable Tablets and was a misbranded drug because it was a prescription drug product that failed to contain the ''Rx-only'' symbol on its label. The product was refused entry on October 22, 2019. The product contained in the third parcel was 196 packets (pieces) of Kamagra Sildenafil Citrate Jelly and was a misbranded drug because it was a prescription drug product that failed to contain the ''Rx-only'' symbol on its label. The product was refused entry on October 22, 2019. The product contained in the fourth parcel was 231 packets (pieces) of Kamagra Sildenafil Citrate Jelly and was a misbranded drug because it was a prescription drug product that failed to contain the ''Rx-only'' symbol on its label. The product was refused entry on October 22, 2019.

On or about September 26, 2019, Mr. Tran offered for import a parcel that was intercepted and processed by FDA. The product contained in the parcel was 196 packets (pieces) of Kamagra Sildenafil Oral Jelly and was a misbranded drug because it was a prescription drug product that failed to contain the ''Rx-only'' symbol on its label. The product was refused entry on October 29, 2019.

Because of this pattern of importing or offering for import misbranded drugs (*i.e.,* in an amount, frequency, or dosage that is inconsistent with his personal or household use) that are not designated in an authorized electronic data interchange system as products regulated by FDA, in accordance with section 306(b)(3)(D) of the FD&C Act, FDA sent Mr. Tran, by certified mail on August 7, 2020, a notice proposing to debar him for 5 years from importing or offering for import any drug into the United States.

In proposing a debarment period, FDA weighed the considerations set forth in section 306(c)(3) of the FD&C Act that it considered applicable to Mr. Tran's pattern of conduct and concluded that his conduct warranted the imposition of a 5-year period of debarment.

The proposal informed Mr. Tran of the proposed debarment and offered him an opportunity to request a hearing, providing him 30 days from the date of receipt of the letter in which to file the request, and advised him that failure to request a hearing constituted a waiver of the opportunity for a hearing and of any contentions concerning this action. Mr. Tran received the proposal and notice of opportunity for a hearing on August 15, 2020. Mr. Tran failed to request a hearing within the timeframe prescribed by regulation and, therefore, has waived his opportunity for a hearing and waived any contentions concerning his debarment (21 CFR part 12).

II. Findings and Order

Therefore, the Assistant Commissioner, Office of Human and Animal Food Operations, under section 306(b)(3)(D) of the FD&C Act, under authority delegated to the Assistant Commissioner, finds that Mr. Tuan Anh Tran has engaged in a pattern of importing or offering for import misbranded drugs (*i.e.,* in an amount, frequency, or dosage that is inconsistent with his personal or household use) that are not designated in an authorized electronic data interchange system as products regulated by FDA. FDA finds that this pattern of conduct should be accorded a debarment of 5 years as provided by section 306(c)(2)(A)(iii) of the FD&C Act.

As a result of the foregoing finding, Mr. Tran is debarred for 5 years from importing or offering for import any drug into the United States, effective (see **DATES**). Pursuant to section 301(cc) of the FD&C Act (21 U.S.C. 331(cc)), the importing or offering for import into the United States of any drug or controlled substance by, with the assistance of, or at the direction of Mr. Tran is a prohibited act.

Any application by Mr. Tran for termination of debarment under section 306(d)(1) of the FD&C Act should be identified with Docket No. FDA–2020–N–1255 and sent to the Dockets Management Staff (see **ADDRESSES**). The public availability of information in these submissions is governed by 21 CFR 10.20(j).

Publicly available submissions will be placed in the docket and will be viewable at *https://www.regulations.gov* or at the Dockets Management Staff (see

ADDRESSES) between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

Dated: November 23, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–26250 Filed 11–27–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Recharter for the National Advisory Council on Nurse Education and Practice

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, HHS is hereby giving notice that the National Advisory Council on Nurse Education and Practice (NACNEP) has been rechartered. The effective date of the recharter is November 30, 2020.

FOR FURTHER INFORMATION CONTACT: Camillus Ezeike, Ph.D., JD, LLM, RN, PMP, Designated Federal Officer, Bureau of Health Workforce, Division of Nursing and Public Health, HRSA, 5600 Fishers Lane, Rockville, Maryland 20857; 301–443–2866; or *BHWNACNEP@hrsa.gov*.

SUPPLEMENTARY INFORMATION: NACNEP provides advice and recommendations to the Secretary of HHS (''Secretary'') and Congress on policy matters and the preparation of general regulations concerning activities under Title VIII of the Public Health Service (PHS) Act, including the range of issues relating to the nurse workforce, education, and practice improvement. NACNEP also prepares and submits an annual report to the Secretary and Congress describing its activities, including NACNEP's findings and recommendations concerning activities under Title VIII, as required by the PHS Act.

The recharter of NACNEP was approved on November 30, 2020, which will also stand as the filing date. The recharter of NACNEP gives authorization for the Council to operate until November 30, 2022.

A copy of the NACNEP charter is available on the NACNEP website at *https://www.hrsa.gov/advisory-committees/nursing/about.html.* A copy of the charter can also be obtained by accessing the FACA database that is maintained by the Committee Management Secretariat under the General Services Administration. The website address for the FACA database is *http://www.facadatabase.gov/.*

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2020–26247 Filed 11–27–20; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request; Information Collection Request Title: Rural Health Care Coordination Program OMB No. 0906–0024—Reinstate With Changes

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on the proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on this ICR should be received no later than January 29, 2021.

ADDRESSES: Submit your comments to *paperwork@hrsa.gov* or mail the HRSA Information Collection Clearance Officer, Room 14N136B, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call Lisa Wright-Solomon, the HRSA Information Collection Clearance Officer at (301) 443–1984.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the information request collection title for reference.

Information Collection Request Title: Rural Health Care Coordination Program OMB No. 0906–0024—Reinstate with Changes.

Abstract: The Rural Health Care Coordination Program (Care Coordination Program) is authorized under Section 330A(e) of the Public Health Service Act (42 U.S.C. 254(e)), as amended, to ''improve access and quality of care through the application of care coordination strategies with the focus areas of collaboration, leadership and workforce, improved outcomes, and sustainability in rural communities.'' This authority permits HRSA's Federal Office of Rural Health Policy to support rural health consortiums/networks aiming to achieve the overall goals of improving access, delivery, and quality of care through the application of care coordination strategies in rural communities.

This ICR was discontinued in January 2020. HRSA is requesting a reinstatement with changes as it was decided to re-compete this pilot program.

The proposed Rural Health Care Coordination Program draft measures for information collection reflect changes to the Clinical Measures section, which was previously in section eight and now currently in section six. The Clinical Measures Section now expands previous project focus from three chronic diseases (*i.e.* Type 2 diabetes, Congestive Heart Failure, and Chronic Obstructive Pulmonary Disease) to an inclusive list of clinical measures in order to reflect a patient's overall health and well-being as well as the organization's overall improved outcomes for the project. Proposed revisions also include measures to examine key elements cited for a successful rural care coordination program: (1) Collaboration, (2) leadership and workforce, (3) improved outcomes, and (4) sustainability.

1. Collaboration—Utilizing a collaborative approach to coordinate and deliver health care services through a consortium, in which member organizations actively engage in integrated, coordinated, patient-centered delivery of health care services.

2. Leadership and Workforce—Developing and strengthening a highly skilled care coordination workforce to respond to vulnerable populations' unmet needs within the rural communities.

3. Improved Outcomes—Expanding access and improving care quality and delivery, and health outcomes through evidence-based model and/or promising practices tailored to meet the local populations' needs.

4. Sustainability—Developing and strengthening care coordination program's financial sustainability by establishing effective revenue sources such as expanded service reimbursement, resource sharing, and/or contributions from partners at the

community, county, regional, and state levels.

With the continuing shift in the healthcare environment towards provision of value-based care and utilization of reimbursement strategies through Centers for Medicare and Medicaid Services quality reporting programs, the latest competitive Rural Health Care Coordination Program cohort also aligned with this shift. An increased number of sophisticated applicants leveraging increasingly intricate reporting methodologies for quality data collection, utilization and analysis has resulted in an estimate of burden hours more in line with the realities of the health care landscape. In addition, the total number of responses has increased to 10 since the previous Notice of Award. This is due to a new Rural Health Care Coordination Program grant cycle with an increased number of awardees and therefore an increased number of respondents.

Need and Proposed Use of the Information: For this program, performance measures were drafted to provide data to the program and to enable HRSA to provide aggregate program data required by Congress under the Government Performance and Results Act of 1993. These measures cover the principal topic areas of interest to the Federal Office of Rural Health Policy, including: (a) Access to care; (b) population demographics; (c) staffing; (d) consortium/network; (e) sustainability; and (f) project specific domains. All measures will speak to HRSA's progress toward meeting the goals set.

Likely Respondents: Recipients of the Rural Health Care Coordination Program funding.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Rural Health Care Coordination Grant Program Measures	10	1	10	3.5	35
Total	10		10		35

HRSA specifically requests comments on: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2020–26254 Filed 11–27–20; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Federal Financial Participation in State Assistance Expenditures; Federal Matching Shares for Medicaid, the Children's Health Insurance Program, and Aid to Needy Aged, Blind, or Disabled Persons for October 1, 2021 Through September 30, 2022

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

DATES: The percentages listed in Table 1 will be effective for each of the four quarter-year periods beginning October 1, 2021 and ending September 30, 2022.

FOR FURTHER INFORMATION CONTACT: Ann Conmy, Office of Health Policy, Office of the Assistant Secretary for Planning and Evaluation, Room 447D—Hubert H. Humphrey Building, 200 Independence Avenue SW, Washington, DC 20201, (202) 690–6870.

SUPPLEMENTARY INFORMATION: The Federal Medical Assistance Percentages (FMAP), Enhanced Federal Medical Assistance Percentages (eFMAP), and disaster-recovery FMAP adjustments for Fiscal Year 2022 have been calculated pursuant to the Social Security Act (the Act). These percentages will be effective from October 1, 2021 through September 30, 2022. This notice announces the calculated FMAP rates, in accordance with sections 1101(a)(8) and 1905(b) of the Act, that the U.S. Department of Health and Human Services (HHS) will use in determining the amount of federal matching for state medical assistance (Medicaid), Temporary Assistance for Needy Families (TANF) Contingency Funds, Child Support Enforcement collections, Child Care Mandatory and Matching Funds of the Child Care and Development Fund, Title IV–E Foster Care Maintenance payments, Adoption Assistance payments and Kinship Guardianship Assistance payments, and the eFMAP rates for the Children's Health Insurance Program (CHIP) expenditures. Table 1 gives figures for each of the 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. This notice reminds states of adjustments available for states meeting requirements for disproportionate employer pension or insurance fund contributions and adjustments for disaster recovery. At this time, no state qualifies for such adjustments, and territories are not eligible.

The FY 2022 FMAP rates do not include the 6.2 percentage point increase in the FMAP provided under Section 6008 of the Families First Coronavirus Response Act (FFCRA) (Pub. L. 116–127) because the increase depends upon states meeting statutory requirements in FFCRA that cannot be assumed. If applied, the temporary 6.2 percentage increase in the FMAP is effective beginning January 1, 2020 and can extend through the last day of the calendar quarter in which the public health emergency declared by the Secretary of Health and Human Services

for COVID–19, including any extensions, terminates.

Programs under title XIX of the Act exist in each jurisdiction. Programs under titles I, X, and XIV operate only in Guam and the Virgin Islands. The percentages in this notice apply to state expenditures for most medical assistance and child health assistance, and assistance payments for certain social services. The Act provides separately for federal matching of administrative costs.

Sections 1905(b) and 1101(a)(8)(B) of the Social Security Act (the Act) require the Secretary of HHS to publish the FMAP rates each year. The Secretary calculates the percentages, using formulas in sections 1905(b) and 1101(a)(8), and calculations by the Department of Commerce of average income per person in each state and for the United States (meaning, for this purpose, the fifty states and the District of Columbia). The percentages must fall within the upper and lower limits specified in section 1905(b) of the Act. The percentages for the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands are specified in statute, and thus are not based on the statutory formula that determines the percentages for the 50 states.

Federal Medical Assistance Percentage (FMAP)

Section 1905(b) of the Act specifies the formula for calculating FMAPs as the Federal medical assistance percentage'' for any state shall be 100 per centum less the state percentage; and the state percentage shall be that percentage which bears the same ratio to 45 per centum as the square of the per capita income of such state bears to the square of the per capita income of the continental United States (including Alaska) and Hawaii; except that the Federal medical assistance percentage shall in no case be less than 50 per centum or more than 83 per centum.

Section 1905(b) further specifies that the FMAP for Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa shall be 55 percent. Section 4725(b) of the Balanced Budget Act of 1997 amended section 1905(b) to provide that the FMAP for the District of Columbia, for purposes of titles XIX and XXI, shall be 70 percent. For the District of Columbia, we note under Table 1 that other rates may apply in certain other programs. In addition, we note the rate that applies for Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands in certain other programs pursuant to section 1118 of the Act. Section 202(c) of the Further Consolidated Appropriations Act, 2020 (Pub. L. 116–94) amends section 1905(b) to increase the FMAP to 76 percent for Puerto Rico and increase the FMAP to 83 percent for the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa to 83 percent, for the period beginning December 21, 2020, and ending September 30, 2021. The rates for the States, District of Columbia and the territories are displayed in Table 1, Column 1.

Section 1905(y) of the Act, as added by section 2001 of the Patient Protection and Affordable Care Act of 2010 (''Affordable Care Act'') (Pub. L. 111–148), provides for a significant increase in the FMAP for medical assistance expenditures for newly eligible individuals described in section 1902(a)(10)(A)(i)(VIII) of the Act, as added by the Affordable Care Act (the new adult group); ''newly eligible'' is defined in section 1905(y)(2)(A) of the Act. The FMAP for the new adult group is 100 percent for Calendar Years 2014, 2015, and 2016, gradually declining to 90 percent in 2020, where it remains indefinitely. In addition, section 1905(z) of the Act, as added by section 10201 of the Affordable Care Act, provides that states that offered substantial health coverage to certain low-income parents and nonpregnant, childless adults on the date of enactment of the Affordable Care Act, referred to as ''expansion states,'' shall receive an enhanced FMAP beginning in 2014 for medical assistance expenditures for nonpregnant childless adults who may be required to enroll in benchmark coverage under section 1937 of the Act. These provisions are discussed in more detail in the Medicaid Program: Eligibility Changes Under the Affordable Care Act of 2010 proposed rule published on August 17, 2011 (76 FR 51148, 51172) and the final rule published on March 23, 2012 (77 FR 17144, 17194). This notice is not intended to set forth the matching rates for the new adult group as specified in section 1905(y) of the Act or the matching rates for nonpregnant, childless adults in expansion states as specified in section 1905(z) of the Act.

Other Adjustments to the FMAP

For purposes of Title XIX (Medicaid) of the Social Security Act, the Federal Medical Assistance Percentage (FMAP), defined in section 1905(b) of the Social Security Act, for each state beginning with fiscal year 2006, can be subject to an adjustment pursuant to section 614 of the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA), Public Law 111–3. Section 614 of CHIPRA stipulates that a state's FMAP under Title XIX (Medicaid) must be adjusted in two situations.

In the first situation, if a state experiences no growth or positive growth in total personal income and an employer in that state has made a significantly disproportionate contribution to an employer pension or insurance fund, the state's FMAP must be adjusted. The adjustment involves disregarding the significantly disproportionate employer pension or insurance fund contribution in computing the per capita income for the state (but not in computing the per capita income for the United States). Employer pension and insurance fund contributions are significantly disproportionate if the increase in contributions exceeds 25 percent of the total increase in personal income in that state. A **Federal Register** Notice with comment period was published on June 7, 2010 (75 FR 32182) announcing the methodology for calculating this adjustment; a final notice was published on October 15, 2010 (75 FR 63480).

The second situation arises if a state experiences negative growth in total personal income. Beginning with Fiscal Year 2006, section 614(b)(3) of CHIPRA specifies that, for the purposes of calculating the FMAP for a calendar year in which a state's total personal income has declined, the portion of an employer pension or insurance fund contribution that exceeds 125 percent of the amount of such contribution in the previous calendar year shall be disregarded in computing the per capita income for the state (but not in computing the per capita income for the United States).

No Federal source of reliable and timely data on pension and insurance contributions by individual employers and states is currently available. We request that states report employer pension or insurance fund contributions to help determine potential FMAP adjustments for states experiencing significantly disproportionate pension or insurance contributions and states experiencing a negative growth in total personal income. See also the information described in the January 21, 2014 **Federal Register** notice (79 FR 3385).

Section 2006 of the Affordable Care Act provides a special adjustment to the FMAP for certain states recovering from a major disaster. This notice does not contain an FY 2022 adjustment for a major statewide disaster for any state (territories are not eligible for FMAP adjustments) because no state had a recent major statewide disaster and had

its FMAP decreased by at least three percentage points from FY 2020 to FY 2021. See information described in the December 22, 2010 **Federal Register** notice (75 FR 80501).

Enhanced Federal Medical Assistance Percentage (eFMAP) for CHIP

Section 2105(b) of the Act specifies the formula for calculating the eFMAP rates as the ''enhanced FMAP'', for a state for a fiscal year, is equal to the Federal medical assistance percentage (as defined in the first sentence of section 1905(b)) for the state increased by a number of percentage points equal to 30 percent of the number of percentage points by which (1) such Federal medical assistance percentage for the state, is less than (2) 100 percent; but in no case shall the enhanced FMAP for a state exceed 85 percent.

The eFMAP rates are used in the Children's Health Insurance Program under Title XXI, and in the Medicaid program for expenditures for medical assistance provided to certain children as described in sections 1905(u)(2) and 1905(u)(3) of the Act. There is no specific requirement to publish the eFMAP rates. We include them in this notice for the convenience of the states (Table 1, Column 2).

Section 2705(b) of the Act, as amended by the HEALTHY KIDS Act of 2017, increased the eFMAP by 11.5 percentage points for FY 2021 and is no longer applicable.

(Catalog of Federal Domestic Assistance Program Nos. 93.558: TANF Contingency Funds; 93.563: Child Support Enforcement; 93.596: Child Care Mandatory and Matching Funds of the Child Care and Development Fund; 93.658: Foster Care Title IV–E; 93.659: Adoption Assistance; 93.769: Ticket-to-Work and Work Incentives Improvement Act (TWWIIA) Demonstrations to Maintain Independence and Employment; 93.778: Medical Assistance Program; 93.767: Children's Health Insurance Program)

Dated: November 24, 2020.

Alex M. Azar II,

Secretary.

TABLE 1—FEDERAL MEDICAL ASSISTANCE PERCENTAGES AND ENHANCED FEDERAL MEDICAL ASSISTANCE PERCENTAGES, EFFECTIVE OCTOBER 1, 2021–SEPTEMBER 30, 2022

[Fiscal year 2022]

State	Federal Medical Assistance Percentages	Enhanced Federal Medical Assistance Percentages
Alabama	72.37	80.66
Alaska	50.00	65.00
American Samoa *	55.00	68.50
Arizona	70.01	79.01
Arkansas	71.62	80.13
California	50.00	65.00
Colorado	50.00	65.00
Connecticut	50.00	65.00
Delaware	57.72	70.40
District of Columbia **	70.00	79.00
Florida	61.03	72.72
Georgia	66.85	76.80
Guam *	55.00	68.50
Hawaii	53.64	67.55
Idaho	70.21	79.15
Illinois	51.09	65.76
Indiana	66.30	76.41
Iowa	62.14	73.50
Kansas	60.16	72.11
Kentucky	72.75	80.93
Louisiana	68.02	77.61
Maine	64.00	74.80
Maryland	50.00	65.00
Massachusetts	50.00	65.00
Michigan	65.48	75.84
Minnesota	50.51	65.36
Mississippi	78.31	84.82
Missouri	66.36	76.45
Montana	64.90	75.43
Nebraska	57.80	70.46
Nevada	62.59	73.81
New Hampshire	50.00	65.00
New Jersey	50.00	65.00
New Mexico	73.71	81.60
New York	50.00	65.00
North Carolina	67.65	77.36
North Dakota	53.59	67.51
Northern Mariana Islands *	55.00	68.50
Ohio	64.10	74.87
Oklahoma	68.31	77.82
Oregon	60.22	72.15
Pennsylvania	52.68	66.88
Puerto Rico*	55.00	68.50
Rhode Island	54.88	68.42
South Carolina	70.75	79.53
South Dakota	58.69	71.08
Tennessee	66.36	76.45

TABLE 1—FEDERAL MEDICAL ASSISTANCE PERCENTAGES AND ENHANCED FEDERAL MEDICAL ASSISTANCE PERCENTAGES, EFFECTIVE OCTOBER 1, 2021–SEPTEMBER 30, 2022—Continued

[Fiscal year 2022]

State	Federal Medical Assistance Percentages	Enhanced Federal Medical Assistance Percentages
Texas	60.80	72.56
Utah	66.83	76.78
Vermont	56.47	69.53
Virgin Islands *	55.00	68.50
Virginia	50.00	65.00
Washington	50.00	65.00
West Virginia	74.68	82.28
Wisconsin	59.88	71.92
Wyoming	50.00	65.00

* For purposes of section 1118 of the Social Security Act, the percentage used under titles I, X, XIV, and XVI will be 75 per centum for the territories.

** For purposes of section 1905(b) of the Social Security Act, the FMAP for the District of Columbia, for purposes of titles XIX and XXI, shall be 70 percent. The values for the District of Columbia in the table were set for the state plan under titles XIX and XXI and for capitation payments and disproportionate share hospital (DSH) allotments under those titles. For other purposes, the percentage for DC is 50.00, unless otherwise specified by law.

[FR Doc. 2020–26387 Filed 11–27–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Center for Scientific Review Special Emphasis Panel, December 10, 2020, 09:30 a.m. to December 10, 2020, 05:00 p.m., National Institutes of Health, Eunice Kennedy Shriver National Institute of, 6701B Rockledge Drive, Bethesda, MD 20892, which was published in the **Federal Register** on November 16, 2020, 85 FR 73063.

This notice is being amended to change the meeting start time from 10:00 a.m. to 9:30 a.m. The meeting is closed to the public.

Dated: November 24, 2020.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–26370 Filed 11–27–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; 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 Drug Abuse Special Emphasis Panel; Mechanism for Time-Sensitive Drug Abuse Research (R21 Clinical Trial Optional).

Date: December 9, 2020.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Sheila Pirooznia, Ph.D., Scientific Review Officer, Division of Extramural Review, Scientific Review Branch, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20892, (301) 496–9350, *sheila.pirooznia@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. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: November 24, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–26367 Filed 11–27–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; 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: Center for Scientific Review Special Emphasis Panel; Small Business: Spine and Vertebral Disc.

Date: December 17, 2020.

Time: 11:00 a.m. to 12:00 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: Aftab A. Ansari, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of

Health, 6701 Rockledge Drive, Room 4108, MSC 7814, Bethesda, MD 20892, 301–237–9931, *ansaria@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 24, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–26368 Filed 11–27–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; Neurological Sciences and Disorders (NSD)—B, Member Conflict.

Date: November 30, 2020.

Time: 9:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Mirela Milescu, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH, NSC, 6001 Executive Blvd., Suite 3208, MSC 9529, Rockville, MD 20852, *mirela.milescu@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: November 24, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–26366 Filed 11–27–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director, National Institutes of Health; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Advisory Committee to the Director, National Institutes of Health.

These meetings will be held as virtual meetings and are open to the public. Individuals who plan to view the virtual meeting and need special assistance or other reasonable accommodations to view the meeting, should notify the Contact Person listed below in advance of the meeting. The meetings will be videocast and can be accessed from the NIH Videocasting and Podcasting website (*http://videocast.nih.gov/*).

Name of Committee: Advisory Committee to the Director, National Institutes of Health.

Date: December 10, 2020.

Time: 12:00 p.m. to 6:00 p.m.

Agenda: NIH Director's Report, COVID–19 Science, Other Business of the Committee.

Place: National Institutes of Health, Building 1, One Center Drive, Bethesda, MD 20892 (Virtual Meeting).

Name of Committee: Advisory Committee to the Director, National Institutes of Health.

Date: December 11, 2020.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: COVID–19 Science, ACD Working Group Updates, NIH Strategic Plan, Other Business of the Committee.

Place: National Institutes of Health, Building 1, One Center Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Gretchen Wood, Staff Assistant, National Institutes of Health, Office of the Director, One Center Drive, Building 1, Room 126, Bethesda, MD 20892, 301–496–4272, *Woodgs@od.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.

Information is also available on the Institute's/Center's home page: *http://acd.od.nih.gov,* where an agenda and any additional information for the meeting will be posted when available.

This notice is being published less than 15 days prior to the meeting due to scheduling difficulties.

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS)

Dated: November 23, 2020.

Natasha M. Copeland,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–26276 Filed 11–27–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2020–0528]

Certificates of Alternative Compliance for the Eighth Coast Guard District

AGENCY: Coast Guard, DHS.

ACTION: Notification of issuance of certificates of alternative compliance.

SUMMARY: The Coast Guard announces that the Eighth Coast Guard District's Prevention Division has issued certificates of alternative compliance from the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), to vessels of special construction or purpose that cannot fully comply with the light, shape, and sound signal provisions of 72 COLREGS without interfering with the vessel's design and construction. We are issuing this notice because its publication is required by statute. This notification of issuance of certificates of alternative compliance promotes the Coast Guard's marine safety mission.

DATES: These Certificates of Alternative Compliance were issued between January 2015 and May 2020.

FOR FURTHER INFORMATION CONTACT: For information or questions about this notice call or email LTJG Elliot VanDeren, District Eight, Prevention Division, U.S. Coast Guard, telephone 504–671–2126, email *Elliot.D.VanDeren@uscg.mil.*

SUPPLEMENTARY INFORMATION: The United States is signatory to the International Maritime Organization's International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), as amended. The special construction or purpose of some vessels makes them unable to comply with the light, shape,

or sound signal provisions of the 72 COLREGS. Under statutory law, however, specified 72 COLREGS provisions are not applicable to a vessel of special construction or purpose if the Coast Guard determines that the vessel cannot comply fully with those requirements without interfering with the special function of the vessel.[1]

The owner, builder, operator, or agent of a special construction or purpose vessel may apply to the Coast Guard District Office in which the vessel is being built or operated for a determination that compliance with alternative requirements is justified,[2] and the Chief of the Prevention Division then issues the applicant a certificate of alternative compliance (COAC) if he or she determines that the vessel cannot comply fully with 72 COLREGS light, shape, and sound signal provisions without interference with the vessel's special function.[3] If the Coast Guard issues a COAC, it must publish notice of this action in the **Federal Register**.[4]

The Eighth Coast Guard District has issued COACs to the following vessels from January 2015 to May 2020:

Year	Vessel name	Details
2015	CAROLINE F MCCALL	This certificate authorized the placement of the vessel's forward masthead light on the top of the pilothouse, 15′ 11–5/8″ above the hull, and its aft masthead light on the main mast above the pilot house, 9′ 9″ aft of the forward masthead light.
2015	ALYA MCCALL	This certificate authorized the placement of the vessel's forward masthead light on the top of the purposed hand rail, 18′ 8–13/16″ above the hull, and its aft masthead light on the main mast above the pilot house, 9′ 9″ aft of the forward masthead light.
2015	ADRIATIC	This certificate authorized the placement of the vessel's aft masthead light on the pilothouse, 30′ aft of the forward masthead light.
2015	MARIYA MORAN	This certificate authorized the placement of the vessel's sidelights 6′ 3″ from the sides of the vessel.
2015	SHELIA BORDELON	This certificate authorized the placement of the vessel's aft masthead light on the main mast above the pilothouse, 17′ 6–1/8″ aft of the forward masthead light.
2015	LENNY J	This certificate authorized the placement of the vessel's side lights 36″ below the forward masthead light and placement of its masthead lights in a vertical line, 36″ apart from each other.
2015	GEMI	This certificate authorized the placement of the vessel's masthead light on the pilothouse, 19′ 6–3/4″ aft of the forward masthead light.
2016	NAJLA MCCALL	This certificate authorized the placement of the vessel's forward masthead light on the top of the purposed hand rail, 18′ 8–13/16″ above the hull, and its aft masthead light on the main mast above the pilot house, 9′ 9″ aft of the forward masthead light.
2016	HERMES	This certificate authorized the placement of the vessel's aft masthead light on the pilothouse, 23′ 11–1/2″ aft of the forward masthead light.
2016	PAUL CANDIES	This certificate authorized the placement of the vessel's forward masthead light on the flight deck, 11′ 3–3/16″ forward of the aft masthead light.
2016	DEFENDER	This certificate authorized the placement of the vessel's forward masthead light 29′ 3″ above the hull.
2017	FANTASY ISLAND	This certificate authorized the placement of the vessel's after masthead light on the main mast above the pilot house, 25′ 11–7/16″ aft of the forward masthead light.
2017	ELLIS ISLAND	This certificate authorized the placement of the vessel's sidelights atop the pilot house, 15′ 11–3/4″ inboard from the side shell.
2017	Conrad hull C1151	This certificate authorized the placement of the vessel's forward anchor light 5′ 1–3/8″ above its aft anchor light.
2017	Conrad hull C1152	This certificate authorized the placement of the vessel's forward anchor light 5′ 1–3/8″ above its aft anchor light.
2017	CAROLYN CHOUEST	This certificate authorized the placement of the vessel's aft masthead light on the main mast atop the pilot house, 25′ 4–11/16″ aft of the forward masthead light.
2017	JUDITH ANN	This certificate authorized the placement of the vessel's after masthead light on the main mast atop the pilot house, 16′ 10–15/16″ aft of the forward masthead light.
2017	GARY CHOUEST	This certificate authorized the placement of the vessel's aft masthead light on the main mast atop the pilot house, 28′–11/16″ aft of the forward masthead light.
2017	COMMANDER	This certificate authorized the placement of the vessel's masthead light on the main mast atop the pilot house, 60′ 11–1/8″ aft of the stem. Additionally this certificate authorized the placement of the vessel's sidelights 8′ inboard from the side shell and placement of the RAM/NUC lights 3′ 3–13/16″ off centerline.
2017	MARGARET ANN	This certificate authorized the placement of the vessel's sidelights forward of the forward masthead light, 15′ 10–11/16″ aft of the stem.
2017	OSRB 4	This certificate authorized the placement of the vessel's sidelights 8′ 8″ inboard of the side shell.
2018	COURAGEOUS	This certificate authorized the placement of the vessel's masthead light on the main mast atop the pilot house, 60′ 11–1/8″ aft of the stem. Additionally this certificate authorized the placement of the vessel's sidelights 8′ inboard from the side shell and placement of the RAM/NUC lights 3′ 3–13/16″ off centerline.

[1] 33 U.S.C. 1605.

[2] 33 CFR 81.5.

[3] 33 CFR 81.9.

[4] 33 U.S.C. 1605(c) and 33 CFR 81.18.

Year	Vessel name	Details
2018	CONTENDER	This certificate authorized the placement of the vessel's masthead light on the main mast atop the pilot house, 60′ 11–1/8″ aft of the stem. Additionally this certificate authorized the placement of the vessel's sidelights 8′ inboard from the side shell and placement of the RAM/NUC lights 3′ 3–13/16″ off centerline.
2018	CHAMPION	This certificate authorized the placement of the vessel's masthead light on the main mast atop the pilot house, 60′ 11–1/8″ aft of the stem. Additionally this certificate authorized the placement of the vessel's sidelights 8′ inboard from the side shell and placement of the RAM/NUC lights 3′ 3–13/16″ off centerline.
2018	CHALLENGER	This certificate authorized the placement of the vessel's masthead light on the main mast atop the pilot house, 60′ 11–1/8″ aft of the stem. Additionally this certificate authorized the placement of the vessel's sidelights 8′ inboard from the side shell and placement of the RAM/NUC lights 3′ 3–13/16″ off centerline.
2018	HOS WARHORSE	This certificate authorized the placement of the vessel's aft masthead light on the main mast atop the pilot house, 111′ aft of the forward masthead light. Additionally, this certificate authorized the placement of the vessel's sidelights on the bridge wings. This certificate also allowed two sets of RAM/NUC lights on the starboard side of the mast, screened in such a way as to allow an unbroken 360 degree arc of visibility.
2018	HOS WILD HORSE	This certificate authorized the placement of the vessel's aft masthead light on the main mast atop the pilot house, 111′ aft of the forward masthead light. Additionally, this certificate authorized the placement of the vessel's sidelights on the bridge wings. This certificate also allowed two sets of RAM/NUC lights on the starboard side of the mast, screened in such a way as to allow an unbroken 360 degree arc of visibility.
2018	ELRINGTON	This certificate authorized the placement of the vessel's sidelights 4′ 3″ forward of the masthead light and 16′ 3″ inboard of the side shell.
2018	LATOUCHE	This certificate authorized the placement of the vessel's sidelights 4′ 3″ forward of the masthead light and 16′ 3″ inboard of the side shell.
2018	BAINBRIDGE	This certificate authorized the placement of the vessel's sidelights 4′ 3″ forward of the masthead light and 16′ 3″ inboard of the side shell.
2018	INGOT	This certificate authorized the placement of the vessel's sidelights 4′ 3″ forward of the masthead light and 16′ 3″ inboard of the side shell.
2018	CAPE ANN	This certificate authorized the placement of the vessel's sidelights on the elevated pilothouse, 6′ 7″ inboard of the sides of the vessel.
2018	YOUNGS TIDE	This certificate authorized the placement of the vessel's aft masthead light on the main mast atop the pilot house, 20′ 10″ aft of the forward masthead light
2018	SEACOR TOTONACA	This certificate authorized the placement of the vessel's aft masthead light on the main mast atop the pilot house, 24′ 4″ aft of the forward masthead light
2018	CC PORTLAND	This certificate authorized the placement of the vessel's sidelights 4′ 3″ forward of the masthead light and 16′ 3″ inboard of the side shell.
2018	CC ARANSAS	This certificate authorized the placement of the vessel's sidelights 4′ 3″ forward of the masthead light and 16′ 3″ inboard of the side shell.
2018	CC LA QUINTA	This certificate authorized the placement of the vessel's sidelights 4′ 3″ forward of the masthead light and 16′ 3″ inboard of the side shell.
2018	CC GREGORY	This certificate authorized the placement of the vessel's sidelights 4′ 3″ forward of the masthead light and 16′ 3″ inboard of the side shell.
2018	WACHAPREAGUE	This certificate authorized the placement of the vessel's sidelights 8′ 1″ off the centerline.
2018	CHINCOTEAGUE	This certificate authorized the placement of the vessel's sidelights 8′ 1″ off the centerline.
2018	CAPE LOOKOUT	This certificate authorized the placement of the vessel's sidelights 6′ 7″ inboard from the sides of the vessel.
2018	CAPE HENRY	This certificate authorized the placement of the vessel's sidelights 6′ 7″ inboard from the sides of the vessel.
2018	EVENING BREEZE	This certificate authorized the placement of a set of RAM/NUC lights 3′ 6″ off centerline of the mast, screened in such a way as to allow an unbroken 360 degree arc of visibility. Additionally, this certificate authorized the placement of one set of sidelights on the upper pilot house, 12′ 11″ inboard from the sides of the vessel, and the other set on the lower pilot house, 9′ 3″ inboard from the sides of the vessel.
2018	DEER ISLAND	This certificate authorized the placement of the vessel's aft masthead light on the main mast atop the pilot house, 26′ 9–7/8″ aft of the forward masthead light.
2018	MARK E. KUEBLER	This certificate authorized the placement of the vessel's sidelights 10′ 10–3/4″ inboard from the sides of the vessel and authorized the lights on its mast, carried in a vertical line, to be spaced less than two meters apart. Additionally, this certificate authorized the vessel's lights on its mast to be spaced less than two meters apart from the fore and aft centerline of the vessel in the athwartship direction. This certificate also authorized the placement of the vessel's masthead light 39′ 4–5/8″ above the hull.
2018	POWHATAN	This certificate authorized the placement of the vessel's sidelights 21′ 10–1/2″ inboard from the side of the vessel.

Year	Vessel name	Details
2018	FUGRO ENTERPRISE	This certificate authorized the placement of the vessel's after masthead light on the main mast atop the pilot house, 42′ 6–1/2″ aft of the forward masthead light, sidelights on the bridge wings, 10′ 6″ off the centerline of the vessel, and two sets of RAM/NUC lights 3′ 8″ off the centerline of the mast, screened in such a way as to allow an unbroken 360 degree arc of visibility.
2018	MICHAEL CROMBIE MCCALL	This certificate authorized the placement of the vessel's forward masthead light on the top of the pilothouse, 26′ 3–10/16″ above the hull, and its aft masthead light on the main mast above the pilothouse, 11′ 1–3/16″ aft and 14′ 3–5/8″ above the forward masthead light.
2019	BAILEY	This certificate authorized the placement of the vessel's side lights 7′ 9″ inboard from the sides of the vessel.
2019	TED C. LITTON	This certificate authorized the placement of the vessel's sidelights 10′ 10–3/4″ inboard from the sides of the vessel, and authorized the lights on its mast carried in a vertical line to be spaced less than two meters apart. Additionally, this certificate authorized the lights on its mast to be spaced less than two meters apart from the fore and aft centerline of the vessel in the athwartship direction. This certificate also authorized the placement of the vessel's masthead light 39′ 4–5/8″ above the hull.
2019	CHRISTIAN CHOUEST	This certificate authorized the placement of the vessel's after masthead light on the main mast atop the pilothouse, 21′ 9–11/16″ aft of the forward masthead light.
2019	ALLIE CHOUEST	This certificate authorized the placement of the vessel's after masthead light on the main mast atop the pilothouse, 21′ 9–11/16″ aft of the forward masthead light.
2019	GAVEA	This certificate authorized the placement of the vessel's aft masthead light on the main mast atop the pilothouse, 21′ 9–11/16″ aft of the forward masthead light.
2019	CONNOLLY M	This certificate authorized the placement of the vessel's sidelights 10′ 10–3/4″ inboard from the sides of the vessel, and authorized the lights on its mast carried in a vertical line to be spaced less than two meters apart. Additionally, this certificate authorized the lights on its mast to be spaced less than two meters apart from the fore and aft centerline of the vessel in the athwartship direction. This certificate also authorized the placement of the vessel's masthead light 39′ 4–5/8″ above the hull.
2019	ANDREW S.	This certificate authorized the placement of the vessel's sidelights on the elevated pilothouse, 13′ inboard of the sides of the vessel, the placement of the masthead light 42′ 4″ above the hull, and the placement of the stern light on the aft most mast on the elevated pilothouse.
2019	ALYSSA CHOUEST	This certificate authorized the placement of the vessel's stern light 188′ 6″ aft of the forward perpendicular, on the centerline, and 37′ 7″ above the main deck on the winch platform.
2019	COOPER K.	This certificate authorized the placement of the vessel's sidelights on the elevated pilothouse, 10′ 10–3/4″ inboard from the sides of the vessel, and the masthead light 22′ 7–1/8″ above the hull when the mast is in the lowered position.
2019	GUYANA HERO	This certificate authorized the placement of the vessel's stern light 49′ 2″ above the main deck, on the centerline, at frame 33 of the elevated pilothouse.
2019	MAZU	This certificate authorized the placement of the vessel's sidelights on the elevated pilot house, 10′ 1″ outboard from the centerline of the vessel, the placement of the masthead light on the mast, 22′ 7–1/8″ above the hull when the mast is in the lowered position, and the placement of the RAM/NUC lights 1′ 6″ off centerline, starting 25′ 5–1/8″ above the hull and vertically spaced 6′ 7″.
2019	GENERAL MACARTHUR	This certificate authorized the placement of the vessel's stern light on the dredge ladder end, 25′ off centerline, the placement of the forward anchor light on the pilot house at a height of 62′ atop the pilot house mast, only 6′ above the aft anchor light, and the placement of the aft anchor light on the dredge ladder A-frame, 3′ 4″ off centerline and at a height of 56′ above the baseline, with a 19 degree obstruction from the dredge boom crane.
2019	C. D. WHITE	This certificate authorized the placement of the vessel's sidelights on the elevated pilot house, 6′ outboard from the centerline of the vessel, and the placement of the RAM/NUC lights 1′ 8″ off centerline, starting 25′ 8–1/16″ above the hull and vertically spaced 6′ 7″.
2020	CECIL M	This certificate authorized the placement of the vessel's sidelights on the elevated pilot house, 10′ 1″ outboard from the centerline of the vessel, the placement of the masthead light on the mast, 22′ 7–1/8″ above the hull when the mast is in the lowered position, and the placement of the RAM/NUC lights 1′ 6″ off centerline, starting 25′ 5–1/8″ above the hull and vertically spaced 6′ 7″.
2020	SEACOR MIXTECA	This certificate authorized the placement of the vessel's aft masthead light on the main mast, 24′ 4″ aft of the forward masthead light, and the placement of the stern light on the centerline, 38′ 5–1/2″ above the main deck on the aft end of the pilothouse.
2020	SEACOR TARAHUMARA	This certificate authorized the placement of the vessel's aft masthead light on the main mast, 24′ 4″ aft of the forward masthead light, and the placement of the stern light on the centerline, 38′ 5–1/2″ above the main deck on the aft end of the pilothouse.

Year	Vessel name	Details
2020	KING	This certificate authorized the placement of the vessel's sidelights on the pilot house, 6′ 1–1/2″ outboard from the centerline of the vessel.
2020	GEMINI	This certificate authorized the placement of the vessel's sidelights on the elevated pilot house, 10′ 1″ outboard from the centerline of the vessel, the placement of the masthead light on the mast, 22′ 7–1/8″ above the hull when the mast is in the lowered position, and the placement of the RAM/NUC lights 1′ 6″ off centerline, starting 25′ 5–1/8″ above the hull and vertically spaced 6′ 7″.

The Eighth Coast Guard District's Prevention Division, U.S. Coast Guard, certifies that the vessels listed above are of special construction or purpose and are unable to comply fully with the requirements of the provisions enumerated in the 72 COLREGS, without interfering with the normal operation, construction, or design of the vessels. The Eighth Coast Guard District's Prevention Division, U.S. Coast Guard, further finds and certifies that the listed vessels are in the closet possible compliance with the applicable provisions of the 72 COLREGS.[5]

This notice is issued under authority of 33 U.S.C. 1605(c) and 33 CFR 81.18.

Dated: Nov 17, 2020.

T.O. Phillips,

Captain, U.S. Coast Guard, Chief, Prevention Division, Eighth Coast Guard District.

[FR Doc. 2020–26293 Filed 11–27–20; 8:45 am]

BILLING CODE 9110–04–P

[5] 33 U.S.C. 1605(a); 33 CFR 81.9.

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[1651–0107]

Agency Information Collection Activities: Application for Waiver of Passport and/or Visa (DHS Form I–193)

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day notice and request for comments; Extension of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than January 29, 2021) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0107 in the subject line and the agency name. To avoid duplicate submissions, please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov.*

Due to COVID–19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov.* Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/.*

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Application for Waiver of Passport and/or Visa (DHS Form I–193).

OMB Number: 1651–0107.

Form number: DHS Form I–193.

Current Actions: This submission is being made to extend the expiration date with no change to the burden hours or to the information collected on Form I–193.

Type of Review: Extension (without change).

Affected Public: Individuals.

Abstract: The data collected on DHS Form I–193, Application for Waiver of Passport and/or Visa, allows CBP to determine an applicant's identity, alienage, claim to legal status in the United States, and eligibility to enter the United States under 8 CFR 211.1(b)(3) and 212.1(g). DHS Form I–193 is an application submitted by a nonimmigrant alien seeking admission to the United States requesting a waiver of passport and/or visa requirements due to an unforeseen emergency. It is also an application submitted by an immigration alien returning to an unrelinquished lawful permanent residence in the United States after a temporary absence aboard requesting a waiver of documentary requirements for good cause. The waiver of the documentary requirements and the information collected on DHS Form I–193 is authorized by Sections 212(a)(7), 212(d)(4), and 212(k) of the Immigration and Nationality Act, as amended, and 8 CFR 211.1(b)(3) and 212.1(g). This form is accessible at *https://www.uscis.gov/i-193.*

Estimated Number of Respondents: 25,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 25,000.

Estimated Time per Response: 10 minutes.

Estimated Total Annual Burden Hours: 4,150.

Dated: November 20, 2020.

Seth D. Renkema,

Branch Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection.

[FR Doc. 2020–26315 Filed 11–27–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOMELAND SECURITY

[Docket Number–2020–0048]

Agency Information Collection Activities: Solicitation of Proposal Information for Award of Public Contracts, 700–24, 700–25

AGENCY: Department of Homeland Security (DHS).

ACTION: 60-Day notice and request for comments; extension without change of a currently approved collection, 1600–0005.

SUMMARY: The Department of Homeland Security, will submit the following Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted until January 29, 2021. This process is conducted in accordance with 5 CFR 1320.1

ADDRESSES: You may submit comments, identified by docket number Docket # 2020–0048, at:

○ *Federal rulemaking Portal: http://www.regulations.gov.* Please follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and docket number Docket # 2020–0048. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

SUPPLEMENTARY INFORMATION: The Department of Homeland Security (DHS) collects information, when necessary, when inviting firms to submit bids, proposals, and offers for public contracts for supplies and service. Using solicitation methods such as Requests for Proposals (RFP), Requests for Information (RFI), and Broad Agency Announcements (BAA), the Government requests information from prospective offerors such as pricing information, delivery schedule compliance, and evidence that the offeror has the resources (both human and financial) to accomplish requirements. The information collection is necessary for compliance with the Homeland Security Acquisition Regulation (HSAR), 48 CFR Chapter 30, and the Small Business Innovative Research (SBIR) and Small Business Technology Transfer (STTR) programs, 15 U.S.C 628.

The prior information collection request for OMB No. 1600–0005 was approved through November 30, 2021, and includes the following:

- 3052.209–70 Prohibition on Contracts with Corporate Expatriates *(Required in all solicitations and contracts)* The offeror must disclose whether it is a foreign incorporated entity that should be treated as an inverted domestic corporation.
- 3052.209–71 Reserve Officer Training Corps and Military Recruiting on Campus *(Required in all solicitations and contracts with institutions of higher education)* Requires that the Contractor represent that it does not now have, and agrees that during performance of the contract that it will not adopt, any policy or practice described in paragraph (b) of the clause.
- 3052.209–72 Organizational Conflict of Interest, paragraphs (c), (d) and (e), *(Required in all solicitations and contracts where a potential organizational conflict of interest exists and mitigation may be possible)* The offeror must disclose whether it is aware of any facts which create any actual or potential organizational conflicts of interest; and, provide information as required by the Government and a mitigation plan relating to the conflict, if applicable.
- 3052.209–74 Limitations on Contractors Acting as Lead System Integrators *(Required in solicitations for the acquisition of a major system when the acquisition strategy envisions the use of a lead system integrator)* The offeror must disclose whether it proposes to perform this contract as a lead system integrator with system responsibility, and whether it has a direct financial interest in the system that is the subject of the solicitation; and, provide evidence, as needed.
- 3052.209–76 Prohibition on Federal Protective Service (FPS) Guard Services Contracts with Business Concerns Owned, Controlled, or Operated by an Individual Convicted of a *Felony, paragraphs (a) through (g), (Required in in all solicitations and contracts for FPS guard services)* The offeror must disclose whether it is owned, operated or controlled by an individual convicted of any felony. A business concern owned, operated or controlled by an individual convicted of any felony may submit an award request to the Government. The request must include information that is considered personally identifiable information, and any additional information the Government deems necessary.
- 3052.215–70 Key Personnel and Facilities *(Required in solicitations and contracts when the selection for award is substantially based on the offeror's possession of special capabilities regarding personnel or facilities)* Before removing or replacing any of the specified individuals or facilities, the offeror must notify the Government, in writing, before the change becomes effective.
- 3052.219–72 Evaluation of Prime Contractor Participation in the DHS Mentor-Protégé Program *(Required in all solicitations containing (HSAR) 48 CFR 3052.219–71, DHS Mentor-Protégé Program and (FAR) 48 CFR 52.219–9 Small Business Subcontracting Plan)* The offeror must provide a signed letter of mentor-protégé agreement, if it wishes to receive credit under the source selection factor.
- 3052.247–70 F.o.b. Origin Information *(Required in solicitations as appropriate)* The offeror must provide information related to the offeror's shipping point.

The DHS Science and Technology (S&T) Directorate issues BAAs soliciting when white papers and proposals from the public. DHS S&T evaluates white papers and proposals received in response to a DHS S&T BAA using the evaluation criteria specified in the BAA through a peer or scientific review process in accordance with FAR 35.016(d). Unclassified white papers and proposals are typically collected via the DHS S&T BAA secure website, while classified white papers and proposals must be submitted via proper classified courier or proper classified mailing procedures as described in the National Industrial Security Program Operating Manual (NSPOM).

Federal agencies with an annual extramural research and development (R&D) budget exceeding $100 million are required to participate in the SBIR Program. Similarly, Federal agencies with an extramural R&D budget exceeding $1 billion are required to participate in the STTR Program. Federal agencies who participate in the

SBIR and STTR programs must collect information from the public to meet:

(1) Applicable reporting requirements under 15 U.S.C. 638 (b)(7), (g)(8), (i), (j)(1)(E), (j)(3)(C), (l), (o)(10), and (v);

(2) The requirement to maintain both a publicly accessible database of SBIR/STTR award information and a government database of SBIR/STTR award information for SBIR and STTR program evaluation under 15 U.S.C. 638 g(10, (k), (o)(9), and (o)(15); and

(3) Requirements for public outreach under 15 U.S.C. 638 (j)(2)(F), (o)(14), and (s).

DHS is seeking to renew this collection, and revise it to add, for purposes of entering into other transaction agreements pursuant to 6 U.S.C. 391, 6 U.S.C. 596(1), and 49 U.S.C. 106(l)(6), Form 700–24, Other Transaction Agreement Solicitation, and Form 700–25, Other Transaction Agreement Solicitation Amendment. On the forms, respondents submit an Employer Identification Number, as well as the business' name, address and title. Respondents must also identify the authorized business representative's personal name, and must include a signature.

The information being collected is used by the Government's contracting officers and other acquisition personnel, including technical and legal staff to determine the adequacy of technical and management approach, experience, responsibility, responsiveness, and expertise of the firms submitting offers; the identification of members of the public (*i.e.,* small businesses) who qualify for and are interested in participating in the DHS SBIR Program; and, provide the DHS SBIR Program Office necessary and sufficient information to determine whether proposals submitted by the public to the DHS SBIR Program meet the criteria for consideration under the program.

Failure to collect this information would adversely affect the quality of products and services DHS receives from contractors. Potentially, contracts would be awarded to firms without sufficient experience and expertise, thereby placing the Department's operations in jeopardy. Defective and inadequate contractor deliverables would adversely affect DHS's fulfillment of the mission requirements in all areas. Additionally, the Department would be unsuccessful in identifying small businesses with research and development (R&D) capabilities, which would adversely affect the mission requirements in this area.

Many sources of the requested information use automated word processing systems, databases, and web portals to facilitate preparation of material to be submitted and to post and collect information. It is common place within many of DHS's Components for submissions to be electronic as a result of implementation of e-Government initiatives.

Information technology (*i.e.,* electronic web portal) is used in the collection of information to reduce the data gathering and records management burden. DHS uses a secure website the public can use to propose SBIR research topics and submit proposals in response to SBIR solicitations. In addition, DHS uses a web portal to review RFIs and register to submit a white paper or proposal in response to a specific BAA. The data collection forms standardize the collection of information that is necessary and sufficient for the DHS SBIR Program Office to meet its requirements under 15 U.S.C. 638.

This information collection required by the HSAR and the SBIR and STTR programs may or may not involve small business contractors, depending on the particular transaction. The burden applied to small businesses has been reduced to the least burdensome commensurate with the DHS need for the information. In certain cases, information collection is done via a secure website which is intended to minimize burden for businesses (including small businesses) and other for-profit entities, and not-for-profit institutions. Small businesses and other small entities will be able to enter identifying information and subsequently update rather than resubmit the information via the internet.

Less frequent incidence of collecting such information as offerors' technical approach, management approach, experience statements, and resumes indicating level of expertise would negatively affect the quality of products and services DHS received from contractors. Potentially, contracts would be awarded to firms without sufficient experience and expertise, thereby placing the Department's operations in jeopardy.

Additionally, DHS collects information that is both necessary and sufficient to comply with 15 U.S.C. 638 and receive white papers and proposals from the public in response to BAAs. Failure to allow the public to submit information would diminish the ability of the DHS SBIR Program Office to meet its obligation for outreach as required by 15 U.S.C. 638, evaluate white papers and proposals in accordance with the criteria in the BAA and provide the respondents with the results of the evaluation. DHS/ALL/PIA–006 General Contact Lists dated June15, 2007 covers the basic contact information that must be collected for DHS. Other information collected will typically pertain to the contract itself, and not individuals. All information for this information collection is submitted voluntarily. However, sensitive information (*e.g.,* felony conviction information) may also be collected through this information collection. Due to this sensitivity, and the sensitivities regarding the procurement process as a whole, a new PIA is required to document and identify any potential risks associated with collecting this information.

There is no assurance of confidentiality provided to the respondents.

The burden estimates are based upon definitive proposals reported by DHS and its Components to the Federal Procurement Data System (FPDS) for FY 2019, and, for the forms, data reported by contracting activities related to single source DHS other transaction awards and modifications issued in FY 2019. No program changes occurred and there have been no changes to the information being collected. However, the burden was adjusted to reflect an agency adjustment increase of 13,206 in the number of respondents within DHS for FY 2019, to include the number of respondents added as a result of the new forms, as well as an increase in the average hourly wage rate.

The Office of Management and Budget is particularly interested in comments which:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

Analysis

Agency: Department of Homeland Security (DHS).

Title: Solicitation of Proposal Information for Award of Public Contracts.
OMB Number: 1600–0005.
Frequency: On occasion.
Affected Public: Private Sector.
Number of Respondents: 130,418.
Estimated Time per Respondent: 1.8.
Total Burden Hours: 1,358,512.

Robert Dorr,

Acting Executive Director, Business Management Directorate.

[FR Doc. 2020–26284 Filed 11–27–20; 8:45 am]

BILLING CODE 9112–FL–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[212.LLHQ220000.L10200000.PK0000; OMB Control Number 1004–0041]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Authorizing Grazing Use

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the Bureau of Land Management (BLM) are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before December 30, 2020.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Please provide a copy of your comments to the U.S. Department of the Interior, Bureau of Land Management, 1849 C Street NW, Room 5647, Attn. Chandra Little, Washington, DC 20240; or by email to *cclittle@blm.gov.* Please reference OMB Control Number 1004–0041 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Brian Thrift by email at *bthrift@blm.gov,* or by telephone at 208–373–3869. Individuals who are hearing or speech impaired may call the Federal Relay Service at 1–800–877–8339 for TTY assistance. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.* You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995 (PRA, 44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide 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 17, 2020 (85 FR 50045). The comment period ended on October 16, 2020. The BLM received one comment. The comment was not relevant to this collection of information.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The BLM is required by the Taylor Grazing Act (43 U.S.C. 315–315r) and Subchapter IV of the Federal Land Policy and Management Act (43 U.S.C. 1751–1753) to manage domestic livestock grazing on public lands consistent with land use plans, principles of multiple use and sustained yield, and other relevant factors. Compliance with these statutory provisions necessitates collection of information on matters such as permittee and lessee qualifications for a grazing permit or lease, base property used in conjunction with public lands, and the actual use of public lands for domestic livestock grazing. Most permits and leases are in effect for 10 years and are renewable if the BLM determines that the terms and conditions of the expiring permit or lease are being met.

Title of Collection: Authorizing Grazing Use (43 CFR subparts 4110 and
OMB Control Number: 1004–0041.
Form Number: 4130–1, 4130–1a, 4130–1b, 4130–3a, 4130–4, and 4
Type of Review: Extension of a currently approved collection.
Respondents/Affected Public: Any U.S. citizen or validly licensed business may apply for a BLM grazing permit or lease. The BLM administers nearly 18,000 permits and leases for grazing domestic livestock, at least part of the year on public lands.
Total Estimated Number of Annual Respondents: 18,010.
Total Estimated Number of Annual Responses: 33,810.
Estimated Completion Time per Response: Varies from 10 to 35 minutes, depending on activity.
Total Estimated Number of Annual Burden Hours: 7,811.
Respondent's Obligation: Required to obtain or retain a benefit.
Frequency of Collection: The BLM collects the information on Forms 4130–1, 4130–1a, 4130–1b, and 4130–4 on occasion. The BLM collects the information on Forms 4130–3a and 4130–5 annually.
Total Estimated Annual Nonhour Burden Cost: $30,000.

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,

Regulatory Analyst.

[FR Doc. 2020–26302 Filed 11–27–20; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[20X.LLWY9211000.L54400000.EU0000. LVCLK19K152000; WYW–185641]

Notice of Realty Action: Proposed Big Piney-Marbleton Airport Board, Miley Memorial Field Airport Conveyance

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action.

SUMMARY: The Bureau of Land Management (BLM) has examined certain public lands in Sublette County, Wyoming totaling 7.50 acres, and found them suitable for conveyance to the Big Piney-Marbleton Airport Board (Patentee) under the provisions of Sec. 516 of the Airport and Airway Improvement Act of 1982. The conveyance would support improvements to the Miley Memorial Field Airport near the towns of Big Piney and Marbleton, Wyoming.

DATES: Interested parties may submit written comments regarding this conveyance on or before January 14, 2021.

ADDRESSES: Please send written comment regarding this notice by mail to Keesha Clay, Senior Realty Specialist, BLM Wyoming State Office, 5353 Yellowstone Road, Cheyenne, Wyoming 82009.

FOR FURTHER INFORMATION CONTACT: Keesha Clay, Senior Realty Specialist, at the above address, or by telephone at 307–775–6189. Persons who use a telecommunications device for the deaf may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FRS is available 24 hours a day, seven days a week, to leave a message or question for the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The Federal Aviation Administration (FAA), on behalf of the Patentee, requested the conveyance of 7.50 acres of public lands for improvements to bring the Miley Memorial Field Airport into compliance with FAA safety and design standards. Under Section 516 of the Airport and Airway Improvement Act of 1982 (Pub. L. 97–248; 49 U.S.C. 47125), 43 CFR 2640 and 14 CFR 153, the BLM proposes to convey the following described lands:

Sixth Principal Meridian, Wyoming

T. 30 N., R. 111 W.,
sec. 7, lot 6, SW¼SW¼SE¼NW¼, and SW¼SW¼SW¼SE¼.

The areas described aggregate 7.50 acres.

This notice informs the public that the FAA, on behalf of the Patentee, is requesting the conveyance of public lands for runway and associated improvements to comply with FAA safety and design standards. The Miley Memorial Field Airport currently falls short of some FAA safety and design standards and does not meet all the needs of current and future users. Runway 13/31 does not provide sufficient takeoff distance or strength for current and forecasted users. The conveyance will allow for improvements to support the reconstruction of Runway 13/31, including construction of an associated parallel taxiway and relocation of the airport's perimeter fencing. It will also increase protections for the existing airport's runway object-free area and runway protection zone, which currently include public lands. The FAA recommends that airports control certain lands around them by obtaining ownership in fee or by easement to ensure compatible land uses, thereby enhancing overall safety.

The conveyance is consistent with the Record of Decision and Approved Pinedale Field Office Resource Management Plan, as amended and approved November 26, 2008, which allows public lands to be transferred to other public agencies if the conveyance would achieve an important objective and benefit the public. Conveyance of the proposed lands is also consistent with all other applicable Federal and county land use plans and meets the needs of the community. The lands are not required for any other Federal purpose, and their disposal would not impede access to any other Federal lands in the vicinity or harm any other resources in the area.

This notice segregates the above-described public lands from operation of the public land laws, including the mining laws, except for their conveyance under the Airport and Airway Improvement Act of 1982. The segregative effect will end upon issuance of a conveyance document or one year from the date of this publication, whichever occurs first.

The patent, if issued, will contain the following reservations to the United States:

Excepting and reserving to the United States:

1. A right-of-way thereon for ditches or canals constructed under the authority of the United States, as authorized by the Act of August 30, 1890 (43 U.S.C. 945).

2. All minerals in the lands, together with the right to mine and remove the same under applicable laws and regulations. The Secretary of the Interior reserves the right to determine whether such mining and removal of minerals will interfere with the development, operation, and maintenance of the airport.

By acceptance of this patent, the Patentee agrees for itself, its successors, or its assignees, that the following covenants and conditions shall attach to and run with the land being conveyed:

1. The Patentee will use the conveyed property for airport purposes and will develop that property for airport purposes within five years or as set forth in the conveyance instrument, deed, or quitclaim instrument. Any interim use will be subject to terms and conditions as set by the FAA.

2. The Patentee will operate the airport, together with its appurtenant areas, buildings, and facilities, regardless of whether they are on the land being conveyed, as a public use airport on fair and reasonable terms and without unjust discrimination.

3. The Patentee will not grant or permit any exclusive right in the operation and use of the airport, together with its appurtenant areas, buildings, and facilities, regardless of whether they are on the land being conveyed, as required by Section 303 of the Federal Aviation Act of 1938, as amended, and Section 308(a) of the Federal Aviation Act of 1958, as amended.

4. Any subsequent transfer of the conveyed property interest to another nonfederal public entity will be subject to the terms, conditions, and covenants set forth in the original instrument of conveyance. If the land conveyed is no longer needed for airport purposes, the land may revert to the U.S. Government.

5. In the event of a breach of any term, condition, or covenant contained in the conveyance instrument, the Patentee will, on demand, take such action as required to transfer ownership of the conveyed premises to the U.S. Government.

6. The terms, conditions, covenants, and other federally obligating provisions in the conveyance instrument remain in force and effect as long as the land is held by the Patentee, its successors, or assignees.

Application Comments: The environmental assessment, maps, and terms and conditions are available for review at the **ADDRESSES** listed above. Interested parties may submit comments regarding the specific use proposed in the application or any other factor not directly related to the suitability of the lands for an airport conveyance. The BLM Wyoming State Director will review any adverse comments regarding

the conveyance and may sustain, vacate, or modify this realty action. In the absence of any adverse comments, the decision will become final. The lands will not be offered for conveyance until the BLM has signed a Decision Record for the completed Environmental Assessment.

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 available to the public at any time. While you can ask in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 43 CFR 2640 and FAA 14 CFR part 153.

Kimber Liebhauser,

Wyoming Acting State Director.

[FR Doc. 2020–26324 Filed 11–27–20; 8:45 am]

BILLING CODE 4310–22–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1174]

Certain Toner Cartridges, Components Thereof, and Systems Containing Same Issuance of a General Exclusion Order and Cease and Desist Orders; Termination of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has affirmed a summary determination of violation of section 337 and has determined to issue (1) a general exclusion order (''GEO'') denying entry of certain toner cartridges, components thereof, and systems containing same; and (2) cease and desist orders (''CDOs'') against 20 respondents (listed below). The investigation is terminated.

FOR FURTHER INFORMATION CONTACT: Panyin A. Hughes, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–3179. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal, telephone (202) 205–1810.

SUPPLEMENTARY INFORMATION: On September 23, 2019, the Commission instituted this investigation based on a complaint filed by Brother Industries, Ltd. of Nagoya Japan; Brother International Corp. (U.S.A.) of Bridgewater, New Jersey; and Brother Industries (U.S.A.), Inc. of Bartlett, Tennessee (collectively, ''Brother''). 84 FR 49762–63 (Sept. 23, 2019). The complaint alleged violations of section 337 based on the importation into the United States, the sale for importation, or the sale within the United States after importation of certain toner cartridges, components thereof, and systems containing same by reason of infringement of certain claims of U.S. Patent Nos. 9,568,856 (''the '856 patent''); 9,575,460 (''the '460 patent''); 9,632,456 (''the '456 patent''); 9,785,093 (''the '093 patent''); and 9,846,387 (''the '387 patent'') (collectively, ''the Asserted Patents''). *Id.* The Commission's notice of investigation named the following 32 respondents: AMI Brothers, Inc. of San Bruno, California (''AMI''); An An Beauty Limited of Kowloon, Hong Kong (''An An Beauty''); Aster Graphics, Inc. of Riverside, California (''Aster''); Aztech Enterprises Limited of Kowloon, Hong Kong (''Aztech''); Billiontree Technology USA Inc. of City of Industry, California (''Billiontree''); Carlos Imaging Supplies, Inc. of Hacienda Heights, California (''Carlos''); Cartridge Evolution, Inc. of Brooklyn, New York (''Cartridge Evolution''); Do it Wiser, LLC of Wilmington, Delaware (''Do it Wiser''); Eco Imaging Inc. of Irvine, California (''Eco Imaging''); Ecoolsmart Co. of Rowland Heights, California (''Ecoolsmart''); EPrinter Solution LLC of Pomona, California (''EPS''); E-Z Ink Inc. of Brooklyn, New York (''E-Z Ink''); Globest Trading Inc. of Ontario, California (''Globest''); Greencycle Tech, Inc. of South El Monte, California (''Greencycle''); Hongkong Boze Co., Ltd. of Kowloon, Hong Kong (''Hongkong Boze''); I8 International, Inc. of City of Industry, California (''I8''); IFree E-Commerce Co. of Kowloon, Hong Kong (''IFree''); Ikong E-Commerce of Walnut, California (''Ikong''); Intercon International Corp. of Brea, California (''Intercon''); IPrint Enterprise Limited of Kowloon, Hong Kong (''IPrint''); LD Products, Inc. of Long Beach, California (''LD Products''); Linkyo Corp. of La Puente, California (''Linkyo''); Mangoket LLC of Alhambra, California (''Mangoket''); New Era Image LLC of Corona, California (''New Era''); OW Supplies Corp. of Corona, California (''OW Supplies''); Solong E-Commerce Co., LLC of Wan Chai, Hong Kong (''Solong''); Smartjet E-Commerce Co., LLC of Wan Chai, Hong Kong (''Smartjet''); Super Warehouse Inc. of Blaine, Washington (''Super Warehouse''); Theresa Meng of Brooklyn, New York (''Ms. Meng''); Triple Best LLC of San Diego, California (''Triple Best''); V4ink, Inc. of Diamond Bar, California (''V4ink''); and Zhuhai Xiaohui E-Commerce Co., Ltd. of Zhuhai, China (''Xiaohui''). *Id.* at 49762–63. The notice of investigation also named the Office of Unfair Import Investigations (''OUII'') as a party. *Id.* at 49763.

Of the 32 respondents, only one, Aster, is participating at this stage. Aster, however, did not oppose the summary determination motion of violation as to the accused products, even though Aster's products are subject to the motion. *See* Joint Stipulation of Brother and Aster for Resolution as to Aster in the Investigation (Mar. 4, 2020). EPS and IFree were terminated from the investigation based upon withdrawal of the complaint against them. *See* Order No. 32 (Jan. 28, 2020), *unreviewed by* Comm'n Notice (Feb. 25, 2020). Cartridge Evolution, E-Z Ink, Linkyo, New Era, OW Supplies, Ms. Meng, Triple Best, and V4ink were terminated from the investigation based upon entry of consent orders. *See* Order No. 36 (Mar. 12, 2020), *unreviewed by* Comm'n Notice (Mar. 31, 2020); Order No. 38 (Mar. 12, 2020), *unreviewed by* Comm'n Notice (Mar. 31, 2020); Order No. 37 (Mar. 12, 2020), *unreviewed by* Comm'n Notice (Mar. 31, 2020); Order No. 10 (Oct. 18, 2019), *unreviewed by* Comm'n Notice (Nov. 6, 2019); Order No. 17 (Nov. 21, 2019), *unreviewed by* Comm'n Notice (Dec. 18, 2019); Order No. 28 (Dec. 30, 2019), *unreviewed by* Comm'n Notice (Jan. 29, 2020); Order No. 18 (Nov. 27, 2019), *unreviewed by* Comm'n Notice (Dec. 18, 2019); Order No. 33 (Fe. 3, 2020), *unreviewed by* Comm'n Notice (Mar. 4, 2020). The following 21 respondents defaulted: AMI, Globest, An An Beauty, Aztech, Xiaohui, Ecoolmart, Greencycle, Intercon, Do it Wiser, I8, Solong, Billiontree, Carlos Imaging, Eco Imaging, Hongkong Boze, Ikong, IPrint, Mangoket, Smartjet, Super Warehouse, and LD Products (collectively, ''Defaulting Respondents''). *See* Order No. 35 (Mar. 5, 2020), *unreviewed by* Comm'n Notice (Mar. 19, 2020); Order No. 31 (Jan. 22,

2020), *unreviewed by* Comm'n Notice (Feb. 21, 2020); Order No. 26 (Dec. 20, 2019), *unreviewed by* Comm'n Notice (Jan 16, 2020); Order No. 25 (Dec. 18, 2019), *unreviewed by* Comm'n Notice (Jan. 16, 2020); Order No. 24 (Dec. 18, 2019), *unreviewed by* Comm'n Notice (Jan. 16, 2020); Order No. 8 (Oct. 15, 2019), *unreviewed by* Comm'n Notice (Nov. 7, 2019).

On March 12, 2020, Brother filed a motion for summary determination of violation of section 337 by Aster and the Defaulting Respondents and for a recommendation that the Commission issue a GEO and CDOs. *See* Complainants' Motion for Summary Determination of Violation and for Recommended Determination on Remedy and Bonding. On March 23, 2020, OUII filled a response in support of Brother's motion. *See* Commission Investigative Staff's Response to Brother's Motion for Summary Determination of Violation. No respondent filed a response to Brother's motion. *Id.*

On July 23, 2020, the presiding administrative law judge (''ALJ'') issued an initial determination (''ID'') (Order No. 40) granting Brother's motion for summary determination on violation of section 337 and issued a recommended determination (''RD'') on remedy and bonding. The ID found that the Commission has subject matter jurisdiction over the investigation. ID at 34. The ID further found that none of the respondents contest the Commission's personal jurisdiction over them or in rem jurisdiction as to the accused products. ID at 34–35. The ID found that Brother: (1) Established the importation requirement as to Aster and Defaulting Respondents, ID at 36–79; (2) demonstrated that the accused products infringe the asserted claims, *id.* at 118–133; and (3) demonstrated that the domestic industry (''DI'') products practice at least one claim of each Asserted Patent and that a DI exists in the United States, *id.* at 84–118. The RD recommended issuance of a general exclusion order (''GEO'') (or, in the alternative, a limited exclusion order directed to Aster and each of the Defaulting Respondents). RD at 134–44. The RD further recommended issuance of cease and desist orders (''CDOs'') directed to Aster and each defaulting respondent that has domestic operations. *Id.* at 144–46. The RD also recommended setting different bond rates for entry of the different products covered by the GEO during the period of Presidential review. *Id.* at 146–48 (recommended bond rate table at 147). No one petitioned for review of the ID.

On August 24, 2020, Aster filed a public interest statement in response to the Commission's notice soliciting public interest comments pursuant to 19 CFR 210.50(a)(4)(i). In its submission, Aster argued that any Commission remedial orders issued in this investigation should not cover its new products pursuant to its stipulation with Brother. *See* Respondent Aster Graphics, Inc.'s Statement of Public Interest. On August 26, 2020, Brother filed a response. *See* Complainants' Motion to Strike Aster Graphics, Inc.'s Statement on the Public Interest for Failure to Comply with Commission Rule 210.15 Or, in the Alternative, for Leave to Respond.

On September 8, 2020, the Commission determined not to review the ID and requested written submissions on remedy, the public interest, and bonding. 85 FR 56628–31 (Sept. 14, 2020). The Commission rejected Aster's August 24, 2020 public interest submission as improper under 19 CFR 210.50(a)(4)(i). *Id.* at 56630. The Commission noted that while 19 CFR 210.50(a)(4)(i) provides that parties may file information with the Commission relating to the public interest, Aster's submission concerned the scope of the remedy and thus did not fall within the ambit of the public interest submissions provided for under 19 CFR 210.50(a)(4)(i). *Id.* The Commission stated that ''Aster will have an opportunity to raise its arguments regarding the scope of any remedial orders in a remedy submission before the Commission in response to the instant notice, which invites parties to file submissions addressing remedy, bonding and the public interest as noted below.'' *Id.*

On September 22, 2020, Brother, Aster, and OUII filed initial submissions in response to the Commission's request. *See* Complainants' Submission on Remedy, the Public Interest, and Bonding; Respondent Aster Graphics, Inc.'s Submission on Remedy, the Public Interest and Bonding; Response of the Office of Unfair Import Investigations to the Commission's Request for Written Submissions Regarding Remedy, the Public Interest, and Bonding. On September 29, 2020, the parties filed reply submissions. *See* Complainants' Reply Submission on Remedy, the Public Interest, and Bonding; [1] Respondent Aster Graphics, Inc.'s Reply to the Submission of the Office of Unfair Import Investigations and Complainants on Remedy, the Public Interest and Bonding; Reply of the Office of Unfair Import Investigations to the Private Parties' Written Submissions Regarding Remedy, the Public Interest, and Bonding.

As noted above, the Commission affirmed the ID's finding that there is a violation of section 337 with respect to Aster and Defaulting Respondents. The Commission also finds that the statutory requirements for issuance of a GEO under section 337(d)(2) are met. *See* 19 U.S.C. 1337(d)(2). The Commission further finds that issuance of CDOs against Aster and 19 of the defaulting respondents (noted below) is appropriate under section 337(f)(1). *See* 19 U.S.C. 1337(f)(1). In addition, the Commission finds that the public interest factors do not preclude issuance of the requested relief. *See* 19 U.S.C. 1337(d)(1), (f)(1).

The Commission therefore has determined that the appropriate remedy in this investigation is: (1) A GEO prohibiting the unlicensed importation of certain toner cartridges, components thereof, and systems containing same that infringe one or more of claims 1–5, 10, and 12–15 of the '093 patent; claims 1, 7–11, 15, and 16 of the '460 patent; claims 1–7, and 9 of the '856 patent; claims 1, 4, 5, and 9 of the '456 patent; and claims 1, 3, 5, 7–12, and 18 of the '387 patent; and (2) CDOs directed to Aster, AMI, Billiontree, Carlos Imaging, Do It Wiser, Eco Imaging, Ecoolmart, Globest, Greencycle, Hongkong Boze, I8, Ikong, Intercon, IPrint, LD Products, Mangoket, Smartjet, Solong, Super Warehouse, and Xiaohui. The Commission has also determined that the bond during the period of Presidential review shall be in the amount of the following percentages of the entered value for respondents AMI, Aster, and Globest:

Infringing products	AMI (%)	Aster (%)	Globest (%)
Accused 221/225 Products	568	1463	900
Accused 223/227 Products	274	336	372
Accused 420/450 Products	.....	623	682
Accused 630/660 Products	575	886	635
Accused 730/760/770 Products	589	354	369

The bond for all other infringing articles shall be in the amount of one hundred percent (100%) of the entered value.

The Commission's orders were delivered to the President and to the

[1] The Chair granted Brother's motion for leave to file one day late. Brother filed on time but inadvertently omitted to include the certificate of service. Brother corrected the omission the next day.

United States Trade Representative on the day of their issuance. The investigation is terminated.

While temporary remote operating procedures are in place in response to COVID–19, the Office of the Secretary is not able to serve parties that have not retained counsel or otherwise provided a point of contact for electronic service. Accordingly, pursuant to Commission Rules 201.16(a) and 210.7(a)(1) (19 CFR 201.16(a), 210.7(a)(1)), the Commission orders that the Complainant complete service for any party without a method of electronic service noted on the attached Certificate of Service and shall file proof of service on the Electronic Document Information System (EDIS).

The Commission vote for this determination took place on November 23, 2020.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: November 23, 2020.

William Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2020–26277 Filed 11–27–20; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1225]

Notice of a Commission Determination Not to Review an Initial Determination Terminating the Investigation in Its Entirety Based on Withdrawal of the Complaint; Termination of the Investigation; Certain Active Matrix OLED Display Devices and Components Thereof

AGENCY: International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the International Trade Commission has determined not to review an initial determination (''ID'') (Order No. 7) of the presiding administrative law judge (''ALJ'') terminating the investigation based on withdrawal of the complaint. The investigation is terminated.

FOR FURTHER INFORMATION CONTACT: Clint Gerdine, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708–2310. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal, telephone 202–205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on October 28, 2020, based on a complaint filed by Solas OLED Ltd. (''Solas'') of Dublin, Ireland. 85 FR 68368–69 (Oct. 28, 2020). The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain active matrix OLED display devices and components thereof by reason of infringement of certain claims of U.S. Patent Nos. 8,139,007; 7,573,068; and 7,868,880. The complaint further alleges the existence of a domestic industry. The Commission's notice of investigation named the following as respondents: Apple Inc. of Cupertino, California; Sony Electronics Inc. of San Diego, California; Samsung Electronics America, Inc. of Ridgefield Park, New Jersey; Samsung Display Co., Ltd. and Samsung Electronics Co., Ltd., both of Gyeonggi-do, South Korea; Dell Technologies Inc. of Round Rock, Texas; Motorola Mobility LLC of Chicago, Illinois; LG Electronics Inc. and LG Display Co., Ltd., both of Seoul, South Korea; LG Display America, Inc. of San Jose, California; and LG Electronics USA, Inc. of Englewood Cliffs, New Jersey. The Office of Unfair Import Investigations is participating in the investigation.

On November 6, 2020, Solas moved to terminate the investigation in its entirety based on withdrawal of the complaint. No party opposed the motion.

On November 12, 2020, the ALJ issued the subject ID (Order No. 7), granting the unopposed motion to terminate the investigation in its entirety based on withdrawal of the complaint. The ID finds that the motion for termination satisfies Commission Rule 210.21(a)(1) (19 CFR 210.21(a)(1)) and that termination of the investigation is not contrary to the public interest. The ID also finds that no extraordinary circumstances exist that would prevent the requested termination. No party petitioned for review.

The Commission has determined not to review the subject ID. The investigation is terminated.

The Commission vote for this determination took place on November 24, 2020.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in part 210 of the Commission's Rules of Practice and Procedure, 19 CFR part 210.

By order of the Commission.

Issued: November 24, 2020.

William Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2020–26357 Filed 11–27–20; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–1546–1549 (Preliminary)]

Thermal Paper From Germany, Japan, Korea, and Spain

Determination

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 there is a reasonable indication that industries in the United States are materially injured by reason of imports of thermal paper from Germany, Japan, Korea, and Spain, provided for in subheadings 4811.80.80 and 4811.80.90 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value (''LTFV'').[2]

Commencement of Final Phase Investigation

Pursuant to section 207.18 of the Commission's rules, the Commission also gives notice of the commencement of the final phase of its investigations. The Commission will issue a final phase notice of scheduling, which will be published in the **Federal Register** as provided in section 207.21 of the Commission's rules, upon notice from the U.S. Department of Commerce (''Commerce'') of affirmative preliminary determinations in the

[1] The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

[2] 85 FR 65073 (October 14, 2020).

investigations under § 733(b) of the Act, or, if the preliminary determinations are negative, upon notice of affirmative final determinations in those investigations under § 735(a) of the Act. Parties that filed entries of appearance in the preliminary phase of the investigations need not enter a separate appearance for the final phase of the investigations. Industrial users, and, if the merchandise under investigation is sold at the retail level, representative consumer organizations have the right to appear as parties in Commission antidumping investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

Background

On October 7, 2020, Appvion Operations, Inc. (Appleton, Wisconsin) and Domtar Corporation (Fort Mill, South Carolina) filed petitions with the Commission and Commerce, alleging that an industry in the United States is materially injured or threatened with material injury by reason of LTFV imports of thermal paper from Germany, Japan, Korea, and Spain. Accordingly, effective October 7, 2020, the Commission instituted antidumping duty investigation nos. 731–TA–1546–1549 (Preliminary).

Notice of the institution of the Commission's investigations and of a public conference 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 October 14, 2020 (85 FR 65073). In light of the restrictions on access to the Commission building due to the COVID–19 pandemic, the Commission conducted its conference through written testimony and video conference. All persons who requested the opportunity were permitted to participate.

The Commission made these determinations pursuant to § 733(a) of the Act (19 U.S.C. 1673b(a)). It completed and filed its determinations in these investigations on November 23, 2020. The views of the Commission are contained in USITC Publication 5141 (December 2020), entitled *Thermal Paper from Germany, Japan, Korea, and Spain: Investigation Nos. 731–TA–1546–1549 (Preliminary).*

By order of the Commission.

Issued: November 23, 2020.

William Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2020–26271 Filed 11–27–20; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Polycrystalline Diamond Compacts and Articles Containing Same, DN 3509;* the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing pursuant to the Commission's Rules of Practice and Procedure.

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.*

General information concerning the Commission may also be obtained by accessing its internet server at United States International Trade Commission (USITC) at *https://www.usitc.gov* . The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of US Synthetic Corporation on November 23, 2020. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain polycrystalline diamond compacts and articles containing same. The complaint names as respondents: SF Diamond Co., Ltd. of China; SF Diamond USA, Inc. of Spring, TX; Element Six Abrasives Holdings Ltd. of United Kingdom; Element Six Global Innovation Centre of United Kingdom; Element Six GmbH of Germany; Element Six Limited of South Africa; Element Six Production (Pty) Limited of Ireland; Element Six Hard Materials (Wuxi) Co. Limited of China; Element Six Trading (Shanghai) Co. Limited of China; Element Six Technologies US Corporation of Santa Clara, CA; Element Six US Corporation of Spring, TX; ServSix US of Orem, UT; Synergy Materials Technology Limited of Hong Kong; Iljin Diamond Co., Ltd. of Korea; Iljin Holdings Co., Ltd. of Korea; Iljin USA Inc. of Houston, TX; Iljin Europe GmbH of Germany; Iljin Japan Co., Ltd. of Japan; Iljin China Co., Ltd. of China; Henan Jingrui New Material Technology Co., Ltd. of China; Zhengzhou New Asia Superhard Materials Composite Co., Ltd. of China; International Diamond Services, Inc. of Houston, TX; CR Gems Superabrasives Co., Ltd. of China; FIDC Beijing Fortune International Diamond of China; Fujian Wanlong Superhard Material Technology Co., Ltd. of China; Zhuhai Juxin Technology of China; and Shenzhen Haimingrun Superhard Materials Co., Ltd. of China. The complainant requests that the Commission issue a limited exclusion order, cease and desist orders, and impose a bond upon respondents' alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the

United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions on the public interest must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation. Any written submissions on other issues must also be filed by no later than the close of business, eight calendar days after publication of this notice in the **Federal Register**. Complainant may file replies to any written submissions no later than three calendar days after the date on which any initial submissions were due. Any submissions and replies filed in response to this Notice are limited to five (5) pages in length, inclusive of attachments.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. Submissions should refer to the docket number (''Docket No. 3509'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, Electronic Filing Procedures.[1]) Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov.*) No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice. Persons with questions regarding filing should contact the Secretary at *EDIS3Help@usitc.gov.*

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,[2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.[3]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: November 23, 2020.

William Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2020–26283 Filed 11–27–20; 8:45 am]

BILLING CODE 7020–02–P

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *https://edis.usitc.gov.*

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—ODPI, Inc.

Notice is hereby given that, on November 19, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), ODPi, Inc. (''ODPi'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, International Business Machines Corporation, Armonk, NY, has withdrawn as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and ODPi intends to file additional written notifications disclosing all changes in membership.

On November 23, 2015, ODPi filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on December 23, 2015 (80 FR 79930).

The last notification was filed with the Department on June 12, 2020. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on June 25, 2020 (85 FR 38159).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2020–26360 Filed 11–27–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Consortium for Execution of Rendezvous and Servicing Operations

Notice is hereby given that, on November 18, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Consortium for Execution of Rendezvous and Servicing Operations (''CONFERS'') filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Cateni, El Segundo, CA, Maxar Technologies, Westminister, CO, Oceaneering Space Systems, Houston, TX and Starfish Space Inc., Kent, WA have been added as parties to this venture.

No organization has withdrawn as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and CONFERS intends to file additional written

notifications disclosing all changes in membership.

On September 10, 2018, CONFERS filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on October 19, 2018 (83 FR 53106).

The last notification was filed with the Department on May 1, 2020. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on May 28, 2020 (85 FR 32049).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2020–26358 Filed 11–27–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Dynamic Spectrum Alliance, Inc.

Notice is hereby given that, on November 23, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Dynamic Spectrum Alliance, Inc. (''DSA'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, The University of York, Heslington, UNITED KINGDOM; Amazon, Sunnyvale, CA; and Google, Mountain View, CA have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and DSA intends to file additional written notifications disclosing all changes in membership.

On September 1, 2020, DSA filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on September 18, 2020 (85 FR 58390).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2020–26362 Filed 11–27–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Cooperative Research Group on AC²AT–II

Notice is hereby given that, on November 19, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Southwest Research Institute—Cooperative Research Group on Advanced Combustion Catalyst and Aftertreatment Technologies—II (''AC²AT–II'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Denso Corporation ''Client'', Aichi-ken, JAPAN, has withdrawn as a party to this venture. No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and AC²AT–II intends to file additional written notifications disclosing all changes in membership.

On February 6, 2019, AC²AT–II filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on February 28, 2019 (84 FR 6821).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2020–26361 Filed 11–27–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–688E]

Established Aggregate Production Quotas for Schedule I and II Controlled Substances and Assessment of Annual Needs for the List I Chemicals Ephedrine, Pseudoephedrine, and Phenylpropanolamine for 2021

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Final order.

SUMMARY: This final order establishes the initial 2021 aggregate production quotas for controlled substances in schedules I and II of the Controlled Substances Act and the assessment of annual needs for the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine.

DATES: *Applicable Date:* Applicable November 30, 2020.

FOR FURTHER INFORMATION CONTACT: Scott A. Brinks, Diversion Control Division, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152, Telephone: (571) 362–3261.

SUPPLEMENTARY INFORMATION:

I. Legal Authority

Section 306 of the Controlled Substances Act (CSA) (21 U.S.C. 826) requires the Attorney General to establish aggregate production quotas for each basic class of controlled substance listed in schedule I and II and assessment of annual needs for the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine. The Attorney General has delegated this function to the Administrator of the Drug Enforcement Administration (DEA) pursuant to 28 CFR 0.100.

II. Background

The 2021 aggregate production quotas (APQ) and assessment of annual needs (AAN) represent those quantities of schedule I and II controlled substances and the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine that may be manufactured in the United States in 2021 to provide for the estimated medical, scientific, research, industrial needs of the United States, lawful export requirements, and the establishment and maintenance of reserve stocks. These quotas include imports of ephedrine, pseudoephedrine, and phenylpropanolamine, but do not include imports of controlled

substances for use in industrial processes.

On September 1, 2020, a notice titled ''Proposed Aggregate Production Quotas for Schedule I and II Controlled Substances and Assessment of Annual Needs for the List I Chemicals Ephedrine, Pseudoephedrine, and Phenylpropanolamine for 2021'' (hereinafter ''Proposed 2021 APQ'') was published in the **Federal Register**. 85 FR 54407. This notice proposed the 2021 APQ for each basic class of controlled substance listed in schedules I and II and the 2021 AAN for the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine. All interested persons were invited to comment on or object to the proposed APQ and the proposed AAN on or before October 1, 2020.

III. Comments Received

Within the public comment period, DEA received 294 comments from DEA registrants, hospital associations, professional associations, doctors, nurses, health system organizations, State Attorneys General, and others. The comments included concerns over drug shortages due to further quota reductions from doctors and nurses, patients, and various health groups and hospital affiliations; requests for less interference in the doctor-patient relationship; concerns about the quota process with a request for public hearing; and comments not pertaining to DEA regulated activities.

The majority of the commenters expressed concerns regarding the potential adverse impact of the decrease to the APQ of controlled substances on the availability of pain-relieving prescription drugs for people with chronic pain. DEA received comments from four DEA-registered manufacturers regarding ten different schedule I and II controlled substances. Commenters stated the proposed APQ for ANPP, d-amphetamine (for conversion), fentanyl, hydrocodone (for sale), hydromorphone, lisdexamfetamine, morphine (for conversion), noroxymorphone (for conversion), oxycodone (for sale), and sufentanil be sufficient for manufacturers to meet medical and scientific needs. DEA has considered the comments for specific controlled substances in establishing the 2021 APQ.

DEA received no comments regarding the proposed established 2021 AAN for ephedrine, pseudoephedrine, and phenylpropanolamine.

A. Shortages

Issue: Some commenters expressed concerns about the decrease in certain APQ. These commenters alleged that decreases to the APQ have resulted in a shortage of injectable opioid medications and interfere with the treatment of patients. Some of these commenters also suggested that DEA separate quotas for solid oral controlled substances and injectable controlled substances, and urged DEA to utilize its discretionary authority under the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment Act (SUPPORT Act),[1] to establish APQ in terms of pharmaceutical dosage form for all schedule II controlled substances.

DEA Response: DEA is committed to ensuring an adequate and uninterrupted supply of controlled substances in order to meet the legitimate medical, scientific, and export needs of the United States. DEA sets APQ in a manner to provide for all dispensings authorized for legitimate medical purposes, and in turn, the APQ take into consideration both injectable opioids and solid oral opioids to meet the estimated medical needs of the United States. The SUPPORT Act allows, but does not require, DEA to grant quotas in terms of dosage forms if the agency determines that doing so will assist in avoiding the overproduction, shortages, or diversion of a controlled substance. DEA believes that incorporating all dosage forms into the APQ, rather than allocating APQ by dosage form, allows the agency flexibility to adjust the individual quotas granted to manufacturers to alleviate any potential shortages and react to unforeseen emergencies. DEA believes the most accurate use of this authority would be in determining individual procurement quotas, if warranted under the circumstances. For example, if there was a shortage of any dosage form, the APQ would not need to be raised for manufacturers to produce that specific dosage form. Conversely, if multiple APQ for dosage forms were permitted, it is more likely that the APQ for that dosage form would need to be raised to respond to such a shortage before production could commence, thereby delaying the response time to the shortage.

Although DEA sets the APQ, it is possible that the business practices of manufacturers may lead to a shortage of controlled substances at the patient level, despite the adequacy of the APQ set by DEA. DEA can grant an individual quota to a manufacturer, and pursuant to the SUPPORT Act, also has the authority to grant individual manufacturing and/or procurement quotas for specific dosage forms; however, DEA cannot demand that the manufacturer utilize the quota immediately, nor does it have the authority to demand immediate production of dosage forms.

DEA and the Food and Drug Administration (FDA) are required to coordinate efforts to prevent or alleviate drug shortages pursuant to 21 U.S.C. 826(h) and maintain a collaborative working relationship. In addition, DEA and FDA have worked collaboratively. For example, in 2016 the domestic shortage of injectable controlled substances was alleviated by the importation of certain injectable controlled substances coordinated by the collaborated effort of FDA and DEA. The alleviation of this drug shortage did not require an adjustment to the APQ. Again in 2020, when hospitals informed DEA that there was a domestic shortage of injectable controlled substances due to the Coronavirus Disease of 2019 (COVID–19) health emergency, DEA collaborated with FDA to increase the appropriate APQ and individual quotas to allow for increased manufacturing of the specific drug products.

B. Pain Management Association Letters

Issue: DEA received comments that expressed concern that DEA's proposed reduction of opioids would adversely impact the availability of pain-relieving prescription drugs for people with chronic pain. The general concern is that lowering the APQ, which in turn decreases the amount available for physicians to write prescriptions, increases the probability that a physician cannot or will not prescribe such pain-relieving drugs.

DEA Response: DEA sets APQ in a manner to ensure that all prescriptions authorized for legitimate medical purposes can be filled. DEA does not set guidelines regarding patterns of prescribing medications, nor does DEA determine what dosage(s) are deemed ''medically necessary.'' Prescribers authorized to dispense controlled substances are responsible for adhering to the laws and regulations set forth under the CSA, which requires doctors to only write prescriptions for legitimate medical needs. Any practitioner issuing an invalid prescription for controlled substances and any pharmacy knowingly filling such a prescription would be in violation of the CSA.

C. Relevant Information Obtained From Health and Human Services (HHS) Agencies

Some commenters, including the State Attorneys General for West Virginia, Kentucky, Arkansas, and

[1] Public Law 115–271.

South Dakota, were concerned with DEA's use and/or analysis of relevant information from HHS, including: (1) Centers for Medicare and Medicaid Services (CMS) data on overprescribing; (2) FDA data; and (3) Centers for Disease Control and Prevention (CDC) data on overdose deaths.

CMS Data on Over-Prescribing

Issue: Some commenters expressed concern with DEA's use and interpretation of CMS data; particularly, in how such raw data would be used in the future to draw conclusions on the issue of overprescribing. Pain management associations questioned how DEA would distinguish between appropriate and inappropriate prescribing, and urged DEA to use ''nuanced and evidence-based means to draw distinctions between appropriate and inappropriate use.'' These associations also cautioned against misapplying dosage thresholds from CDC prescription guidance for schedule II substances to determine overprescribing rates.

DEA Response: As previously stated, DEA sets APQ in a manner to ensure that all prescriptions authorized for legitimate medical purposes can be filled. DEA does not set guidelines regarding patterns of prescribing medications, nor does DEA determine what dosage(s) can be deemed ''medically necessary.'' Prescribers authorized to dispense controlled substances are responsible for adhering to the laws and regulations set forth under the CSA, which require doctors to only write prescriptions for legitimate medical needs. Any practitioner issuing an invalid prescription for controlled substances and any pharmacy knowingly filling such a prescription would be in violation of the CSA.

As DEA discussed in the prior Proposed 2021 APQ, DEA contacted HHS and CMS, a component of HHS, to explore the possibility of using the agencies' data to estimate over prescribing. CMS informed DEA that the agency had reviewed its internal databases, and did not have the ability to systematically distinguish between appropriate and inappropriate prescriptions without investigating each prescription.

Issue: West Virginia, and joining state commenters, raised concerns that overprescribing, *i.e.,* opioids prescribed beyond actual medical needs, was not accounted for as part of diversion. The States noted that ''DEA has not accounted for illegitimate—but legal—demand for opioids through overprescribing.''

DEA Response: DEA sets APQ in a manner to ensure that all prescriptions authorized for legitimate medical purposes can be filled. Again, DEA does not set guidelines regarding patterns of prescribing medications, nor does DEA set guidelines as to what dosage(s) can be deemed ''medically necessary.'' Upon review of the studies cited in West Virginia's comment letter, DEA has determined that they are insufficient to support a reduction in the APQ. The studies cited found that for a variety of medical procedures, physicians prescribe more controlled substances for post-operative pain than patients utilize. While the referenced studies are concerning, DEA has concluded they are insufficient to support a determination on the level of overprescribing that occurs across the range of the medical procedures performed each year nationwide.

Prescribers authorized to dispense controlled substances are responsible for adhering to the laws and regulations set forth under the CSA, which require doctors to only write prescriptions for legitimate medical needs. Any practitioner issuing an invalid prescription for controlled substances and any pharmacy knowingly filling such a prescription would be in violation of the CSA. As DEA explores the possibility of using state Prescription Drug Monitoring Program (PDMP) data to estimate diversion, it may be possible to reliably discern over-prescribing on a national level and use this information to help determine the APQ. However, DEA does not currently have access to this data. Additionally, DEA previously attempted to use CMS data, but CMS did not have the ability to systematically distinguish between appropriate and inappropriate prescriptions without investigating each prescription.

FDA Data

Issue: West Virginia, and joining state commenters, took exception to DEA's response to FDA's projected levels of medical need for selected controlled substances, claiming that DEA outright rejected FDA recommendations.

DEA Response: DEA did not reject critical FDA ''recommendations.'' The term ''recommendation'' as used by the states appears to have been incorrectly interpreted; FDA only provided to DEA data that estimated legitimate domestic medical need. The data allowed DEA to estimate a collective decline in opioids to meet legitimate domestic medical need. Scientific, research, industrial needs, lawful export requirements, and the establishment and maintenance of reserve stocks are derived from information provided from quota applicants and research protocols submitted directly to DEA. On April 10, 2020, DEA published adjustments to the 2020 APQ for specific controlled substances identified by HHS COVID–19 treatment protocols, in order to allow manufacturers to meet the new and unforeseen medical need. 85 FR 20302. As explained in that notice, FDA's data was based on an analysis performed prior to the declaration of a national public health emergency due to COVID–19 by the HHS Secretary on January 31, 2020. DEA and HHS subsequently worked in concert to determine changes in legitimate medical need based on the unforeseen emergency posed by COVID–19, particularly the need of certain controlled substances required to treat patients on ventilators.

As stated in the Proposed 2021 APQ, DEA considered both the potential for diversion as well as the anticipated increase in demand for opioids used to treat patients with COVID–19, as previously identified by HHS, in proposing the 2021 APQ for those specific controlled substances.

Issue: Another commenter pointed out that while FDA's recommendation may have been made prior to the declaration of the COVID–19 emergency, DEA still did not provide any information about how it accounted for the impact of COVID–19 when arriving at its 2021 proposed APQ.

DEA Response: In the April 10, 2020 notice, DEA stated that DEA and HHS worked in concert to determine changes in legitimate medical need based on the unforeseen emergency posed by COVID–19, particularly the need of certain controlled substances required to treat patients on ventilators. DEA extended the projections provided by HHS to insure the relevant APQ were established to account for the predicted ''second wave'' of COVID–19 patients for the upcoming months.

CDC Data and Overdose Deaths

Issue: One commenter took issue with DEA's analysis of CDC data and DEA not differentiating between types of fentanyl overdoses, *i.e.,* overdoses that are the result of lawfully manufactured fentanyl versus illicit fentanyl.

DEA Response: CDC provided DEA with data from their National Vital Statistics System-Mortality files. DEA could not determine from CDC's data if the patient overdosed on an illicit opioid or a FDA-approved opioid product. Nor could DEA determine if the overdose was a result of accidental or intentional ingestion. As such, DEA is unable to determine the number of

overdose deaths resulting from fentanyl diverted from legitimate sources.

Whereas DEA is required to consider rates of overdose deaths pursuant to changes made by the SUPPORT Act, DEA concluded that the provided data on overdose deaths for 2015 through 2017 could not be reliably utilized to estimate the amount of diversion for the five covered controlled substances for the 2021 APQ.

D. Relevant Information Obtained From the States

Issue: Some commenters raised concerns that DEA did not adequately utilize data from the States. West Virginia, and joining state commenters, encouraged DEA to expand its methodology to enable better use of state data that does currently exist, despite not having a fulsome set of state data.

DEA Response: DEA solicited relevant information from the States and federal partners to be considered when setting the APQ pursuant to 21 CFR 1303.11. As DEA stated in the Proposed 2021 APQ, only 20 of the 56 State and Territory Attorneys General acknowledged receipt of DEA's letters requesting information on diversion, and of those 20, only nine states sent some form of Prescription Drug Monitoring Program (PDMP) data to DEA. The limited PDMP data that DEA received varied in form and content, and was ultimately determined to be insufficient to develop national estimates of diversion for each of the five covered controlled substances.

DEA is currently working with states and other federal agencies to obtain reliable data that will allow DEA to effectively estimate diversion. For example, DEA is seeking data from state PDMPs which can be evaluated to identify common diversion schemes such as ''doctor shopping,'' a scheme in which a patient obtains controlled substances from multiple treatment providers without the providers knowing of the other prescriptions. Information from PDMPs could assist in identifying additional ''red flags'' that may be evidence of diversion and misuse of covered controlled substances, such as: Over-prescribing; patients traveling long distances or across state lines to have prescriptions filled; early refills; and dangerous drug combinations.

E. The SUPPORT Act Mandates

Disparate Account of Diversion

Issue: West Virginia, and joining state commenters, raised concern over the disparate treatment of the five SUPPORT Act covered controlled substances and other regulated controlled substances in considering diversion.

DEA Response: Pursuant to 21 CFR 1303.11(b)(5), DEA considered the extent of diversion of the basic class as a factor in setting the APQ for each respective basic class, as well as the extent of diversion for all other schedule I and II controlled substances in proposing the estimated APQ. The regulation does not, however, mandate that DEA publish the diversion estimates for all controlled substances. As the state attorneys general comment notes, the SUPPORT Act specifically requires that DEA provide the diversion estimate only for the following five covered controlled substances: Fentanyl, hydrocodone, hydromorphone, oxycodone, and oxymorphone. In compliance with the SUPPORT Act, DEA published the estimated diversion for the five covered controlled substances.

F. Methodology for Determining the APQ and AAN Values

Issue: Some commenters wanted a more explicit explanation of DEA's methodology in determining the APQ and AAN values. West Virginia, and joining state commenters, for instance, called for DEA to adopt a ''specific, clear, and reproducible methodology developed and explained in advance'' to address the ''medically and scientifically necessary amount of controlled substances.'' Another commenter noted that DEA described one such methodology in the 2010 and 2011 AAN, but claimed that a more ''explicit discussion of how that methodology was applied would be beneficial.'' The same commenter also asked that DEA ''publicly provide and explicitly discuss the data it consulted to validate the need'' for APQ reductions.

DEA Response: As stated in the September 1, 2020, notice, DEA applies the factors listed in 21 CFR 1303.11 in determining the APQ and 21 CFR 1315.11 in determining the AAN. FDA is required to provide an estimate of the quantity of controlled substances together with reserves of such drugs that are necessary to supply the normal and emergency medicinal and scientific requirements of the United States to DEA. 42 U.S.C. 242(a). Under this statute, HHS has delegated that responsibility to FDA, which provided the relevant information to DEA. DEA considered this information, including the observed and estimated domestic usage of marketed schedule II controlled substances, new drug applications and abbreviated drug application approvals, and clinical trials for schedule I and II controlled substances. The determination of scientifically necessary amounts of controlled substances occurs through the submission of business confidential and proprietary information from manufacturers. DEA also considered the impact of products entering and exiting the market, expected product development, expected exports, and inventory data.

Since 2014, FDA has observed a decline in the number of prescriptions written for schedule II opioids. DEA continues to set aggregate production quotas to meet the medical needs of the United States while combating the opioid crisis. These decreases take into account the combined efforts of DEA, FDA, and CDC enforcing regulations and issuing guidance documents, as well as many states enacting prescription monitoring database programs to stem the opioid epidemic.

G. Further Collaboration of Agencies and Stakeholders; Request for a Public Hearing

Issue: Some commenters suggested that DEA further or better collaborate with the states, other federal agencies, and other industry stakeholders. One commenter urged DEA to ''collaborate with a broad range of stakeholders'' to ''address the opioid crisis while ensuring an adequate supply of opioids for clinically appropriate care.'' The commenter further suggested that DEA should engage such stakeholders in roundtable discussions, listening sessions, or public hearings. West Virginia, and joining state commenters, urged DEA to work with states and other partners to develop methods to measure overprescribing and related forms of diversion. Another commenter asked that DEA work with ''HHS, Department of Defense, and others tasked with national security and emergency preparedness'' to ''address any emergent supply needs or preemptive supply preparation'' such as those arising from the pandemic.

DEA Response: DEA has and will continue to collaborate with federal agencies, industry, and medical associations to combat the opioid crisis, prevent diversion, and set appropriate manufacturing quantities of controlled substances and chemicals to meet legitimate need and preparedness for unforeseen circumstances within the United States. Additionally, the **Federal Register** comment period provides an opportunity for all stakeholders to make their issues known to DEA. Unfortunately, many of those issues revolve around prescribing practices for

specific medical conditions. As stated previously, DEA does not set guidelines regarding patterns of prescribing medications nor does DEA determine what dosages can be deemed ''medically necessary.''

Issue: One commenter stated that the DEA should have a hearing to gather stakeholder feedback on how DEA can help address the opioid epidemic while ensuring an adequate supply of opioids for clinically appropriate care and enable stakeholders to express their views about the proposed reductions.

DEA Response: Under DEA's regulations, the decision of whether to grant this type of a hearing on the issues raised by the commenter lies solely within the discretion of the Administrator. 21 CFR 1303.11(c) and 21 CFR 1303.13(c). The Administrator has considered the commenter's request and determined that a hearing is not necessary.

H. Comments From DEA-Registered Manufacturers

DEA received comments from four DEA-registered manufacturers regarding ten different schedule I and II controlled substances, requesting that the proposed APQ for ANPP, d-amphetamine (for conversion), fentanyl, hydrocodone (for sale), hydromorphone, lisdexamfetamine, morphine (for conversion), noroxymorphone (for conversion), oxycodone (for sale), and sufentanil be established to sufficient levels to allow for manufacturers to meet medical and scientific needs.

DEA considered the comments for specific controlled substances and made adjustments as needed which are described below in the section titled Determination of 2021 Aggregate Production Quotas and Assessment of Annual Needs.

I. Out of Scope Comments

DEA received several comments which addressed issues that are outside the scope of this final order. The comments were general in nature and raised issues of specific medical illnesses, medical treatments, and medication costs, as well as issues related to a separate **Federal Register** notice, and, therefore, were outside of the scope of this Final Order, and do not impact the original analysis involved in establishing the 2021 APQ.

IV. Determination of 2021 Aggregate Production Quotas and Assessment of Annual Needs

In determining the final 2021 aggregate production quotas and assessment of annual needs, DEA has considered the above comments along with the factors set forth in 21 CFR 1303.11 and 21 CFR 1315.11, in accordance with 21 U.S.C. 826(a), and other relevant factors, including the 2020 manufacturing quotas, current 2020 sales and inventories, anticipated 2021 export requirements, industrial use, additional applications for 2021 quotas, as well as information on research and product development requirements.

DEA also considered the HHS Secretary's renewal of the public health emergency due to COVID–19 and worked with both FDA and the Assistant Secretary for Preparedness and Response (ASPR), including their revised estimated medical and Strategic National Stockpile requirements for fentanyl, hydromorphone, and morphine in establishing the 2021 APQ. Based on all of the above, the Administrator is adjusting the 2021 APQ for 4-anilino-N-phenethyl-4-piperadine (ANPP), 5-methoxy-n-n-dimethyltryptamine, Crotonyl fentanyl, D-methamphetamine (for sale), Fentanyl, Ethylone, Etonitazene, Gamma hydroxybutyric acid, Lisdexamfetamine, and Norlevorphanol.

Regarding D-amphetamine (for conversion), hydrocodone (for sale), hydromorphone, morphine (for conversion), noroxymorphone (for conversion), oxycodone (for sale), and sufentanil, DEA has determined the proposed APQ are sufficient to provide for the 2021 estimated medical, scientific, research, industrial needs of the United States, export requirements, and the establishment and maintenance of reserve stocks. This final order establishes these APQ as well as the AAN at the same amounts as proposed.

Estimates of Diversion Pursuant to the SUPPORT Act

The SUPPORT Act (21 U.S.C. 826(i)(1)(a)) requires that ''in establishing any quota under this section . . . , for [the covered controlled substances], the Attorney General shall estimate the amount of diversion of the [covered controlled substances] that occurs in the United States.'' To estimate diversion as is required by the SUPPORT Act, DEA aggregated the active pharmaceutical ingredient (API) of each covered controlled substance by metric weight where the data was available in the aforementioned databases. Based on the individual entries into the aforementioned databases, DEA calculated the estimated amount of diversion by multiplying the strength of the API listed for each finished dosage form by the total amount of units reported to estimate the metric weight in kilograms of the controlled substance being diverted. The estimate of diversion for each of the covered controlled substances is reported below.

DIVERSION ESTIMATES FOR 2019

[kg]

Fentanyl	0.090
Hydrocodone	30.294
Hydromorphone	1.424
Oxycodone	60.959
Oxymorphone	1.311

In accordance with the SUPPORT Act, after estimating the amount of diversion for the foregoing five controlled substances, DEA made adjustments to the individual aggregate production quotas for each covered controlled substance by the corresponding quantities listed in the table. In accordance with 21 U.S.C. 826, 21 CFR 1303.11, and 21 CFR 1315.11, the Administrator hereby establishes the 2021 APQ for the following schedule I and II controlled substances and the 2021 AAN for the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine, expressed in grams of anhydrous acid or base, as follows:

Basic class	Final 2021 quotas (g)
Schedule I	
1-[1-(2-Thienyl)cyclohexyl]pyrrolidine	20
1-(1-Phenylcyclohexyl)pyrrolidine	15
1-(2-Phenylethyl)-4-phenyl-4-acetoxypiperidine	10
1-(5-Fluoropentyl)-3-(1-naphthoyl)indole (AM2201)	30
1-(5-Fluoropentyl)-3-(2-iodobenzoyl)indole (AM694)	30
1-Benzylpiperazine	25
1-Methyl-4-phenyl-4-propionoxypiperidine	10

Basic class	Final 2021 quotas (g)
1-[1-(2-Thienyl)cyclohexyl]piperidine	15
2-(2,5-Dimethoxy-4-ethylphenyl)ethanamine (2C–E)	30
2-(2,5-Dimethoxy-4-methylphenyl)ethanamine (2C–D)	30
2-(2,5-Dimethoxy-4-nitro-phenyl)ethanamine (2C–N)	30
2-(2,5-Dimethoxy-4-(n)-propylphenyl)ethanamine (2C–P)	30
2-(2,5-Dimethoxyphenyl)ethanamine (2C–H)	100
2-(4-Bromo-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl)ethanamine (25B–NBOMe; 2C–B–NBOMe; 25B; Cimbi-36)	30
2-(4-Chloro-2,5-dimethoxyphenyl)ethanamine (2C–C)	30
2-(4-Chloro-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl)ethanamine (25C–NBOMe; 2C–C–NBOMe; 25C; Cimbi-82)	25
2-(4-Iodo-2,5-dimethoxyphenyl)ethanamine (2C–I)	30
2-(4-Iodo-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl)ethanamine (25I–NBOMe; 2C–I–NBOMe; 25I; Cimbi-5)	30
2,5-Dimethoxy-4-ethylamphetamine (DOET)	25
2,5-Dimethoxy-4-(n)-propylthiophenethylamine	25
2,5-Dimethoxyamphetamine (DMA)	25
2-(4-Ethylthio-2,5-dimethoxyphenyl)ethanamine (2C–T–2)	30
2-(4-(Isopropylthio)-2,5-dimethoxyphenyl)ethanamine (2C–T–4)	30
3,4,5-Trimethoxyamphetamine	30
3,4-Methylenedioxyamphetamine (MDA)	55
3,4-Methylenedioxymethamphetamine (MDMA)	50
3,4-Methylenedioxy-N-ethylamphetamine (MDEA)	40
3,4-Methylenedioxy-N-methylcathinone (methylone)	40
3,4-Methylenedioxypyrovalerone (MDPV)	35
3-Fluoro-N-methylcathinone (3–FMC)	25
3-Methylfentanyl	30
3-Methylthiofentanyl	30
4-Bromo-2,5-dimethoxyamphetamine (DOB)	30
4-Bromo-2,5-dimethoxyphenethylamine (2–CB)	25
4-Chloro-alpha-pyrrolidinovalerophenone (4-chloro-alpha-PVP)	25
1-(4-Cyanobutyl)-N-(2-phenylpropan-2-yl)-1 H-indazole-3-carboximide (4CN-Cumyl-Butinaca)	25
4-Fluoroisobutyryl fentanyl	30
4-Fluoro-N-methylcathinone (4–FMC; Flephedrone)	25
4-Methyl-N-ethylcathinone (4–MEC)	25
4-Methoxyamphetamine	150
4-Methyl-2,5-dimethoxyamphetamine (DOM)	25
4-Methylaminorex	25
4-Methyl-N-methylcathinone (mephedrone)	45
4-Methyl-alpha-ethylaminopentiophenone (4–MEAP)	25
4-Methyl-alpha-pyrrolidinohexiophenone (MPHP)	25
4-Methyl-alpha-pyrrolidinopropiophenone (4-MePPP)	25
5-(1,1-Dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl-phenol	50
5-(1,1-Dimethyloctyl)-2-[(1R,3S)3-hydroxycyclohexyl-phenol (cannabicyclohexanol or CP–47,497 C8-homolog)	40
5F–CUMYL–PINACA	25
5F–EDMB–PINACA	25
5F–MDMB–PICA	25
5F–AB–PINACA; N-(1-amino-3-methyl-1-oxobutan-2-yl)-1-(5-fluoropentyl)-1H-indazole-3-carboxamide	25
5F–CUMYL–P7AICA; (1-(5-fluoropentyl)-N-(2-phenylpropan-2-yl)-1H-pyrrolo[2,3-b]pyridine-3-carboximide)	25
5F–ADB; 5F–MDMB–PINACA (methyl 2-(1-(5-fluoropentyl)-1H-indazole-3-carboxamido)-3,3-dimethylbutanoate)	30
5F–AMB (methyl 2-(1-(5-fluoropentyl)-1*H*-indazole-3-carboxamido)-3-methylbutanoate)	30
5F–APINACA; 5F–AKB48 (*N*-(adamantan-1-yl)-1-(5-fluoropentyl)-1H-indazole-3-carboxamide)	30
5-Fluoro-PB–22; 5F–PB–22	20
5-Fluoro-UR144, XLR11 ([1-(5-fluoro-pentyl)-1*H*-indol-3-yl](2,2,3,3-tetramethylcyclopropyl)methanone	25
5-Methoxy-3,4-methylenedioxyamphetamine	25
5-Methoxy-N,N-diisopropyltryptamine	25
5-Methoxy-N,N-dimethyltryptamine	35
AB–CHMINACA	30
AB–FUBINACA	50
AB–PINACA	30
ADB–FUBINACA (N-(1-amino-3,3-dimethyl-1-oxobutan-2-yl)-1-(4-fluorobenzyl)-1H-indazole-3-carboxamide)	30
Acetorphine	25
Acetyl Fentanyl	100
Acetyl-alpha-methylfentanyl	30
Acetyldihydrocodeine	30
Acetylmethadol	25
Acryl Fentanyl	25
ADB–PINACA (N-(1-amino-3,3-dimethyl-1-oxobutan-2-yl)-1-pentyl-1H-indazole-3-carboxamide)	50
AH–7921	30
All other tetrahydrocannabinols	1,000
Allylprodine	25
Alphacetylmethadol	25
Alpha-Ethyltryptamine	25
Alphameprodine	25
Alphamethadol	25
Alphaprodine	25

Basic class	Final 2021 quotas (g)
Alpha-Methylfentanyl	30
Alpha-Methylthiofentanyl	30
Alpha-Methyltryptamine (AMT)	25
Alpha-Pyrrolidinobutiophenone (α-PBP)	25
Alpha-Pyrrolidinoheptaphenone (PV8)	25
Alpha-Pyrrolidinohexanophenone (α-PHP)	25
Alpha-Pyrrolidinopentiophenone (α-PVP)	25
Aminorex	25
Anileridine	20
APINACA, AKB48 (*N*-(1-adamantyl)-1-pentyl-1*H*-indazole-3-carboxamide)	25
Benzethidine	25
Benzylmorphine	30
Betacetylmethadol	25
Beta-Hydroxy-3-methylfentanyl	30
Beta-Hydroxyfentanyl	30
Beta-Hydroxythiofentanyl	30
Betameprodine	25
Betamethadol	4
Betaprodine	25
Bufotenine	15
Butylone	25
Butyryl fentanyl	30
Cathinone	40
Clonitazene	25
Codeine methylbromide	30
Codeine-N-oxide	192
Crotonyl fentanyl	25
Cyclopentyl Fentanyl	30
Cyclopropyl Fentanyl	20
Cyprenorphine	25
Delta 9–THC	384,460
Desomorphine	25
Dextromoramide	25
Diampromide	20
Diethylthiambutene	20
Diethyltryptamine	25
Difenoxin	9,200
Dihydromorphine	753,500
Dimenoxadol	25
Dimepheptanol	25
Dimethylthiambutene	20
Dimethyltryptamine	50
Dioxaphetyl butyrate	25
Dipipanone	25
Drotebanol	25
Ethylmethylthiambutene	25
Ethylone	25
Etonitazene	25
Etorphine	30
Etoxeridine	25
Fenethylline	30
Fentanyl related substances	600
FUB–144	25
FUB–AKB48	25
FUB–AMB, MMB-Fubinaca, AMB-Fubinaca	25
Furanyl fentanyl	30
Furethidine	25
Gamma Hydroxybutyric Acid	29,417,000
Heroin	45
Hydromorphinol	40
Hydroxypethidine	25
Ibogaine	30
Isobutyryl Fentanyl	25
Isotonitazene	25
JWH–018 and AM678 (1-Pentyl-3-(1-naphthoyl)indole)	35
JWH–019 (1-Hexyl-3-(1-naphthoyl)indole)	45
JWH–073 (1-Butyl-3-(1-naphthoyl)indole)	45
JWH–081 (1-Pentyl-3-(1-(4-methoxynaphthoyl)indole)	30
JWH–122 (1-Pentyl-3-(4-methyl-1-naphthoyl)indole)	30
JWH–200 (1-[2-(4-Morpholinyl)ethyl]-3-(1-naphthoyl)indole)	35
JWH–203 (1-Pentyl-3-(2-chlorophenylacetyl)indole)	30
JWH–250 (1-Pentyl-3-(2-methoxyphenylacetyl)indole)	30
JWH–398 (1-Pentyl-3-(4-chloro-1-naphthoyl)indole)	30

Basic class	Final 2021 quotas (g)
Ketobemidone	30
Levomoramide	25
Levophenacylmorphan	25
Lysergic acid diethylamide (LSD)	40
MAB–CHMINACA; ADB–CHMINACA (*N*-(1-amino-3,3-dimethyl-1-oxobutan-2-yl)-1-(cyclohexylmethyl)-1*H*-indazole-3-carboxamide)	30
MDMB–CHMICA; MMB–CHMINACA(methyl 2-(1-(cyclohexylmethyl)-1*H*-indole-3-carboxamido)-3,3-dimethylbutanoate)	30
MDMB–FUBINACA (methyl 2-(1-(4-fluorobenzyl)-1H-indazole-3-carboxamido)-3,3-dimethylbutanoate)	30
MMB–CHMICA (AMB–CHMICA); Methyl-2-(1-(cyclohexylmethyl)-1H-indole-3-carboxamido)-3-methylbutanoate	25
Marihuana	1,500,000
Marihuana extract	200,000
Mecloqualone	30
Mescaline	25
Methaqualone	60
Methcathinone	25
Methoxyacetyl fentanyl	30
Methyldesorphine	5
Methyldihydromorphine	25
Morpheridine	25
Morphine methylbromide	5
Morphine methylsulfonate	5
Morphine-N-oxide	150
MT–45	30
Myrophine	25
NM2201; Naphthalen-1-yl 1-(5-fluoropentyl)-1H-indole-3-carboxylate	25
N,N-Dimethylamphetamine	25
Naphyrone	25
N-Ethyl-1-phenylcyclohexylamine	25
N-Ethyl-3-piperidyl benzilate	10
N-Ethylamphetamine	24
N-Ethylhexedrone	25
N-Ethylpentylone, ephylone	30
N-Hydroxy-3,4-methylenedioxyamphetamine	24
N-Methyl-3-Piperidyl Benzilate	30
Nicocodeine	25
Nicomorphine	25
Noracymethadol	25
Norlevorphanol	2,550
Normethadone	25
Normorphine	40
Norpipanone	25
Ocfentanil	25
Ortho-fluorofentanyl, 2-fluorofentanyl	30
Para-chloroisobutyryl fentanyl	30
Para-fluorofentanyl	25
Para-fluorobutyryl fentanyl	25
Para-methoxybutyryl fentanyl	30
Parahexyl	5
PB–22; QUPIC	20
Pentedrone	25
Pentylone	25
Phenadoxone	25
Phenampromide	25
Phenomorphan	25
Phenoperidine	25
Pholcodine	5
Piritramide	25
Proheptazine	25
Properidine	25
Propiram	25
Psilocybin	30
Psilocyn	50
Racemoramide	25
SR–18 and RCS–8 (1-Cyclohexylethyl-3-(2-methoxyphenylacetyl)indole)	45
SR–19 and RCS–4 (1-Pentyl-3-[(4-methoxy)-benzoyl]indole)	30
Tetrahydrofuranyl fentanyl	15
Thebacon	25
Thiafentanil	25
Thiofentanyl	25
THJ–2201 ([1-(5-fluoropentyl)-1H-indazol-3-yl](naphthalen-1-yl)methanone)	30
Tilidine	25
Trimeperidine	25
UR–144 (1-pentyl-1H-indol-3-yl)(2,2,3,3-tetramethylcyclopropyl)methanone	25

Basic class	Final 2021 quotas (g)
U–47700	30
Valeryl fentanyl	25
Schedule II	
1-Phenylcyclohexylamine	15
1-Piperidinocyclohexanecarbonitrile	25
4-Anilino-N-phenethyl-4-piperidine (ANPP)	937,758
Alfentanil	3,260
Alphaprodine	25
Amobarbital	20,100
Bezitramide	25
Carfentanil	20
Cocaine	68,576
Codeine (for conversion)	1,612,500
Codeine (for sale)	27,616,684
D-amphetamine (for sale)	21,200,000
D-amphetamine (for conversion)	14,137,578
D-methamphetamine (for conversion)	485,02
D-methamphetamine (for sale)	40,000
D,L-amphetamine	21,200,000
D,L-methamphetamine	50
Dextropropoxyphene	35
Dihydrocodeine	156,713
Dihydroetorphine	25
Diphenoxylate (for conversion)	14,100
Diphenoxylate (for sale)	770,800
Ecgonine	68,576
Ethylmorphine	30
Etorphine hydrochloride	32
Fentanyl	731,452
Glutethimide	25
Hydrocodone (for conversion)	1,250
Hydrocodone (for sale)	30,821,224
Hydromorphone	2,827,940
Isomethadone	30
L-amphetamine	30
L-methamphetamine	587,229
Levo-alphacetylmethadol (LAAM)	25
Levomethorphan	30
Levorphanol	26,495
Lisdexamfetamine	21,000,000
Meperidine	856,695
Meperidine Intermediate-A	30
Meperidine Intermediate-B	30
Meperidine Intermediate-C	30
Metazocine	15
Methadone (for sale)	25,619,700
Methadone Intermediate	27,673,600
Methylphenidate	57,438,334
Metopon	25
Moramide-intermediate	25
Morphine (for conversion)	3,376,696
Morphine (for sale)	27,784,062
Nabilone	62,000
Norfentanyl	25
Noroxymorphone (for conversion)	22,044,741
Noroxymorphone (for sale)	376,000
Opium (powder)	250,000
Opium (tincture)	530,837
Oripavine	33,010,750
Oxycodone (for conversion)	620,887
Oxycodone (for sale)	57,110,032
Oxymorphone (for conversion)	28,204,371
Oxymorphone (for sale)	563,174
Pentobarbital	25,850,000
Phenazocine	25
Phencyclidine	35
Phenmetrazine	25
Phenylacetone	40
Piminodine	25
Racemethorphan	5
Racemorphan	5

Basic class	Final 2021 quotas (g)
Remifentanil	3,000
Secobarbital	172,100
Sufentanil	4,000
Tapentadol	13,447,541
Thebaine	57,137,944
List I Chemicals	
Ephedrine (for conversion)	100
Ephedrine (for sale)	4,136,000
Phenylpropanolamine (for conversion)	14,878,320
Phenylpropanolamine (for sale)	16,690,000
Pseudoephedrine (for conversion)	1,000
Pseudoephedrine (for sale)	174,246,000

The Administrator also establishes APQ for all other schedule I and II controlled substances included in 21 CFR 1308.11 and 1308.12 at zero. In accordance with 21 CFR 1303.13 and 21 CFR 1315.13, upon consideration of the relevant factors, the Administrator may adjust the 2021 APQ and AAN as needed.

Timothy J. Shea,

Acting Administrator.

[FR Doc. 2020–26289 Filed 11–27–20; 8:45 am]

BILLING CODE 4410–09–P

NATIONAL SECURITY COMMISSION ON ARTIFICIAL INTELLIGENCE

[Docket No. 11–2020–01]

National Security Commission on Artificial Intelligence; Notice of Federal Advisory Committee Meeting

AGENCY: National Security Commission on Artificial Intelligence.

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The National Security Commission on Artificial Intelligence (the ''Commission'') is publishing this notice to announce the following asynchronous Federal Advisory Committee meeting and paper review process. The meeting will be closed to the public.

DATES: Closed to the public, December 15, 2020 to February 14, 2021.

FOR FURTHER INFORMATION CONTACT: Ms. Angela Ponmakha, 703–614–6379 (Voice), *nscai-dfo@nscai.gov. Mailing address:* Designated Federal Officer, National Security Commission on Artificial Intelligence, 2530 Crystal Drive, Box 45, Arlington, VA 22202. *website: https://www.nscai.gov.*

SUPPLEMENTARY INFORMATION: The meeting and paper review process are being held under the provisions of the Federal Advisory Committee Act (FACA) (5 U.S.C., Appendix), the Government in the Sunshine Act (5 U.S.C. 552b), and 41 CFR 102–3.140 and 102–3.150.

Purpose of the Meeting: The John S. McCain National Defense Authorization Act for Fiscal Year 2019 (FY19 NDAA), Sec. 1051, Public Law 115–232, 132 Stat. 1636, 1962–65 (2018), created the Commission to ''consider the methods and means necessary to advance the development of artificial intelligence, machine learning, and associated technologies by the United States to comprehensively address the national security and defense needs of the United States.'' The Commission will consider potential recommendations to Congress and the Executive Branch. According to the FY19 NDAA, the Commission ''may include a classified annex.''

Agenda: Due to the restrictions on in-person meetings imposed by the COVID–19 pandemic—including travel, social distancing, and other factors—the Commission will hold an asynchronous Federal Advisory Committee meeting beginning on or about December 15, 2020 and ending on or about February 14, 2020. For the asynchronous meeting, individual commissioners or small groups of commissioners will meet with Commission staff during this period of time to discuss and deliberate specifically on the Commission's draft classified annex. The Designated Federal Officer, Ms. Angela Ponmakha, or an alternate designated federal officer will convene and conclude all such meetings. Due to the restrictions from the COVID–19 pandemic, Commissioners may also deliberate and vote on the classified annex through a paper approval process managed by the Designated Federal Officer and relevant Commission staff. All materials and discussions in the asynchronous meeting and paper approval process will be classified.

Meeting Accessibility: In accordance with Section 10(d) of the FACA, NSCAI has determined the series of meetings and paper approval process will be closed to the public. Specifically, the Commission's Committee Management Officer, in consultation with the General Services Administration's Secretariat and Office of General Counsel, has determined in writing that the meetings will be closed to the public because they will consider matters covered by 5 U.S.C. 552b(c)(1). The determination is because it is expected that discussions throughout the course of the asynchronous meeting and the paper approval process will involve classified matters of national security concern. Such classified material is so intertwined with the unclassified material that it cannot be reasonably segregated into separate discussions without defeating the effectiveness and meaning of the overall meetings. To permit the meeting to be open to the public would preclude discussion of such matters and would greatly diminish the ultimate utility of the Commission's findings and recommendations to the Congress and the President.

Written Statements: Written comments may be submitted to the Commission at any time regarding its mission or in response to the stated agenda of planned meetings via email to: *nscai-dfo@nscai.gov* in either Adobe Acrobat or Microsoft Word format. The DFO will compile all written submissions and provide them to the Commissioners for consideration. Please note that all submitted comments will be treated as public documents and will be made available for public inspection, including, but not limited to, being posted on the Commission's website.

Dated: November 24, 2020.

Michael Gable,

Chief of Staff.

[FR Doc. 2020–26365 Filed 11–27–20; 8:45 am]

BILLING CODE 3610–Y8–P

NUCLEAR REGULATORY COMMISSION

[NRC–2020–0132]

Environmental Assessments and Findings of No Significant Impacts of Independent Spent Fuel Storage Facilities Decommissioning Funding Plans

AGENCY: Nuclear Regulatory Commission.

ACTION: Environmental assessment and finding of no significant impacts; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is publishing this notice regarding the issuance of a Final Environmental Assessment (EA) and a Finding of No Significant Impacts (FONSI) for its review and approval of the initial and updated decommissioning funding plans submitted by independent spent fuel storage installation (ISFSI) licensees for the ISFSIs listed in the ''Discussion'' section of this document.

DATES: November 30, 2020.

ADDRESSES: Please refer to Docket ID NRC–2020–0132 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–2020–0132. Address questions about Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* 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.
- *Attention:* The PDR, where you may examine and order copies of public documents is currently closed. You may submit your request to the PDR via email at *PDR.Resource@nrc.gov* or call 1–800–397–4209 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Donald Habib, telephone: 301–415–1035, email: *Donald.Habib@nrc.gov* or Bernard White, telephone: 301–415–6577, email: *Bernie.White@nrc.gov.* Both are staff of the Office of Nuclear Material Safety and Safeguards at the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is considering the approval of the initial and updated decommissioning funding plans (DFPs) submitted by ISFSI licensees. The NRC staff has prepared a Final EA and FONSI determination for each of the initial and updated ISFSI DFPs in accordance with the NRC regulations in part 51 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions,'' which implement the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*).

The NRC requires its licensees to plan for the eventual decommissioning of their licensed facilities prior to license termination. On June 17, 2011, the NRC published a final rule in the **Federal Register** amending its decommissioning planning regulations (76 FR 35511). The final rule amended the NRC regulation, 10 CFR 72.30, which concerns financial assurance and decommissioning for ISFSIs. This regulation requires each holder of, or applicant for, a license under 10 CFR part 72 to submit a DFP for the NRC's review and approval. The DFP is to demonstrate the licensee's financial assurance, *i.e.,* that funds will be available to decommission the ISFSI.

II. Discussion

The table in this notice includes the plant name, docket number, licensee, and ADAMS Accession Number for the Final EA and FONSI determination for each of the individual ISFSIs. The table also includes the ADAMS Accession Number for other relevant documents, including the initial and updated DFP submittals, as well as the financial analyses documenting the findings of reasonable assurance that funds will be available to decommission the ISFSIs. For further details with respect to these actions, see the NRC staff's Final EA and FONSI determinations and financial analyses approving the DFP, which are available for public inspection in ADAMS and at *https://www.regulations.gov* under Docket ID NRC–2020–0132. For additional direction on accessing information related to this document, see the **ADDRESSES** section of this document.

FINDING OF NO SIGNIFICANT IMPACTS

Arkansas Nuclear One, Units 1 and 2	
Docket No.	72–13.
Licensee	Entergy Operations, Inc., currently Entergy Nuclear Company, LLC (Entergy).
Proposed Action	The NRC's review and approval of Entergy's initial and updated DFPs submitted in accordance with 10 CFR 72.30(b) and (c).
Environmental Impacts of Proposed Action	The NRC staff has determined that the proposed action, the review and approval of Entergy's initial and updated DFPs, submitted in accordance with 10 CFR 72.30(b) and (c), will not authorize changes to licensed operations or maintenance activities, or result in changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of solid waste. Moreover, the approval of the initial and updated DFPs will not authorize any construction activity, facility modification, or other land-disturbing activity. The NRC staff has concluded that the proposed action is a procedural and administrative action that will not have a significant impact on the environment.

FINDING OF NO SIGNIFICANT IMPACTS—Continued

Finding of No Significant Impacts	The proposed action does not require changes to the ISFSI's licensed routine operations, maintenance activities, or monitoring programs, nor does it require new construction or land-disturbing activities. The scope of the proposed action concerns only the NRC's review and approval of Entergy's initial and updated DFPs. The scope of the proposed action does not include, and will not result in, the review and approval of decontamination or decommissioning activities or license termination for the ISFSI or for other parts of Arkansas Nuclear One, Units 1 and 2. Therefore, the NRC staff determined that approval of the initial and updated DFPs for the Arkansas Nuclear ISFSI will not significantly affect the quality of the human environment, and accordingly, the staff has concluded that a FONSI is appropriate. The NRC staff further finds that preparation of an environmental impact statement (EIS) is not required.
Available Documents	Entergy Operations, Inc., 2012. ISFSI Decommissioning Funding Plans (10 CFR 72.30), December 17, 2012. ADAMS Accession No. ML12354A131. Entergy Operations, Inc., 2015. ISFSI Decommissioning Funding Plans (10 CFR 72.30), December 17, 2015. ADAMS Accession No. ML15351A523. Entergy Operations, Inc., 2018. Response to Request for Additional Information Regarding ISFSI Decommissioning Funding Plans (10 CFR 72.30). April 10, 2018. ADAMS Accession No. ML18101A902. U.S. Nuclear Regulatory Commission. Letter to B. Bevill, AR Dept of Health, re: Review of the Draft EA and FONSI for the ANO, Units 1 and 2 ISFSI Decommissioning Funding Plan (72–13) L24819. July 8, 2016. ADAMS Accession No. ML16190A297. U.S. Nuclear Regulatory Commission. Final Environmental Assessment and Finding of No Significant Impacts for Entergy Nuclear Company, LLC 's Initial and Updated Decommissioning Funding Plans Submitted in Accordance with 10 CFR 72.30(b) and (c) for Arkansas Nuclear One, Units 1 and 2 Independent Spent Fuel Storage Installation. November 2020. ADAMS Accession Package No. ML20149K448. U.S. Nuclear Regulatory Commission. Environmental Assessment for Final Rule-Decommissioning Planning. February 1, 2009. ADAMS Accession No. ML090500648. U.S. Nuclear Regulatory Commission. Note to File, Re: ESA Section 7 No Effect Determination for ISFSI DFP Reviews. May 15, 2017. ADAMS Accession No. ML17135A062. U.S. Nuclear Regulatory Commission Analysis of Entergy Services, Inc.'s Initial and Updated Decommissioning Funding Plans for Arkansas Nuclear One, Units 1 and 2; Grand Gulf Nuclear Station, Unit 1; River Bend Station, Unit 1; and Waterford Steam Electric Station, Unit 3 Independent Spent Fuel Storage Installations. November 2020. ADAMS Accession No. ML20267A285.
Grand Gulf Nuclear Station, Unit 1	
Docket No.	72–50.
Licensee	Entergy Operations, Inc., currently Entergy Nuclear Company, LLC (Entergy).
Proposed Action	The NRC's review and approval of Entergy's initial and updated DFPs submitted in accordance with 10 CFR 72.30(b) and (c).
Environmental Impacts of Proposed Action	The NRC staff has determined that the proposed action, the review and approval of Entergy's initial and updated DFPs, submitted in accordance with 10 CFR 72.30(b) and (c), will not authorize or changes to licensed operations or maintenance activities, or result in changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of solid waste. Moreover, the approval of the initial and updated DFPs will not authorize any construction activity, facility modification, or other land-disturbing activity. The NRC staff has concluded that the proposed action is a procedural and administrative action that will not have a significant impact on the environment.
Finding of No Significant Impacts	The proposed action does not require changes to the ISFSI's licensed routine operations, maintenance activities, or monitoring programs, nor does it require new construction or land-disturbing activities. The scope of the proposed action concerns only the NRC's review and approval of Entergy's DFPs. The scope of the proposed action does not include, and will not result in, the review and approval of decontamination or decommissioning activities or license termination for the ISFSI or for other parts of Grand Gulf Nuclear Station. Therefore, the NRC staff determined that approval of the initial and updated DFPs for the Grand Gulf ISFSI will not significantly affect the quality of the human environment, and accordingly, the staff has concluded that a FONSI is appropriate. The NRC staff further finds that preparation of an environmental impact statement (EIS) is not required.
Available Documents	Entergy Operations, Inc., 2012. ISFSI Decommissioning Funding Plans (10 CFR 72.30), December 17, 2012. ADAMS Accession No. ML12354A131. Entergy Operations, Inc., 2015. ISFSI Decommissioning Funding Plans (10 CFR 72.30), December 17, 2015. ADAMS Accession No. ML15351A523. Entergy Operations, Inc., 2018. Response to Request for Additional Information Regarding ISFSI Decommissioning Funding Plans (10 CFR 72.30). April 10, 2018. ADAMS Accession No. ML18101A902. U.S. Nuclear Regulatory Commission. Letter to J. Giarrusso, Jr. re: U.S. Nuclear Regulatory Commission Preliminary Determination of No Effects Regarding the Grand Gulf Nuclear Station Independent Spent Fuel Storage Installation Decommissioning Funding Plan. September 2, 2016. ADAMS Accession No. ML16250A460. U.S. Nuclear Regulatory Commission. Final Environmental Assessment and Finding of No Significant Impacts for Entergy Nuclear Company, LLC's Initial and Updated Decommissioning Funding Plans Submitted in Accordance with 10 CFR 72.30(b) and (c) for Grand Gulf Nuclear Station Independent Spent Fuel Storage Installation. November 2020. ADAMS Accession Package No. ML20150A262. U.S. Nuclear Regulatory Commission. Environmental Assessment for Final Rule-Decommissioning Planning. February 1, 2009. ADAMS Accession No. ML090500648. U.S. Nuclear Regulatory Commission. Note to File, Re: ESA Section 7 No Effect Determination for ISFSI DFP Reviews. May 15, 2017. ADAMS Accession No. ML17135A062. U.S. Nuclear Regulatory Commission Analysis of Entergy Services, Inc.'s Initial and Updated Decommissioning Funding Plans for Arkansas Nuclear One, Units 1 and 2; Grand Gulf Nuclear Station, Unit 1; River Bend Station, Unit 1; and Waterford Steam Electric Station, Unit 3 Independent Spent Fuel Storage Installations. November 2020. ADAMS Accession No. ML20267A285.
River Bend Station, Unit 1	
Docket No.	72–49.
Licensee	Entergy Operations, Inc., currently Entergy Nuclear Company, LLC (Entergy),
Proposed Action	The NRC's review and approval of Entergy's initial and updated DFPs submitted in accordance with 10 CFR 72.30(b) and (c).

FINDING OF NO SIGNIFICANT IMPACTS—Continued

Environmental Impacts of Proposed Action	The NRC staff has determined that the proposed action, the review and approval of Entergy's initial and updated DFPs, submitted in accordance with 10 CFR 72.30(b) and (c), will not authorize changes to licensed operations or maintenance activities, or result in changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of solid waste. Moreover, the approval of the initial and updated DFPs will not authorize any construction activity, facility modification, or other land-disturbing activity. The NRC staff has concluded that the proposed action is a procedural and administrative action that will not have a significant impact on the environment.
Finding of No Significant Impacts	The proposed action does not require changes to the ISFSI's licensed routine operations, maintenance activities, or monitoring programs, nor does it require new construction or land-disturbing activities. The scope of the proposed action concerns only the NRC's review and approval of Entergy's initial and updated DFPs. The scope of the proposed action does not include, and will not result in, the review and approval of decontamination or decommissioning activities or license termination for the ISFSI or for other parts of River Bend Station, Unit 1 site. Therefore, the NRC staff determined that approval of the initial and updated DFPs for the River Bend ISFSI will not significantly affect the quality of the human environment, and accordingly, the staff has concluded that a FONSI is appropriate. The NRC staff further finds that preparation of an environmental impact statement (EIS) is not required.
Available Documents	Entergy Operations, Inc., 2012. ISFSI Decommissioning Funding Plans (10 CFR 72.30), December 17, 2012. ADAMS Accession No. ML12354A131. Entergy Operations, Inc., 2015. ISFSI Decommissioning Funding Plans (10 CFR 72.30), December 17, 2015. ADAMS Accession No. ML15351A523. Entergy Operations, Inc., 2018. Response to Request for Additional Information Regarding ISFSI Decommissioning Funding Plans (10 CFR 72.30). April 10, 2018. ADAMS Accession No. ML18101A902. U.S. Nuclear Regulatory Commission. Letter to R. Blackwell. re: Review of the Draft Environmental Assessment and Finding of No Significant Impact for the River Bend Station Independent Spent Fuel Storage Installation Decommissioning Funding Plan. August 17, 2017. ADAMS Accession No. ML17226A187. U.S. Nuclear Regulatory Commission. Final Environmental Assessment and Finding of No Significant Impacts for Entergy Nuclear Company, LLC's Initial and Updated Decommissioning Funding Plans Submitted in Accordance with 10 CFR 72.30(b) and (c) for River Bend Station, Unit 1 Independent Spent Fuel Storage Installation. November 2020. ADAMS Accession Package No. ML20150A266. U.S. Nuclear Regulatory Commission. Environmental Assessment for Final Rule-Decommissioning Planning. February 1, 2009. ADAMS Accession No. ML090500648. U.S. Nuclear Regulatory Commission. Note to File, Re: ESA Section 7 No Effect Determination for ISFSI DFP Reviews. May 15, 2017. ADAMS Accession No. ML17135A062. U.S. Nuclear Regulatory Commission Analysis of Entergy Services, Inc.'s Initial and Updated Decommissioning Funding Plans for Arkansas Nuclear One, Units 1 and 2; Grand Gulf Nuclear Station, Unit 1; River Bend Station, Unit 1; and Waterford Steam Electric Station, Unit 3 Independent Spent Fuel Storage Installations. November 2020. ADAMS Accession No. ML20267A285.
Waterford Steam Electric Station, Unit 3	
Docket No.	72–75.
Licensee	Entergy Operations, Inc., currently Entergy Nuclear Company, LLC (Entergy).
Proposed Action	The NRC's review and approval of Entergy's initial and updated DFPs submitted in accordance with 10 CFR 72.30(b) and (c).
Environmental Impacts of Proposed Action	The NRC staff has determined that the proposed action, the review and approval of Entergy's initial and updated DFPs, submitted in accordance with 10 CFR 72.30(b) and (c), will not authorize changes to licensed operations or maintenance activities, or result in changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of solid waste. Moreover, the approval of the initial and updated DFPs will not authorize any construction activity, facility modification, or other land-disturbing activity. The NRC staff has concluded that the proposed action is a procedural and administrative action that will not have a significant impact on the environment.
Finding of No Significant Impacts	The proposed action does not require changes to the ISFSI's licensed routine operations, maintenance activities, or monitoring programs, nor does it require new construction or land-disturbing activities. The scope of the proposed action concerns only the NRC's review and approval of Entergy's initial and updated DFPs. The scope of the proposed action does not include, and will not result in, the review and approval of decontamination or decommissioning activities or license termination for the ISFSI or for other parts of Waterford Steam Electric Station Unit 3. Therefore, the NRC staff determined that approval of the initial and updated DFPs for the Waterford Steam Electric Station ISFSI will not significantly affect the quality of the human environment, and accordingly, the staff has concluded that a FONSI is appropriate. The NRC staff further finds that preparation of an environmental impact statement (EIS) is not required.
Available Documents	Entergy Operations, Inc., 2012. ISFSI Decommissioning Funding Plans (10 CFR 72.30), December 17, 2012. ADAMS Accession No. ML12354A131. Entergy Operations, Inc., 2015. ISFSI Decommissioning Funding Plans (10 CFR 72.30), December 17, 2015. ADAMS Accession No. ML15351A523. Entergy Operations, Inc., 2018. Response to Request for Additional Information Regarding ISFSI Decommissioning Funding Plans (10 CFR 72.30). April 10, 2018. ADAMS Accession No. ML18101A902. U.S. Nuclear Regulatory Commission. Letter to R. Blackwell re: Review of the Draft Environmental Assessment and Finding of No Significant Impact for the Waterford Independent Spent Fuel Storage Installation Decommissioning Funding Plan. August 17, 2017. ADAMS Accession No. ML17227A045. U.S. Nuclear Regulatory Commission. Final Environmental Assessment and Finding of No Significant Impacts for Entergy Nuclear Company, LLC's, Initial and Updated Decommissioning Funding Plans Submitted in Accordance with 10 CFR 72.30(b) and (c) for Waterford Steam Electric Station, Unit 3 Independent Spent Fuel Storage Installation. November 2020. ADAMS Accession Package No. ML20150A271. U.S. Nuclear Regulatory Commission. Environmental Assessment for Final Rule-Decommissioning Planning. February 1, 2009. ADAMS Accession No. ML090500648. U.S. Nuclear Regulatory Commission. Note to File, Re: ESA Section 7 No Effect Determination for ISFSI DFP Reviews. May 15, 2017. ADAMS Accession No. ML17135A062. U.S. Nuclear Regulatory Commission Analysis of Entergy Services, Inc.'s Initial and Updated Decommissioning Funding Plans for Arkansas Nuclear One, Units 1 and 2; Grand Gulf Nuclear Station, Unit 1; River Bend Station, Unit 1; and Waterford Steam Electric Station, Unit 3 Independent Spent Fuel Storage Installations. November 2020. ADAMS Accession No. ML20267A285.

FINDING OF NO SIGNIFICANT IMPACTS—Continued

Braidwood Station, Units 1 and 2	
Docket No.	72–73.
Licensee	Exelon Generation Co., LLC (EGC or Exelon).
Proposed Action	The NRC's review and approval of Exelon's initial and updated DFPs submitted in accordance with 10 CFR 72.30(b) and (c).
Environmental Impacts of Proposed Action	The NRC staff has determined that the proposed action, the review and approval of Exelon's initial and updated DFPs, submitted in accordance with 10 CFR 72.30(b) and (c), will not authorize changes to licensed operations or maintenance activities, or result in changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of solid waste. Moreover, the approval of the initial and updated DFPs will not authorize any construction activity, facility modification, or other land-disturbing activity. The NRC staff has concluded that the proposed action is a procedural and administrative action that will not have a significant impact on the environment.
Finding of No Significant Impacts	The proposed action does not require changes to the ISFSI's licensed routine operations, maintenance activities, or monitoring programs, nor does it require new construction or land-disturbing activities. The scope of the proposed action concerns only the NRC's review and approval of Exelon's initial and updated DFPs. The scope of the proposed action does not include, and will not result in, the review and approval of decontamination or decommissioning activities or license termination for the ISFSI or for other parts of Braidwood Station, Units 1 and 2. Therefore, the NRC staff determined that approval of the initial and updated DFPs for the Braidwood ISFSI will not significantly affect the quality of the human environment, and accordingly, the staff has concluded that a FONSI is appropriate. The NRC staff further finds that preparation of an environmental impact statement (EIS) is not required.
Available Documents	Exelon Generation Company, LLC (EGC), 2012. Proposed Independent Spent Fuel Storage Installation (ISFSI) Decommissioning Funding Plans for Braidwood, Byron, Dresden, LaSalle, Limerick, Oyster Creek, Peach Bottom, Quad Cities, and Salem. December 17, 2012. ADAMS Accession No. ML12353A488. Exelon Generation Company, LLC (EGC), 2015. Report on Status of Decommissioning Funding for Reactors and Independent Spent Fuel Storage Installation. March 31, 2015. ADAMS Accession No. ML15090A537. Exelon Generation Company, LLC (EGC), 2018. Response to Request for Additional Information Regarding Decommissioning Funding Plans for Independent Spent Fuel Storage Installations (ISFSIs). May 2, 2018. ADAMS Accession No. ML18124A197. U.S. Nuclear Regulatory Commission. Letter to J. G. Klinger, Illinois Emergency Management Agency Division of Nuclear Safety, re: Review of the Draft EA and FONSI for the Braidwood, Units 1 and 2 ISFSI Decommissioning Funding Plan (72–73) L24788. June 22, 2016. ADAMS Accession No. ML16174A437. U.S. Nuclear Regulatory Commission. Final Environmental Assessment and Finding of No Significant Impacts for Exelon Generation Company, LLC's Initial and Updated Decommissioning Funding Plans Submitted in Accordance with 10 CFR 72.30(b) and (c) for Braidwood Station, Units 1 and 2 Independent Spent Fuel Storage Installation. November 2020. ADAMS Accession Package No. ML20150A278. U.S. Nuclear Regulatory Commission. Environmental Assessment for Final Rule-Decommissioning Planning. February 1, 2009. ADAMS Accession No. ML090500648. U.S. Nuclear Regulatory Commission. Note to File, Re: ESA Section 7 No Effect Determination for ISFSI DFP Reviews. May 15, 2017. ADAMS Accession No. ML17135A062. U.S. Nuclear Regulatory Commission's Analysis of Exelon Generation Company, LLC.'s Initial Decommissioning Funding Plans and Decommissioning Fund Plan Updates for the Braidwood, Byron, Dresden, LaSalle, Limerick, Oyster Creek, Peach Bottom, Quad Cities and Salem Independent Spent Fuel Storage Installations. November 2020. ADAMS Accession No. ML20279A501.

Byron Station, Units 1 and 2	
Docket No.	72–68.
Licensee	Exelon Generation Co., LLC (EGC or Exelon).
Proposed Action	The NRC's review and approval of Exelon's initial and updated DFPs submitted in accordance with 10 CFR 72.30(b) and (c).
Environmental Impacts of Proposed Action	The NRC staff has determined that the proposed action, the review and approval of Exelon's initial and updated DFPs, submitted in accordance with 10 CFR 72.30(b) and (c), will not authorize changes to licensed operations or maintenance activities, or result in changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of solid waste. Moreover, the approval of the initial and updated DFPs will not authorize any construction activity, facility modification, or other land-disturbing activity. The NRC staff has concluded that the proposed action is a procedural and administrative action that will not have a significant impact on the environment.
Finding of No Significant Impacts	The proposed action does not require changes to the ISFSI's licensed routine operations, maintenance activities, or monitoring programs, nor does it require new construction or land-disturbing activities. The scope of the proposed action concerns only the NRC's review and approval of Exelon's initial and updated DFPs. The scope of the proposed action does not include, and will not result in, the review and approval of decontamination or decommissioning activities or license termination for the ISFSI or for other parts of Byron [Station], Units 1 and 2. Therefore, the NRC staff determined that approval of the initial and updated DFPs for the Byron ISFSI will not significantly affect the quality of the human environment, and accordingly, the staff has concluded that a FONSI is appropriate. The NRC staff further finds that preparation of an environmental impact statement (EIS) is not required.
Available Documents	Exelon Generation Company, LLC (EGC), 2012. Proposed Independent Spent Fuel Storage Installation (ISFSI) Decommissioning Funding Plans for Braidwood, Byron, Dresden, LaSalle, Limerick, Oyster Creek, Peach Bottom, Quad Cities, and Salem. December 17, 2012. ADAMS Accession No. ML12353A488. Exelon Generation Company, LLC (EGC), 2015. Report on Status of Decommissioning Funding for Reactors and Independent Spent Fuel Storage Installation. March 31, 2015. ADAMS Accession No. ML15090A537. Exelon Generation Company, LLC (EGC), 2018. Response to Request for Additional Information Regarding Decommissioning Funding Plans for Independent Spent Fuel Storage Installations (ISFSIs). May 2, 2018. ADAMS Accession No. ML18124A197. U.S. Nuclear Regulatory Commission. Letter to J. G. Klinger, Illinois Emergency Management Agency Division of Nuclear Safety, re: Review of the Draft EA and FONSI for the Byron, Units 1 and 2 ISFSI Decommissioning Funding Plan (72–68) L24789. June 23, 2016. ADAMS Accession No. ML16174A020. U.S. Nuclear Regulatory Commission. Final Environmental Assessment and Finding of No Significant Impacts for Exelon Generation Company, LLC's Initial and Updated Decommissioning Funding Plans Submitted in Accordance with 10 CFR 72.30(b) and (c) for Byron Station, Units 1 and 2 Independent Spent Fuel Storage Installation. November 2020. ADAMS Accession Package No. ML20150A274.

FINDING OF NO SIGNIFICANT IMPACTS—Continued

	U.S. Nuclear Regulatory Commission. Environmental Assessment for Final Rule-Decommissioning Planning. February 1, 2009. ADAMS Accession No. ML090500648. U.S. Nuclear Regulatory Commission. Note to File, Re: ESA Section 7 No Effect Determination for ISFSI DFP Reviews. May 15, 2017. ADAMS Accession No. ML17135A062. U.S. Nuclear Regulatory Commission's Analysis of Exelon Generation Company, LLC's Initial Decommissioning Funding Plans and Decommissioning Fund Plan Updates for the Braidwood, Byron, Dresden, LaSalle, Limerick, Oyster Creek, Peach Bottom, Quad Cities and Salem Independent Spent Fuel Storage Installations. November 2020. ADAMS Accession No. ML20279A501.
Calvert Cliffs Nuclear Power Plant, Units 1 and 2	
Docket No.	72–08.
Licensee	Exelon Generation Co., LLC (EGC or Exelon) and Constellation Energy Nuclear Group, LLC (CENG).
Proposed Action	The NRC's review and approval of CENG's initial and Exelon's updated DFPs submitted in accordance with 10 CFR 72.30(b) and (c).
Environmental Impacts of Proposed Action	The NRC staff has determined that the proposed action, the review and approval of CENG's initial and Exelon's updated DFPs, submitted in accordance with 10 CFR 72.30(b) and (c), will not authorize changes to licensed operations or maintenance activities, or result in changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of solid waste. Moreover, the approval of the initial and updated DFPs will not authorize any construction activity, facility modification, or other land-disturbing activity. The NRC staff has concluded that the proposed action is a procedural and administrative action that will not have a significant impact on the environment.
Finding of No Significant Impacts	The proposed action does not require changes to the ISFSI's licensed routine operations, maintenance activities, or monitoring programs, nor does it require new construction or land-disturbing activities. The scope of the proposed action concerns only the NRC's review and approval of CENG's initial and Exelon's updated DFPs. The scope of the proposed action does not include, and will not result in, the review and approval of decontamination or decommissioning activities or license termination for the ISFSI or for other parts of Calvert Cliffs Nuclear Power Plant, Units 1 and 2. Therefore, the NRC staff determined that approval of CENG's initial and Exelon's updated DFPs for the Calvert Cliffs ISFSI will not significantly affect the quality of the human environment, and accordingly, the staff has concluded that a FONSI is appropriate. The NRC staff further finds that preparation of an environmental impact statement (EIS) is not required.
Available Documents	Exelon Generation Company, LLC (EGC), 2012. Proposed Independent Spent Fuel Storage Installation (ISFSI) Decommissioning Funding Plans for Braidwood, Byron, Dresden, LaSalle, Limerick, Oyster Creek, Peach Bottom, Quad Cities, and Salem. December 17, 2012. ADAMS Accession No. ML12353A488. Exelon Generation Company, LLC (EGC), 2015. Report on Status of Decommissioning Funding for Reactors and Independent Spent Fuel Storage Installation. March 31, 2015. ADAMS Accession No. ML15090A537. Exelon Generation Company, LLC (EGC), 2018. Response to Request for Additional Information Regarding Decommissioning Funding Plans for Independent Spent Fuel Storage Installations (ISFSIs). May 2, 2018. ADAMS Accession No. ML18124A197. U.S. Nuclear Regulatory Commission. Letter to T. Levering, Maryland Department of Environment, re: Review of the Draft EA and FONSI for the Calvert Cliffs Nuclear Power Plant, Units 1 and 2 ISFSI Decommissioning Funding Plan (72–08) L24809. July 8, 2016. ADAMS Accession No. ML16190A351. U.S. Nuclear Regulatory Commission. Final Environmental Assessment and Finding of No Significant Impacts for Constellation Energy Nuclear Group, LLC's Initial and Exelon Generation Company, LLC's Updated Decommissioning Funding Plans Submitted in Accordance with 10 CFR 72.30(b) and (c) for Calvert Cliffs Nuclear Power Plants, Units 1 and 2 Independent Spent Fuel Storage Installation. November 2020. ADAMS Accession Package No. ML20150A274. U.S. Nuclear Regulatory Commission. Environmental Assessment for Final Rule-Decommissioning Planning. February 1, 2009. ADAMS Accession No. ML090500648. U.S. Nuclear Regulatory Commission. Note to File, Re: ESA Section 7 No Effect Determination for ISFSI DFP Reviews. May 15, 2017. ADAMS Accession No. ML17135A062. U.S. Nuclear Regulatory Commission's Analysis of Constellation Energy Nuclear Group, LLC.'s Initial Decommissioning Funding Plans and Exelon Generation Company, LLC's Decommissioning Fund Updates for the Calvert Cliffs, Nine Mile Point, and R.E. Ginna Independent Spent Fuel Storage Installations. October 2020. ADAMS Accession No. ML20279A586.
Clinton Power Station, Unit 1	
Docket No.	72–1046.
Licensee	Exelon Generation Co., LLC (ECG or Exelon).
Proposed Action	The NRC's review and approval of Exelon initial DFP submitted in accordance with 10 CFR 72.30(b).
Environmental Impacts of Proposed Action	The NRC staff has determined that the proposed action, the review and approval of Exelon's initial DFP, submitted in accordance with 10 CFR 72.30(b), will not authorize changes to licensed operations or maintenance activities, or result in changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of solid waste. Moreover, the approval of the initial DFP will not authorize any construction activity, facility modification, or other land-disturbing activity. The NRC staff has concluded that the proposed action is a procedural and administrative action that will not have a significant impact on the environment.
Finding of No Significant Impacts	The proposed action does not require changes to the ISFSI's licensed routine operations, maintenance activities, or monitoring programs, nor does it require new construction or land-disturbing activities. The scope of the proposed action concerns only the NRC's review and approval of Exelon's initial DFP. The scope of the proposed action does not include, and will not result in, the review and approval of decontamination or decommissioning activities or license termination for the ISFSI or for other parts of Clinton Power Station, Unit 1. Therefore, the NRC staff determined that approval of the initial DFP for the Clinton ISFSI will not significantly affect the quality of the human environment, and accordingly, the staff has concluded that a FONSI is appropriate. The NRC staff further finds that preparation of an environmental impact statement (EIS) is not required.
Available Documents	Exelon Generation Company, LLC (EGC), 2015. Report on Status of Decommissioning Funding for Reactors and Independent Spent Fuel Storage Installation. March 31, 2015. ADAMS Accession No. ML15090A537. EGC, 2016. Proposed Independent Spent Fuel Storage Installation (ISFSI) Decommissioning Funding Plans for Clinton Power Station. September 6, 2016. ADAMS Accession No. ML16251A032. Exelon Generation Company, LLC (EGC), 2018. Response to Request for Additional Information Regarding Decommissioning Funding Plans for Independent Spent Fuel Storage Installations (ISFSIs). May 2, 2018. ADAMS Accession No. ML18124A197.

FINDING OF NO SIGNIFICANT IMPACTS—Continued

	U.S. Nuclear Regulatory Commission. Letter to J. G. Klinger, Illinois Emergency Management Agency Division of Nuclear Safety, re: Review of the Draft EA and FONSI for the Clinton Power Station, Unit 1 ISFSI Decommissioning Funding Plan (72–1046) L25216. June 16, 2017. ADAMS Accession No. ML17167A007. U.S. Nuclear Regulatory Commission. Final Environmental Assessment and Finding of No Significant Impacts for Exelon Generation Company, LLC's Initial Decommissioning Funding Plan Submitted in Accordance with 10 CFR 72.30(b) for Clinton Power Station, Unit 1 Independent Spent Fuel Storage Installation. October 2020. ADAMS Accession Package No. ML20212L744. U.S. Nuclear Regulatory Commission. Environmental Assessment for Final Rule-Decommissioning Planning. February 1, 2009. ADAMS Accession No. ML090500648. U.S. Nuclear Regulatory Commission. Note to File, Re: ESA Section 7 No Effect Determination for ISFSI DFP Reviews. May 15, 2017. ADAMS Accession No. ML17135A062. U.S. Nuclear Regulatory Commission's Analysis of Exelon Generation Company, LLC's Initial Decommissioning Funding Plan for Clinton Power Station, Unit 1 Independent Spent Fuel Storage Installation. October 2020. ADAMS Accession No. ML20260H376.
Dresden Nuclear Power Station, Units 1, 2, and 3	
Docket No.	72–37.
Licensee	Exelon Generation Co., LLC (EGC or Exelon).
Proposed Action	The NRC's review and approval of Exelon's initial and updated DFPs submitted in accordance with 10 CFR 72.30(b) and (c).
Environmental Impacts of Proposed Action	The NRC staff has determined that the proposed action, the review and approval of Exelon's initial and updated DFPs, submitted in accordance with 10 CFR 72.30(b) and (c), will not authorize changes to licensed operations or maintenance activities, or result in changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of solid waste. Moreover, the approval of the initial and updated DFPs will not authorize any construction activity, facility modification, or other land-disturbing activity. The NRC staff has concluded that the proposed action is a procedural and administrative action that will not have a significant impact on the environment.
Finding of No Significant Impacts	The proposed action does not require changes to the ISFSI's licensed routine operations, maintenance activities, or monitoring programs, nor does it require new construction or land-disturbing activities. The scope of the proposed action concerns only the NRC's review and approval of Exelon's initial and updated DFPs. The scope of the proposed action does not include, and will not result in, the review and approval of decontamination or decommissioning activities or license termination for the ISFSI or for other parts of Dresden Nuclear Power Station, Units 1, 2, and 3. Therefore, the NRC staff determined that approval of the initial and updated DFPs for the Dresden ISFSI will not significantly affect the quality of the human environment, and accordingly, the staff has concluded that a FONSI is appropriate. The NRC staff further finds that preparation of an environmental impact statement (EIS) is not required.
Available Documents	Exelon Generation Company, LLC (EGC), 2012. Proposed Independent Spent Fuel Storage Installation (ISFSI) Decommissioning Funding Plans for Braidwood, Byron, Dresden, LaSalle, Limerick, Oyster Creek, Peach Bottom, Quad Cities, and Salem. December 17, 2012. ADAMS Accession No. ML12353A488. Exelon Generation Company, LLC (EGC), 2015. Report on Status of Decommissioning Funding for Reactors and Independent Spent Fuel Storage Installation. March 31, 2015. ADAMS Accession No. ML15090A537. Exelon Generation Company, LLC (EGC), 2018. Response to Request for Additional Information Regarding Decommissioning Funding Plans for Independent Spent Fuel Storage Installations (ISFSIs). May 2, 2018. ADAMS Accession No. ML18124A197. U.S. Nuclear Regulatory Commission. Letter to J. G. Klinger, Illinois Emergency Management Agency Division of Nuclear Safety, re: Review of the Draft EA and FONSI for the Dresden Station, Units 1, 2, and 3 ISFSI Decommissioning Funding Plan (72–73) L24790. June 29, 2016. ADAMS Accession No. ML16181A186. U.S. Nuclear Regulatory Commission. Final Environmental Assessment and Finding of No Significant Impacts for Exelon Generation Company, LLC's Initial and Updated Decommissioning Funding Plans Submitted in Accordance with 10 CFR 72.30(b) and (c) for Dresden Nuclear Station, Units 1, 2, and 3 Independent Spent Fuel Storage Installation. November 2020. ADAMS Accession Package No. ML20150A237. U.S. Nuclear Regulatory Commission. Environmental Assessment for Final Rule-Decommissioning Planning. February 1, 2009. ADAMS Accession No. ML090500648. U.S. Nuclear Regulatory Commission. Note to File, Re: ESA Section 7 No Effect Determination for ISFSI DFP Reviews. May 15, 2017. ADAMS Accession No. ML17135A062. U.S. Nuclear Regulatory Commission's Analysis of Exelon Generation Company, LLC's Initial Decommissioning Funding Plans and Decommissioning Fund Plan Updates for the Braidwood, Byron, Dresden, LaSalle, Limerick, Oyster Creek, Peach Bottom, Quad Cities and Salem Independent Spent Fuel Storage Installations. November 2020. ADAMS Accession No. ML20279A501.
R.E. Ginna Nuclear Power Plant	
Docket No.	72–67.
Licensee	Exelon Generation Co., LLC (EGC or Exelon) and Constellation Energy Nuclear Group, LLC (CENG).
Proposed Action	The NRC's review and approval of CENG's initial and Exelon's updated DFPs submitted in accordance with 10 CFR 72.30(b) and (c).
Environmental Impacts of Proposed Action	The NRC staff has determined that the proposed action, the review and approval of CENG's initial and Exelon's updated DFPs, submitted in accordance with 10 CFR 72.30(b) and (c), will not authorize changes to licensed operations or maintenance activities, or result in changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of solid waste. Moreover, the approval of the initial and updated DFPs will not authorize any construction activity, facility modification, or other land-disturbing activity. The NRC staff has concluded that the proposed action is a procedural and administrative action that will not have a significant impact on the environment.
Finding of No Significant Impacts	The proposed action does not require changes to the ISFSI's licensed routine operations, maintenance activities, or monitoring programs, nor does it require new construction or land-disturbing activities. The scope of the proposed action concerns only the NRC's review and approval of CENG's initial and Exelon's updated DFPs. The scope of the proposed action does not include, and will not result in, the review and approval of decontamination or decommissioning activities or license termination for the ISFSI or for other parts of R.E. Ginna Nuclear Power Plant. Therefore, the NRC staff determined that approval of the initial and updated DFPs for the Ginna ISFSI will not significantly affect the quality of the human environment, and accordingly, the staff has concluded that a FONSI is appropriate. The NRC staff further finds that preparation of an environmental impact statement (EIS) is not required.

FINDING OF NO SIGNIFICANT IMPACTS—Continued

Available Documents	Exelon Generation Company, LLC (EGC), 2012. Proposed Independent Spent Fuel Storage Installation (ISFSI) Decommissioning Funding Plans for Braidwood, Byron, Dresden, LaSalle, Limerick, Oyster Creek, Peach Bottom, Quad Cities, and Salem. December 17, 2012. ADAMS Accession No. ML12353A488. Exelon Generation Company, LLC (EGC), 2015. Report on Status of Decommissioning Funding for Reactors and Independent Spent Fuel Storage Installation. March 31, 2015. ADAMS Accession No. ML15090A537. Exelon Generation Company, LLC (EGC), 2018. Response to Request for Additional Information Regarding Decommissioning Funding Plans for Independent Spent Fuel Storage Installations (ISFSIs). May 2, 2018. ADAMS Accession No. ML18124A197. U.S. Nuclear Regulatory Commission. Letter to J. Rhodes, New York State Energy Research and Development Authority, re: Review of the Draft EA and FONSI for the R.E. Ginna Nuclear Power Plant ISFSI Decommissioning Funding Plan (72–67) L24841. August 17, 2017. ADAMS Accession No. ML17226A324. U.S. Nuclear Regulatory Commission. Final Environmental Assessment and Finding of No Significant Impact for Constellation Energy Nuclear Group, LLC's Initial Decommissioning Funding Plan and Exelon Generation Company, LLC's Updated Decommissioning Funding Plan Submitted in Accordance with 10 CFR 72.30(b) and (c) for Ginna Independent Spent Fuel Storage Installation. November 2020. ADAMS Accession Package No. ML20212L880. U.S. Nuclear Regulatory Commission. Environmental Assessment for Final Rule-Decommissioning Planning. February 1, 2009. ADAMS Accession No. ML090500648. U.S. Nuclear Regulatory Commission. Note to File, Re: ESA Section 7 No Effect Determination for ISFSI DFP Reviews. May 15, 2017. ADAMS Accession No. ML17135A062. U.S. Nuclear Regulatory Commission's Analysis of Constellation Energy Nuclear Group, LLC.'s Initial Decommissioning Funding Plans and Exelon Generation Company, LLC's Decommissioning Fund Updates for the Calvert Cliffs, Nine Mile Point, and R.E. Ginna Independent Spent Fuel Storage Installations. November 2020. ADAMS Accession No. ML20279A586.
LaSalle County Station, Units 1 and 2	
Docket No.	72–70.
Licensee	Exelon Generation Co., LLC (EGC or Exelon).
Proposed Action	The NRC's review and approval of Exelon's initial and updated DFPs submitted in accordance with 10 CFR 72.30(b) and (c).
Environmental Impacts of Proposed Action	The NRC staff has determined that the proposed action, the review and approval of Exelon's initial and updated DFPs, submitted in accordance with 10 CFR 72.30(b) and (c), will not authorize changes to licensed operations or maintenance activities, or result in changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of solid waste. Moreover, the approval of the initial and updated DFPs will not authorize any construction activity, facility modification, or other land-disturbing activity. The NRC staff has concluded that the proposed action is a procedural and administrative action that will not have a significant impact on the environment.
Finding of No Significant Impacts	The proposed action does not require changes to the ISFSI's licensed routine operations, maintenance activities, or monitoring programs, nor does it require new construction or land-disturbing activities. The scope of the proposed action concerns only the NRC's review and approval of Exelon's initial and updated DFPs. The scope of the proposed action does not include, and will not result in, the review and approval of decontamination or decommissioning activities or license termination for the ISFSI or for other parts of LaSalle [County] Station Units 1 and 2. Therefore, the NRC staff determined that approval of the initial and updated DFPs for the LaSalle ISFSI will not significantly affect the quality of the human environment, and accordingly, the staff has concluded that a FONSI is appropriate. The NRC staff further finds that preparation of an environmental impact statement (EIS) is not required.
Available Documents	Exelon Generation Company, LLC (EGC), 2012. Proposed Independent Spent Fuel Storage Installation (ISFSI) Decommissioning Funding Plans for Braidwood, Byron, Dresden, LaSalle, Limerick, Oyster Creek, Peach Bottom, Quad Cities, and Salem. December 17, 2012. ADAMS Accession No. ML12353A488. Exelon Generation Company, LLC (EGC), 2015. Report on Status of Decommissioning Funding for Reactors and Independent Spent Fuel Storage Installation. March 31, 2015. ADAMS Accession No. ML15090A537. Exelon Generation Company, LLC (EGC), 2018. Response to Request for Additional Information Regarding Decommissioning Funding Plans for Independent Spent Fuel Storage Installations (ISFSIs). May 2, 2018. ADAMS Accession No. ML18124A197. U.S. Nuclear Regulatory Commission. Letter to J. G. Klinger, Illinois Emergency Management Agency Division of Nuclear Safety, re: Review of the Draft EA and FONSI for the LaSalle Station Units 1 and 2 ISFSI Decommissioning Funding Plan (72–70) L24790. June 29, 2016. ADAMS Accession No. ML16182A170. U.S. Nuclear Regulatory Commission. Final Environmental Assessment and Finding of No Significant Impacts for Exelon Generation Company, LLC'S Initial and Updated Decommissioning Funding Plans Submitted in Accordance with 10 CFR 72.30(b) and (c) for LaSalle Independent Spent Fuel Storage Installation. November 2020. ADAMS Accession Package No. ML20150A241. U.S. Nuclear Regulatory Commission. Environmental Assessment for Final Rule-Decommissioning Planning. February 1, 2009. ADAMS Accession No. ML090500648. U.S. Nuclear Regulatory Commission. Note to File, Re: ESA Section 7 No Effect Determination for ISFSI DFP Reviews. May 15, 2017. ADAMS Accession No. ML17135A062. U.S. Nuclear Regulatory Commission's Analysis of Exelon Generation Company, LLC's Initial Decommissioning Funding Plans and Decommissioning Fund Plan Updates for the Braidwood, Byron, Dresden, LaSalle, Limerick, Oyster Creek, Peach Bottom, Quad Cities and Salem Independent Spent Fuel Storage Installations. November 2020. ADAMS Accession No. ML20279A501.
Limerick Generating Station, Units 1 and 2	
Docket No.	72–65.
Licensee	Exelon Generation Co., LLC (EGC or Exelon).
Proposed Action	The NRC's review and approval of Exelon's initial and updated DFPs submitted in accordance with 10 CFR 72.30(b) and (c).

FINDING OF NO SIGNIFICANT IMPACTS—Continued

Environmental Impacts of Proposed Action	The NRC staff has determined that the proposed action, the review and approval of Exelon's initial and updated DFPs, submitted in accordance with 10 CFR 72.30(b) and (c), will not authorize changes to licensed operations or maintenance activities, or result in changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of solid waste. Moreover, the approval of the initial and updated DFPs will not authorize any construction activity, facility modification, or other land-disturbing activity. The NRC staff has concluded that the proposed action is a procedural and administrative action that will not have a significant impact on the environment.
Finding of No Significant Impacts	The proposed action does not require changes to the ISFSI's licensed routine operations, maintenance activities, or monitoring programs, nor does it require new construction or land-disturbing activities. The scope of the proposed action concerns only the NRC's review and approval of Exelon's initial and updated DFPs. The scope of the proposed action does not include, and will not result in, the review and approval of decontamination or decommissioning activities or license termination for the ISFSI or for other parts of Limerick Generating Station Units 1 and 2. Therefore, the NRC staff determined that approval of the initial and updated DFPs for the Limerick ISFSI will not significantly affect the quality of the human environment, and accordingly, the staff has concluded that a FONSI is appropriate. The NRC staff further finds that preparation of an environmental impact statement (EIS) is not required.
Available Documents	Exelon Generation Company, LLC (EGC), 2012. Proposed Independent Spent Fuel Storage Installation (ISFSI) Decommissioning Funding Plans for Braidwood, Byron, Dresden, LaSalle, Limerick, Oyster Creek, Peach Bottom, Quad Cities, and Salem. December 17, 2012. ADAMS Accession No. ML12353A488. Exelon Generation Company, LLC (EGC), 2015. Report on Status of Decommissioning Funding for Reactors and Independent Spent Fuel Storage Installation. March 31, 2015. ADAMS Accession No. ML15090A537. Exelon Generation Company, LLC (EGC), 2018. Response to Request for Additional Information Regarding Decommissioning Funding Plans for Independent Spent Fuel Storage Installations (ISFSIs). May 2, 2018. ADAMS Accession No. ML18124A197. U.S. Nuclear Regulatory Commission. Letter to D. Allard, Bureau of Radiation Protection PA Department of Environmental Protection, re: Review of the Draft EA and FONSI for the Limerick ISFSI Decommissioning Funding Plan (72–65) L24793. April 25, 2016. ADAMS Accession No. ML16120A594. U.S. Nuclear Regulatory Commission. Final Environmental Assessment and Finding of No Significant Impacts for Exelon Generation Company, LLC'S initial and Updated Decommissioning Funding Plans Submitted in Accordance with 10 CFR 72.30(b) and (c) for Limerick Independent Spent Fuel Storage Installation. November 2020. ADAMS Accession No. ML20212L817. U.S. Nuclear Regulatory Commission. Environmental Assessment for Final Rule-Decommissioning Planning. February 1, 2009. ADAMS Accession No. ML090500648. U.S. Nuclear Regulatory Commission. Note to File, Re: ESA Section 7 No Effect Determination for ISFSI DFP Reviews. May 15, 2017. ADAMS Accession No. ML17135A062. U.S. Nuclear Regulatory Commission's Analysis of Exelon Generation Company, LLC's Initial Decommissioning Funding Plans and Decommissioning Fund Plan Updates for the Braidwood, Byron, Dresden, LaSalle, Limerick, Oyster Creek, Peach Bottom, Quad Cities and Salem Independent Spent Fuel Storage Installations. November 2020. ADAMS Accession No. ML20279A501.

Nine Mile Point Nuclear Station, Units 1 and 2

Docket No.	72–1036.
Licensee	Exelon Generation Co., LLC (EGC or Exelon) and Constellation Energy Nuclear Group, LLC (CENG).
Proposed Action	The NRC's review and approval of CENG's initial and Exelon's updated DFPs submitted in accordance with 10 CFR 72.30(b) and (c).
Environmental Impacts of Proposed Action	The NRC staff has determined that the proposed action, the review and approval of CENG's initial and Exelon's updated DFPs, submitted in accordance with 10 CFR 72.30(b) and (c), will not authorize changes to licensed operations or maintenance activities, or result in changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of solid waste. Moreover, the approval of the initial and updated DFPs will not authorize any construction activity, facility modification, or other land-disturbing activity. The NRC staff has concluded that the proposed action is a procedural and administrative action that will not have a significant impact on the environment.
Finding of No Significant Impacts	The proposed action does not require changes to the ISFSI's licensed routine operations, maintenance activities, or monitoring programs, nor does it require new construction or land-disturbing activities. The scope of the proposed action concerns only the NRC's review and approval of CENG's initial and EGC's updated DFPs. The scope of the proposed action does not include, and will not result in, the review and approval of decontamination or decommissioning activities or license termination for the ISFSI or for other parts of Nine Mile Point Nuclear Station, Units 1 and 2. Therefore, the NRC staff determined that approval of the initial and updated DFPs for the Nine Mile Point ISFSI will not significantly affect the quality of the human environment, and accordingly, the staff has concluded that a FONSI is appropriate. The NRC staff further finds that preparation of an environmental impact statement (EIS) is not required.
Available Documents	Exelon Generation Company, LLC (EGC), 2012. Proposed Independent Spent Fuel Storage Installation (ISFSI) Decommissioning Funding Plans for Braidwood, Byron, Dresden, LaSalle, Limerick, Oyster Creek, Peach Bottom, Quad Cities, and Salem. December 17, 2012. ADAMS Accession No. ML12353A488. Exelon Generation Company, LLC (EGC), 2015. Report on Status of Decommissioning Funding for Reactors and Independent Spent Fuel Storage Installation. March 31, 2015. ADAMS Accession No. ML15090A537. Exelon Generation Company, LLC (EGC), 2018. Response to Request for Additional Information Regarding Decommissioning Funding Plans for Independent Spent Fuel Storage Installations (ISFSIs). May 2, 2018. ADAMS Accession No. ML18124A197. U.S. Nuclear Regulatory Commission. Letter to J. Rhodes, New York State Energy Research and Development Authority, re: Review of the Draft EA and FONSI for the Nine Mile Point ISFSI Decommissioning Funding Plan (72–1036) L24836. September 26, 2016. ADAMS Accession No. ML16270A063. U.S. Nuclear Regulatory Commission. Final Environmental Assessment and Finding of No Significant Impacts for Constellation Energy Nuclear Group, LLC's and Exelon Generation Company, LLC's Initial and Updated Decommissioning Funding Plans Submitted in Accordance with 10 CFR 72.30(b) and (c) for Nine Mile Point Independent Spent Fuel Storage Installation. November 2020. ADAMS Accession Package No. ML20212L881. U.S. Nuclear Regulatory Commission. Environmental Assessment for Final Rule-Decommissioning Planning. February 1, 2009. ADAMS Accession No. ML090500648. U.S. Nuclear Regulatory Commission. Note to File, Re: ESA Section 7 No Effect Determination for ISFSI DFP Reviews. May 15, 2017. ADAMS Accession No. ML17135A062.

FINDING OF NO SIGNIFICANT IMPACTS—Continued

	U.S. Nuclear Regulatory Commission's Analysis of Constellation Energy Nuclear Group, LLC's Initial Decommissioning Funding Plans and Exelon Generation Company, LLC's Decommissioning Fund Updates for the Calvert Cliffs, Nine Mile Point, and R.E. Ginna Independent Spent Fuel Storage Installations. November 2020. ADAMS Accession No. ML20279A586.
Oyster Creek	
Docket No.	72–15.
Licensee	Exelon Generation Co., LLC (EGC or Exelon).
Proposed Action	The NRC's review and approval of Exelon's initial and updated DFPs submitted in accordance with 10 CFR 72.30(b) and (c).
Environmental Impacts of Proposed Action	The NRC staff has determined that the proposed action, the review and approval of Exelon's initial and updated DFPs, submitted in accordance with 10 CFR 72.30(b) and (c), will not authorize changes to licensed operations or maintenance activities, or result in changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of solid waste. Moreover, the approval of the initial and updated DFPs will not authorize any construction activity, facility modification, or other land-disturbing activity. The NRC staff has concluded that the proposed action is a procedural and administrative action that will not have a significant impact on the environment.
Finding of No Significant Impacts	The proposed action does not require changes to the ISFSI's licensed routine operations, maintenance activities, or monitoring programs, nor does it require new construction or land-disturbing activities. The scope of the proposed action concerns only the NRC's review and approval of Exelon's initial and updated DFPs. The scope of the proposed action does not include, and will not result in, the review and approval of decontamination or decommissioning activities or license termination for the ISFSI or for other parts of Oyster Creek Nuclear Generating Station. Therefore, the NRC staff determined that approval of the initial and updated DFPs for the Oyster Creek ISFSI will not significantly affect the quality of the human environment, and accordingly, the staff has concluded that a FONSI is appropriate. The NRC staff further finds that preparation of an environmental impact statement (EIS) is not required.
Available Documents	Exelon Generation Company, LLC (EGC), 2012. Proposed Independent Spent Fuel Storage Installation (ISFSI) Decommissioning Funding Plans for Braidwood, Byron, Dresden, LaSalle, Limerick, Oyster Creek, Peach Bottom, Quad Cities, and Salem. December 17, 2012. ADAMS Accession No. ML12353A488. Exelon Generation Company, LLC (EGC), 2015. Report on Status of Decommissioning Funding for Reactors and Independent Spent Fuel Storage Installation. March 31, 2015. ADAMS Accession No. ML15090A537. Exelon Generation Company, LLC (EGC), 2018. Response to Request for Additional Information Regarding Decommissioning Funding Plans for Independent Spent Fuel Storage Installations (ISFSIs). May 2, 2018. ADAMS Accession No. ML18124A197. U.S. Nuclear Regulatory Commission. Letter to P. Baldauf, Department of Environmental Protection Division of Environmental Safety and Health, re: Review of the Draft EA and FONSI for the Oyster Creek ISFSI Decommissioning Funding Plan (72–15) L24794. October 19, 2016. ADAMS Accession No. ML16294A071. U.S. Nuclear Regulatory Commission. Final Environmental Assessment and Finding of No Significant Impacts for Exelon Generation Company, LLC's Initial and Updated Decommissioning Funding Plans Submitted in Accordance with 10 CFR 72.30(b) and (c) for Oyster Creek Independent Spent Fuel Storage Installation. November 2020. ADAMS Accession No. ML20150A243. U.S. Nuclear Regulatory Commission. Environmental Assessment for Final Rule-Decommissioning Planning. February 1, 2009. ADAMS Accession No. ML090500648. U.S. Nuclear Regulatory Commission. Note to File, Re: ESA Section 7 No Effect Determination for ISFSI DFP Reviews. May 15, 2017. ADAMS Accession No. ML17135A062. U.S. Nuclear Regulatory Commission's Analysis of Exelon Generation Company, LLC's Initial Decommissioning Funding Plans and Decommissioning Fund Plan Updates for the Braidwood, Byron, Dresden, LaSalle, Limerick, Oyster Creek, Peach Bottom, Quad Cities and Salem Independent Spent Fuel Storage Installations. November 2020. ADAMS Accession No. ML20279A501.
Peach Bottom Atomic Power Station, Units 2 and 3	
Docket No.	72–29.
Licensee	Exelon Generation Co., LLC (EGC or Exelon) and Public Service Enterprise Group Nuclear, LLC (PSEG).
Proposed Action	The NRC's review and approval of PSEG's initial and Exelon's updated DFPs submitted in accordance with 10 CFR 72.30(b) and (c).
Environmental Impacts of Proposed Action	The NRC staff has determined that the proposed action, the review and approval of PSEG's initial and Exelon's updated DFPs, submitted in accordance with 10 CFR 72.30(b) and (c), will not authorize changes to licensed operations or maintenance activities, or result in changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of solid waste. Moreover, the approval of the initial and updated DFPs will not authorize any construction activity, facility modification, or other land-disturbing activity. The NRC staff has concluded that the proposed action is a procedural and administrative action that will not have a significant impact on the environment.
Finding of No Significant Impacts	The proposed action does not require changes to the ISFSI's licensed routine operations, maintenance activities, or monitoring programs, nor does it require new construction or land-disturbing activities. The scope of the proposed action concerns only the NRC's review and approval of PSEG's initial and Exelon's updated DFPs. The scope of the proposed action does not include, and will not result in, the review and approval of decontamination or decommissioning activities or license termination for the ISFSI or for other parts of Peach Bottom Atomic Power Station Units 1, 2 and 3. Therefore, the NRC staff determined that approval of the initial and updated DFPs for the Peach Bottom ISFSI will not significantly affect the quality of the human environment, and accordingly, the staff has concluded that a FONSI is appropriate. The NRC staff further finds that preparation of an environmental impact statement (EIS) is not required.
Available Documents	Exelon Generation Company, LLC (EGC), 2012. Proposed Independent Spent Fuel Storage Installation (ISFSI) Decommissioning Funding Plans for Braidwood, Byron, Dresden, LaSalle, Limerick, Oyster Creek, Peach Bottom, Quad Cities, and Salem. December 17, 2012. ADAMS Accession No. ML12353A488. PSEG, 2012. Decommissioning Funding Plan for the Independent Spent Fuel Storage Installations [Peach Bottom, Hope Creek and Salem]. December 17, 2012. ADAMS Accession No. ML12353A037. Exelon Generation Company, LLC (EGC), 2015. Report on Status of Decommissioning Funding for Reactors and Independent Spent Fuel Storage Installation. March 31, 2015. ADAMS Accession No. ML15090A537. Public Service Enterprise Group Nuclear, LLC (PSEG), 2015. Decommissioning Funding Plan for Independent Spent Fuel Storage Installations [Peach Bottom, Hope Creek and Salem]. December 17, 2015. ADAMS Accession No. ML15351A336.

FINDING OF NO SIGNIFICANT IMPACTS—Continued

	Exelon Generation Company, LLC (EGC), 2018. Response to Request for Additional Information Regarding Decommissioning Funding Plans for Independent Spent Fuel Storage Installations (ISFSIs). May 2, 2018. ADAMS Accession No. ML18124A197. PSEG, 2018. Response to Request for Additional Information (RAI), Regarding Decommissioning Funding Plan Update for Salem and Hope Creek, and Peach Bottom Independent Spent Fuel Storage Installations, Docket Nos. 72–48 and 72–29. May 7, 2018. ADAMS Accession No. ML18127A045. U.S. Nuclear Regulatory Commission. Letter to D. Allard, Pennsylvania Bureau of Radiation Protection Department of Environmental Protection, re: Review of the Draft EA and FONSI for the Peach Bottom ISFSI Decommissioning Funding Plan (72–29) L24795. October 25, 2016. ADAMS Accession No. ML16299A218. U.S. Nuclear Regulatory Commission. Final Environmental Assessment and Finding of No Significant Impacts for Public Service Enterprise Group Nuclear, LLC's Initial and Exelon Generation Company, LLC's Updated Decommissioning Funding Plan Submitted in Accordance with 10 CFR 72.30(b) and (c) for Peach Bottom Independent Spent Fuel Storage Installation. November 2020. ADAMS Accession No. ML20150A244. U.S. Nuclear Regulatory Commission. Environmental Assessment for Final Rule-Decommissioning Planning. February 1, 2009. ADAMS Accession No. ML090500648. U.S. Nuclear Regulatory Commission. Note to File, Re: ESA Section 7 No Effect Determination for ISFSI DFP Reviews. May 15, 2017. ADAMS Accession No. ML17135A062. U.S. Nuclear Regulatory Commission's Analysis of Public Service Enterprise Group Nuclear, LLC's Initial Decommissioning Fund Plans Updates for the Salem-Hope Creek and Peach Bottom Independent Spent Fuel Storage Installations. October 2020. ADAMS Accession No. ML20279A577. U.S. Nuclear Regulatory Commission's Analysis of Exelon Generation Company, LLC's Initial Decommissioning Funding Plans and Decommissioning Fund Plan Updates for the Braidwood, Byron, Dresden, LaSalle, Limerick, Oyster Creek, Peach Bottom, Quad Cities and Salem Independent Spent Fuel Storage Installations. November 2020. ADAMS Accession No. ML20279A501.

Quad Cities Nuclear Power Station, Units 1 and 2

Docket No.	72–53.
Licensee	Exelon Generation Co., LLC (EGC or Exelon).
Proposed Action	The NRC's review and approval of Exelon's initial and updated DFPs submitted in accordance with 10 CFR 72.30(b) and (c).
Environmental Impacts of Proposed Action	The NRC staff has determined that the proposed action, the review and approval of Exelon's initial and updated DFPs, submitted in accordance with 10 CFR 72.30(b) and (c), will not authorize changes to licensed operations or maintenance activities, or result in changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of solid waste. Moreover, the approval of the initial and updated DFPs will not authorize any construction activity, facility modification, or other land-disturbing activity. The NRC staff has concluded that the proposed action is a procedural and administrative action that will not have a significant impact on the environment.
Finding of No Significant Impacts	The proposed action does not require changes to the ISFSI's licensed routine operations, maintenance activities, or monitoring programs, nor does it require new construction or land-disturbing activities. The scope of the proposed action concerns only the NRC's review and approval of Exelon's initial and updated DFPs. The scope of the proposed action does not include, and will not result in, the review and approval of decontamination or decommissioning activities or license termination for the ISFSI or for other parts of Quad Cities Nuclear Power Station, Units 1 and 2. Therefore, the NRC staff determined that approval of the initial and updated DFPs for the Quad Cities ISFSI will not significantly affect the quality of the human environment, and accordingly, the staff has concluded that a FONSI is appropriate. The NRC staff further finds that preparation of an environmental impact statement (EIS) is not required.
Available Documents	Exelon Generation Company, LLC (EGC), 2012. Proposed Independent Spent Fuel Storage Installation (ISFSI) Decommissioning Funding Plans for Braidwood, Byron, Dresden, LaSalle, Limerick, Oyster Creek, Peach Bottom, Quad Cities, and Salem. December 17, 2012. ADAMS Accession No. ML12353A488. Exelon Generation Company, LLC (EGC), 2015. Report on Status of Decommissioning Funding for Reactors and Independent Spent Fuel Storage Installation. March 31, 2015. ADAMS Accession No. ML15090A537. Exelon Generation Company, LLC (EGC), 2018. Response to Request for Additional Information Regarding Decommissioning Funding Plans for Independent Spent Fuel Storage Installations (ISFSIs). May 2, 2018. ADAMS Accession No. ML18124A197. U.S. Nuclear Regulatory Commission. Letter to J. G. Klinger, Illinois Emergency Management Agency Division of Nuclear Safety, re: Review of the Draft EA and FONSI for the Quad Cities Nuclear Power Station Units 1 and 2 ISFSI Decommissioning Funding Plan (72–53) L24796. June 29, 2016. ADAMS Accession No. ML16182A114. U.S. Nuclear Regulatory Commission. Final Environmental Assessment and Finding of No Significant Impacts for Exelon Generation Company, LLC's Initial and Updated Decommissioning Funding Plans Submitted in Accordance with 10 CFR 72.30(b) and (c) for Quad Cities Power Station, Units 1 and 2 Independent Spent Fuel Storage Installation. November 2020. ADAMS Accession Package No. ML20150A246. U.S. Nuclear Regulatory Commission. Environmental Assessment for Final Rule-Decommissioning Planning. February 1, 2009. ADAMS Accession No. ML090500648. U.S. Nuclear Regulatory Commission. Note to File, Re: ESA Section 7 No Effect Determination for ISFSI DFP Reviews. May 15, 2017. ADAMS Accession No. ML17135A062. U.S. Nuclear Regulatory Commission's Analysis of Exelon Generation Company, LLC's Initial Decommissioning Funding Plans and Decommissioning Fund Plan Updates for the Braidwood, Byron, Dresden, LaSalle, Limerick, Oyster Creek, Peach Bottom, Quad Cities and Salem Independent Spent Fuel Storage Installations. November 2020. ADAMS Accession No. ML20279A501.

Salem Nuclear Generating Station, Units 1 and 2/Hope Creek Generating Station, Unit 1

Docket No.	72–48.
Licensee	Exelon Generation Co., LLC (EGC or Exelon) and Public Service Enterprise Group Nuclear, LLC (PSEG).
Proposed Action	The NRC's review and approval of Exelon's and PSEG's initial and updated DFPs submitted in accordance with 10 CFR 72.30(b) and (c).

FINDING OF NO SIGNIFICANT IMPACTS—Continued

Environmental Impacts of Proposed Action	The NRC staff has determined that the proposed action, the review and approval of Exelon's and PSEG's initial and updated DFPs, submitted in accordance with 10 CFR 72.30(b) and (c), will not authorize changes to licensed operations or maintenance activities, or result in changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of solid waste. Moreover, the approval of the initial and updated DFPs will not authorize any construction activity, facility modification, or other land-disturbing activity. The NRC staff has concluded that the proposed action is a procedural and administrative action that will not have a significant impact on the environment.
Finding of No Significant Impacts	The proposed action does not require changes to the ISFSI's licensed routine operations, maintenance activities, or monitoring programs, nor does it require new construction or land-disturbing activities. The scope of the proposed action concerns only the NRC's review and approval of Exelon's and PSEG's initial and updated DFPs. The scope of the proposed action does not include, and will not result in, the review and approval of decontamination or decommissioning activities or license termination for the shared Salem-Hope Creek ISFSI or for other parts of Salem Generating Station, Units 1 and 2 and Hope Creek, Unit 1. Therefore, the NRC staff determined that approval of the initial and updated DFPs for the Salem-Hope Creek ISFSI will not significantly affect the quality of the human environment, and accordingly, the staff has concluded that a FONSI is appropriate. The NRC staff further finds that preparation of an environmental impact statement (EIS) is not required.
Available Documents	Exelon Generation Company, LLC (EGC), 2012. Proposed Independent Spent Fuel Storage Installation (ISFSI) Decommissioning Funding Plans for Braidwood, Byron, Dresden, LaSalle, Limerick, Oyster Creek, Peach Bottom, Quad Cities, and Salem. December 17, 2012. ADAMS Accession No. ML12353A488. PSEG, 2012. Decommissioning Funding Plan for the Independent Spent Fuel Storage Installations [Peach Bottom, Hope Creek and Salem]. December 17, 2012. ADAMS Accession No. ML12353A037. Exelon Generation Company, LLC (EGC), 2015. Report on Status of Decommissioning Funding for Reactors and Independent Spent Fuel Storage Installation. March 31, 2015. ADAMS Accession No. ML15090A537. Public Service Enterprise Group Nuclear, LLC (PSEG), 2015. Decommissioning Funding Plan for Independent Spent Fuel Storage Installations [Peach Bottom, Hope Creek and Salem]. December 17, 2015. ADAMS Accession No. ML15351A336. Exelon Generation Company, LLC (EGC), 2018. Response to Request for Additional Information Regarding Decommissioning Funding Plans for Independent Spent Fuel Storage Installations (ISFSIs). May 2, 2018. ADAMS Accession No. ML18124A197. PSEG, 2018. Response to Request for Additional Information (RAI), Regarding Decommissioning Funding Plan Update for Salem and Hope Creek, and Peach Bottom Independent Spent Fuel Storage Installations, Docket Nos. 72–48 and 72–29. May 7, 2018. ADAMS Accession No. ML18127A045. U.S. Nuclear Regulatory Commission. Letter to P. Baldauf, New Jersey Department of Environmental Protection Division of Environmental Safety and Health, re: Review of the Draft EA and FONSI for the Salem Generation Station ISFSI Decommissioning Funding Plan (72–48) L24791. September 1, 2016. ADAMS Accession No. ML16250A195. U.S. Nuclear Regulatory Commission. Final Environmental Assessment and Finding of No Significant Impacts for the PSEG Nuclear, LLC's and Exelon Generation Company, LLC's Initial and Updated Decommissioning Funding Plans Submitted in Accordance with 10 CFR 72.30(b) and (c) for the Independent Spent Fuel Storage Installation Shared by Salem Generating Station, Units 1 and 2 and Hope Creek Generating Station, Unit 1. November 2020. ADAMS Accession Package No. ML20150A247. U.S. Nuclear Regulatory Commission. Environmental Assessment for Final Rule-Decommissioning Planning. February 1, 2009. ADAMS Accession No. ML090500648. U.S. Nuclear Regulatory Commission. Note to File, Re: ESA Section 7 No Effect Determination for ISFSI DFP Reviews. May 15, 2017. ADAMS Accession No. ML17135A062. U.S. Nuclear Regulatory Commission's Analysis of Public Service Enterprise Group Nuclear, LLC's Decommissioning Funding Plans and Decommissioning Fund Plan Updates for the Salem-Hope Creek and Peach Bottom Independent Spent Fuel Storage Installations. November 2020. ADAMS Accession No. ML20279A577. U.S. Nuclear Regulatory Commission's Analysis of Exelon Generation Company, LLC's Initial Decommissioning Funding Plans and Decommissioning Fund Plan Updates for the Braidwood, Byron, Dresden, LaSalle, Limerick, Oyster Creek, Peach Bottom, Quad Cities and Salem Independent Spent Fuel Storage Installations. November 2020. ADAMS Accession No. ML20279A501.

Zion Nuclear Power Station, Units 1 and 2

Docket No.	72–1037.
Licensee	Zion Solutions, LLC (ZS) is the general licensee. Exelon Generation Co., LLC (EGC or Exelon) is responsible for final decommissioning of the ISFSI and retains control over the decommissioning funds.
Proposed Action	The NRC's review and approval of Exelon's initial and updated DFPs submitted in accordance with 10 CFR 72.30(b) and (c).
Environmental Impacts of Proposed Action	The NRC staff has determined that the proposed action, the review and approval of Exelon's initial and updated DFPs, submitted in accordance with 10 CFR 72.30(b) and (c), will not authorize changes to licensed operations or maintenance activities, or result in changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of solid waste. Moreover, the approval of the initial and updated DFPs will not authorize any construction activity, facility modification, or other land-disturbing activity. The NRC staff has concluded that the proposed action is a procedural and administrative action that will not have a significant impact on the environment.
Finding of No Significant Impacts	The proposed action does not require changes to the ISFSI's licensed routine operations, maintenance activities, or monitoring programs, nor does it require new construction or land-disturbing activities. The scope of the proposed action concerns only the NRC's review and approval of Exelon's initial and updated DFPs. The scope of the proposed action does not include, and will not result in, the review and approval of decontamination or decommissioning activities or license termination for the ISFSI or for other parts of Zion Nuclear Power Station, Units 1 and 2. Therefore, the NRC staff determined that approval of the initial and updated DFPs for the Zion ISFSI will not significantly affect the quality of the human environment, and accordingly, the staff has concluded that a FONSI is appropriate. The NRC staff further finds that preparation of an environmental impact statement (EIS) is not required.
Available Documents	EGC, 2013. Proposed Independent Spent Fuel Storage Installation (ISFSI) Decommissioning Funding Plan for Zion. October 17, 2013. ADAMS Accession No. ML13291A125. EGC, 2016. Independent Spent Fuel Storage Installation (ISFSI) Decommissioning Funding Plan for Zion. October 17, 2016. ADAMS Accession No. ML16291A505. Exelon Generation Company, LLC (EGC), 2018. Response to Request for Additional Information Regarding Decommissioning Funding Plans for Independent Spent Fuel Storage Installations (ISFSIs). May 2, 2018. ADAMS Accession No. ML18124A197.

FINDING OF NO SIGNIFICANT IMPACTS—Continued

	U.S. Nuclear Regulatory Commission. Letter to J. G. Klinger, Illinois Emergency Management Agency Division of Nuclear Safety, re: Review of the Draft EA and FONSI for the Zion Solutions ISFSI Decommissioning Funding Plan (72–1037) L24852. August 17, 2017. ADAMS Accession No. ML17227A037. U.S. Nuclear Regulatory Commission. Final Environmental Assessment and Finding of No Significant Impacts for Exelon Generation Company, LLC's Initial and Updated Decommissioning Funding Plans Submitted in Accordance with 10 CFR 72.30(b) and (c) for Zion Independent Spent Fuel Storage Installation. October 2020. ADAMS Accession Package No. ML20212L883. U.S. Nuclear Regulatory Commission. Environmental Assessment for Final Rule-Decommissioning Planning. February 1, 2009. ADAMS Accession No. ML090500648. U.S. Nuclear Regulatory Commission. Note to File, Re: ESA Section 7 No Effect Determination for ISFSI DFP Reviews. May 15, 2017. ADAMS Accession No. ML17135A062. U.S. Nuclear Regulatory Commission's Analysis of Exelon Generation Company, LLC's Initial and Updated Decommissioning Funding Plans for Zion Independent Spent Fuel Storage Installation. October 2020. ADAMS Accession No. ML20279A558.

Dated: November 20, 2020.

For the Nuclear Regulatory Commission.

John B. McKirgan,

Chief, Storage and Transportation Licensing Branch, Division of Fuel Management, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2020–26144 Filed 11–27–20; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2020–0246]

Physical Protection Programs at Nuclear Power Reactors Safeguards Information

AGENCY: Nuclear Regulatory Commission.

ACTION: Regulatory guide; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing Revision 1 to Regulatory Guide (RG) 5.76, ''Physical Protection Programs at Nuclear Power Reactors (SGI),'' as a final RG. The NRC has revised RG 5.76 to provide licensees guidance on the implementation of the ''Reasonable Assurance of Protection Time'' concept. This RG (Revision 1) clarifies issues that have been identified through interactions with stakeholders and inspection activities since the original publication of the guide.

DATES: Revision 1 to RG 5.76 is available on November 30, 2020.

ADDRESSES: Revision 1 to RG 5.76 contains Safeguards Information (SGI). Therefore, this RG is being withheld from public disclosure, but is available to those affected licensees, stakeholders who have established a need to know, and cleared stakeholders who have access authorization. For access to RG 5.76, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section.

Please refer to Docket ID NRC–2020–0246 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–2020–0246. Address questions about Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.*
- *Attention:* The PDR, where you may examine and order copies of public documents is currently closed. You may submit your request to the PDR via email at *PDR.Resource@nrc.gov* or call 1–800–397–4209 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Gary Purdy, Office of Nuclear Security and Incident Response, telephone: 301–287–3629, email: *Gary.Purdy@nrc.gov;* or Mekonen Bayssie, Office of Nuclear Regulatory Research; telephone: 301–415–1699, email: *Mekonen.Bayssie@nrc.gov.* Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Discussion

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

Regulatory Guide 5.76 provides approaches determined to be acceptable to the NRC for meeting the requirements described in section 73.55, ''Requirements for physical protection of licensed activities in nuclear power reactors against radiological sabotage,'' of title 10 of the *Code of Federal Regulations* (10 CFR). Specifically, this revision explains that a licensee may meet the general performance objective in 10 CFR 73.55(b)(1) to provide reasonable assurance that ''activities involving special nuclear material are not inimical to the common defense and security and do not constitute an unreasonable risk to the public health and safety'' by having a physical protection program that is capable of independently defending against the design basis threat (DBT) of radiological sabotage for a timeframe of at least 8 hours. This timeframe, referred to as ''Reasonable Assurance of Protection Time'' (RAPT), recognizes the existing layers of protection available to sites along with how the safety and security of the site would evolve over time following initiation of an attack. RG 5.76, Rev. 1 has specific information for both operating power reactors and new reactors licensed under 10 CFR part 50 and 10 CFR part 52.

This revision of RG 5.76 (Revision 1) incorporates lessons learned from operating experience. Specifically, this revision clarifies issues that have been identified through interactions with stakeholders and inspection activities since the original publication of the guide.

II. Additional Information

Regulatory Guide 5.76 contains SGI. Accordingly, this RG is being withheld from public disclosure. It will be made

available to those affected licensees and stakeholders who have an established need-to-know for access to the RG. The NRC did not announce the availability of the draft RG for public comment because the guide contains SGI and Official Use Only-Security Related information. Nonetheless, the NRC is issuing this notice to inform the public of the issuance of this revision to the RG.

On September 17, 2020, the NRC issued a memorandum (ADAMS Accession No. ML20258A250) transmitting the draft regulatory guide for comment to stakeholders who have an established need-to-know for access to the document. The stakeholders' comment period closed on October 23, 2020. The NRC received 13 comments from stakeholders. The comments and the associated agency responses are available to the public in ADAMS under Accession No. ML20325A209.

III. Congressional Review Act

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

IV. Backfitting, Forward Fitting, and Issue Finality

Revision 1 of RG 5.76 provides applicants or licensees with guidance to meet the requirements set forth in 10 CFR 73.55. Licensees are not required to comply with the positions set forth in this regulatory guide. Therefore, issuance of this RG does not constitute backfitting as defined in 10 CFR 50.109, ''Backfitting,'' and as described in Management Directive (MD) 8.4, ''Management of Backfitting, Forward Fitting, Issue Finality, and Information Requests;'' constitute forward fitting as that term is defined and described in MD 8.4; or affect issue finality of any approval issued under 10 CFR part 52, ''Licenses, Certificates, and Approvals for Nuclear Power Plants.'' As explained in Section D., ''Implementation,'' of the regulatory guide, the NRC staff does not intend to use the guidance in this regulatory guide to support NRC staff actions in a manner that would constitute backfitting or forward fitting. If, in the future, the NRC seeks to impose a position in this regulatory guide in a manner that constitutes backfitting or forward fitting or affects the issue finality for a 10 CFR part 52 approval, then the NRC will address the backfitting provision in 10 CFR 50.109, the forward fitting provision of MD 8.4, or the applicable issue finality provision in 10 CFR part 52 respectively.

Dated: November 23, 2020.

For the Nuclear Regulatory Commission.

Meraj Rahimi,

Chief, Regulatory Guidance and Generic Issues Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2020–26273 Filed 11–27–20; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–003, 50–247, 50–286, and 72–051; NRC–2020–0021]

In the Matter of Entergy Nuclear Operations, Inc.; Entergy Nuclear Indian Point 2, LLC; Entergy Nuclear Indian Point 3, LLC; Holtec International and Holtec Decommissioning International, LLC; Indian Point Nuclear Generating Unit Nos 1, 2, and 3

AGENCY: Nuclear Regulatory Commission.

ACTION: Transfer of licenses; order.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing an Order approving the transfer of Provisional Operating License No. DPR–5 for Indian Point Nuclear Generating Station, Unit No. 1 (IP1); Renewed Facility Operating License Nos. DPR–26 and DPR–64 for Indian Point Nuclear Generating Unit Nos. 2 and 3, respectively, (collectively, with IP1, the Indian Point Energy Center (IPEC)); and the general license for the IPEC independent spent fuel storage installation to Holtec International (Holtec) subsidiaries. The Holtec subsidiaries would be known as Holtec Indian Point 2, LLC (Holtec IP2) and Holtec Indian Point 3, LLC (Holtec IP3). The Order also approves the transfer of operating authority from the currently licensed operator, Entergy Nuclear Operations, Inc. (ENOI), to Holtec Decommissioning International, LLC (HDI). The NRC is also issuing conforming amendments for the facility operating licenses for administrative purposes to reflect the transfer of the licenses from ENOI to HDI and the planned name change for Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Indian Point 3, LLC to Holtec IP2 and Holtec IP3, respectively.

DATES: The Order was issued on November 23, 2020, and is effective for 1 year.

ADDRESSES: Please refer to Docket ID NRC–2020–0021 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document by using any of the following methods:

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0021. Address questions about Docket 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 license transfer Order, the NRC safety evaluation supporting the staff's findings, and the conforming license amendments are available in ADAMS Package Accession No. ML19170A147.
- *Attention:* The PDR, where you may examine and order copies of public documents, is currently closed. You may submit your request to the PDR via email at *PDR.Resource@nrc.gov* or call 1–800–397–4209 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Richard V. Guzman, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–1030, email: *Richard.Guzman@nrc.gov.*

SUPPLEMENTARY INFORMATION: The text of the Order is attached.

Dated: November 23, 2020.

For the Nuclear Regulatory Commission.

Richard V. Guzman,

Senior Project Manager, Plant Licensing Branch I, Division of Operator Reactor Licensing, Office of Nuclear Reactor Regulation.

Attachment—Order Approving Transfer of Licenses and Approving Conforming Amendments

United States of America

Nuclear Regulatory Commission

In the Matter of: Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC; Indian Point Nuclear Generating Station, Unit Nos. 1, 2, and 3 and ISFSI, EA–20–142

Docket Nos. 50–003, 50–247, 50–286, and 72–051

License Nos. DPR–5, DPR–26, and DPR–64

Order Approving Transfer of Licenses and Draft Conforming Administrative License Amendments

I.

Entergy Nuclear Operations, Inc. (ENOI); Entergy Nuclear Indian Point 2, LLC; and Entergy Nuclear Indian Point 3, LLC are the holders of the U.S. Nuclear Regulatory Commission (NRC, the Commission) Provisional Operating License No. DPR–5 for Indian Point Nuclear Generating Station, Unit No. 1 (IP1); Renewed Facility Operating License Nos. DPR–26 and DPR–64 for Indian Point Nuclear Generating Station, Unit Nos. 2 and 3, respectively (IP2 and IP3) (collectively, with IP1, the Indian Point Energy Center (IPEC)); and the general license for the IPEC independent spent fuel storage installation (ISFSI) (collectively, the IPEC licenses). IP1 permanently ceased operations on October 31, 1974; IP2 permanently ceased operations on April 30, 2020; and ENOI has certified to the NRC its decision to permanently cease operations at IP3 by April 30, 2021. The IPEC is located in Buchanan, New York, in Westchester County, on the east bank of the Hudson River.

II.

By application dated November 21, 2019 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML19326B953), as supplemented by information provided in letters from Holtec Decommissioning International, LLC (HDI) dated December 19, 2019; January 17, 2020; February 12, 2020; and August 7, 2020 (ADAMS Accession Nos. ML19354A698, ML20017A290, ML20043C539, and ML20220A666, respectively), ENOI, on behalf of itself; Entergy Nuclear Indian Point 2, LLC; Entergy Nuclear Indian Point 3, LLC; Holtec International (Holtec); and HDI (collectively, the Applicants), requested, pursuant to Section 184, ''Inalienability of Licenses,'' of the Atomic Energy Act of 1954, as amended (AEA), and Sections 50.80, ''Transfer of licenses,'' and 72.50, ''Transfer of license,'' of Title 10 of the *Code of Federal Regulations* (10 CFR), that the NRC consent to the transfer of control of the IPEC licenses to Holtec subsidiaries. The Holtec subsidiaries would be known as Holtec Indian Point 2, LLC (Holtec IP2) and Holtec Indian Point 3, LLC (Holtec IP3). The Applicants also requested that the NRC consent to the transfer of ENOI's operating authority (*i.e.,* its authority to conduct licensed activities at the IPEC) to HDI. Finally, the Applicants requested that the NRC approve conforming administrative amendments to the IPEC licenses to reflect the proposed license transfer and to delete certain license conditions to reflect the satisfaction and termination of certain obligations after the license transfer pursuant to 10 CFR 50.90, ''Application for amendment of license, construction permit, or early site permit.''

Upon an NRC approval of the license transfer application and the consummation of the proposed transfer transaction, Holtec IP2 would be the licensed owner for IP1 and IP2 and Holtec IP3 would be the licensed owner for IP3. Holtec IP2 and Holtec IP3 would also respectively own each unit's associated assets and real estate, including each unit's decommissioning trust fund, title to spent nuclear fuel, and rights pursuant to the terms of the Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste with the U.S. Department of Energy. A wholly-owned subsidiary of Holtec, Nuclear Asset Management Company, LLC, would acquire all equity interests in the parent companies owning the three units and would emerge as the direct parent company owner of both Holtec IP2 and Holtec IP3.

Holtec IP2 and Holtec IP3 would enter into an operating agreement for decommissioning services with HDI, which would act as their agent, and Holtec IP2 and Holtec IP3 would pay for HDI's decommissioning, spent fuel management, and site restoration costs incurred at the IPEC; HDI would be the licensed operator for the IPEC. HDI would assume responsibility for compliance with NRC regulations and the current licensing basis, including regulatory commitments that exist at the consummation of the proposed transfer transaction, and would implement any changes under applicable regulatory requirements and practices. Comprehensive Decommissioning International, LLC, a general contractor to HDI, would perform day-to-day activities at the IPEC, including decommissioning activities, pursuant to a general contractor agreement between it and HDI, subject to HDI's direct oversight and control as the licensed operator.

Nuclear Asset Management Company, LLC and HDI would be direct, wholly-owned subsidiaries of Holtec Power, Inc., which is a direct, wholly-owned subsidiary of Holtec.

The NRC published the notice of consideration of approval of the license transfer application and of consideration of amending the licenses to reflect the proposed transfer in the **Federal Register** on January 23, 2020 (85 FR 3947). This notice provided an opportunity to request a hearing within 20 days and an opportunity to comment within 30 days. The comment period was extended on February 19, 2020 (85 FR 9486), for an additional 30 days.

In response, on February 11, 2020, the Safe Energy Rights Group, Inc. (ADAMS Accession No. ML20042C984) and, on February 12, 2020, the State of New York (ADAMS Accession No. ML20043E118); the Town of Cortlandt, Village of Buchanan, and Hendrick Hudson School District (ADAMS Accession No. ML20043F054); and Riverkeeper, Inc. (ADAMS Accession No. ML20043F530) each filed separate hearing requests. These hearing requests are pending before the Commission. The NRC also received over 400 comment submissions, which the NRC staff listed and summarized in its safety evaluation related to the license transfer application. The staff reviewed the hearing requests and comment submissions and considered them as part of its evaluation of the application.

The letter from HDI dated February 12, 2020, requested, in support of the license transfer application, an exemption from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) to allow the use of funds from the IP1, IP2, and IP3 decommissioning trust funds for spent fuel management and site restoration activities at the IPEC and to allow disbursements from the IP1, IP2, and IP3 decommissioning trust funds for these activities to be made without prior notice, similar to withdrawals in accordance with 10 CFR 50.82(a)(8). Separate from this Order, the NRC staff reviewed and approved the exemption request (ADAMS Accession No. ML20309A788). The staff is issuing its approval of the exemption request concurrent with its approval of the license transfer application; the exemption is effective immediately, but will only apply to Holtec IP2, Holtec IP3, and HDI if and when the proposed transfer transaction is consummated.

Pursuant to 10 CFR 50.80, no license for a production or utilization facility, or any right thereunder, shall be transferred, either voluntarily or involuntarily, directly or indirectly, through transfer of control of the license to any person, unless the Commission gives its consent in writing. Upon review of the information in the license transfer application, as supplemented, and other information before the Commission, and relying upon the representations and agreements contained in the application, the NRC staff has determined that Holtec IP2, Holtec IP3, and HDI are qualified to be the holders of the IPEC licenses and that the transfer of the IPEC licenses, as

described in the application, is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto, subject to the conditions set forth below.

Upon review of the application, as supplemented, for conforming administrative amendments to the IPEC licenses to reflect the transfer, the NRC staff has determined that:

(1) The application for amendments complies with the standards and requirements of the AEA and the Commission's rules and regulations set forth in 10 CFR chapter I.

(2) The facility will operate in conformity with the application, the provisions of the AEA, and the rules and regulations of the Commission.

(3) There is reasonable assurance that the activities authorized by the amendments can be conducted without endangering the health and safety of the public, and that such activities will be conducted in compliance with the Commission's regulations.

(4) The issuance of the amendments will not be inimical to the common defense and security or to the health and safety of the public.

(5) The issuance of the amendments is in accordance with 10 CFR part 51 of the Commission's regulations and all applicable requirements have been satisfied. The findings set forth above are supported by an NRC staff safety evaluation dated November 23, 2020, which is available at ADAMS Accession No. ML20297A333.

III.

Accordingly, pursuant to Sections 161b, 161i, and 184 of the AEA, 42 U.S.C. Sections 2201(b), 2201(i), and 2234; and 10 CFR 50.80, 10 CFR 72.50, and 10 CFR 50.90, *it is hereby ordered* that the license transfer application, as described herein, is approved, subject to the following conditions:

(1) At least 2 business days before the planned closing date of the purchase and sale transaction, Holtec shall provide the Directors of the NRC's Office of Nuclear Material Safety and Safeguards (NMSS) and Office of Nuclear Reactor Regulation (NRR) with pre-notification that Holtec IP2 and Holtec IP3 and HDI will enter into a decommissioning operator services agreement that provides for HDI to act as agent for Holtec IP2 and Holtec IP3 and for Holtec IP2 and Holtec IP3 to pay HDI's costs of post-shutdown operations, including decommissioning and spent fuel management costs.

(2) Before the closing of the license transfer, Holtec IP2, Holtec IP3, and HDI shall provide the Directors of NMSS and NRR satisfactory documentary evidence that they have obtained the appropriate amount of insurance required of a licensee under 10 CFR 140.11(a)(4) and 10 CFR 50.54(w).

(3) The NRC staff's approval of this license transfer is subject to the Commission's authority to rescind, modify, or condition the approved transfer based on the outcome of any post-effectiveness hearing on the license transfer application.

It is further ordered that consistent with 10 CFR 2.1315(b), the license amendments that make changes, as indicated in Enclosure 2 to the letter transmitting this Order, to reflect the subject license transfer are approved. The amendments shall be issued and made effective at the time the proposed transfer actions are completed.

It is further ordered that at least 2 business days before the planned closing date of the purchase and sale transaction, ENOI shall provide the Directors of NMSS and NRR with pre-notification of the planned transaction. Should the proposed transfer not be completed within 1 year of the date of this Order, this Order shall become null and void; provided, however, that upon written application and for good cause shown, such date may be extended by order.

This Order is effective upon issuance.

For further details with respect to this Order, see the application dated November 21, 2019, as supplemented by letters dated December 19, 2019; January 17, 2020; February 12, 2020; and August 7, 2020, and the associated NRC staff safety evaluation dated November 23, 2020, which are available for public inspection electronically through ADAMS in the NRC Library at *https://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems accessing the documents located in ADAMS should contact the NRC Public Document Room reference staff by telephone at 1–800–397–4209 or 301–415–4737 or by email to *pdr.resource@nrc.gov.*

Dated: November 23, 2020.

For the Nuclear Regulatory Commission.

John W. Lubinski,

Director, Office of Nuclear Material Safety and Safeguards.

Ho K. Nieh,

Director, Office of Nuclear Reactor Regulation.

[FR Doc. 2020–26278 Filed 11–27–20; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: Renewal of an Existing Information Collection, USAJOBS®, [OMB Control No. 3206–0219]

AGENCY: Office of Personnel Management.

ACTION: 60-Day notice and request for comments.

SUMMARY: The Office of Personnel Management (OPM) offers the general public and other Federal agencies the opportunity to comment on a revised information collection request (ICR) 3206–0219, USAJOBS.

DATES: Comments are encouraged and will be accepted until January 29, 2021. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESS: Interested persons are invited to submit written comments on the proposed information collection to the Office of Personnel Management, Human Resources Solutions, Federal Staffing Center, USAJOBS, 1900 E Street NW, Washington, DC 20415, Attention: John Still or send them via electronic mail to *john.still@opm.gov.*

FOR FURTHER INFORMATION CONTACT: A copy of this ICR, with applicable supporting documentation, may be obtained by contacting the Office of Personnel Management, Human Resources Solutions, Federal Staffing Center, USAJOBS, 1900 E. Street NW, Washington, DC 20415, Attention: John Still, or by sending a request via electronic mail to *john.still@opm.gov.*

SUPPLEMENTARY INFORMATION: As required by the Paperwork Reduction Act of 1995, (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection. USAJOBS is the Federal Government's centralized source for most Federal jobs and employment information, including both positions that are required by law to be posted at that location, *see* 5 U.S.C. 3327, 3330, and positions that can be posted there at an agency's discretion. The Applicant Profile and Resume Builder are two components of the USAJOBS application system. USAJOBS reflects the minimal critical elements collected across the Federal Government to begin an application for Federal jobs under the authority of sections 1104, 1302, 3301, 3304, 3320, 3361, 3393, and 3394 of title 5, United States Code, and Civil Service Rule II, codified at 5 CFR part 2. OPM proposes to renew a currently approved collection. Therefore, we invite comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

Analysis

Agency: Office of Personnel Management.
Title: USAJOBS.
OMB Number: 3206–0219.
Frequency: Annually.
Affected Public: Individuals.
Number of Respondents: 4,529,824.
Estimated Time per Respondent: 43 Minutes.
Total Burden Hours: 3,246,374.

Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

[FR Doc. 2020–26410 Filed 11–27–20; 8:45 am]

BILLING CODE 6325–38–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2021–29 and CP2021–30; MC2021–30 and CP2021–31]

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 2, 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:

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I. Introduction
II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2021–29 and CP2021–30; *Filing Title:* USPS Request to Add Priority Mail Express Contract 84 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* November 23, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Gregory S. Stanton; *Comments Due:* December 2, 2020.

2. *Docket No(s).:* MC2021–30 and CP2021–31; *Filing Title:* USPS Request to Add Priority Mail Contract 681 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* November 23, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Gregory S. Stanton; *Comments Due:* December 2, 2020.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2020–26373 Filed 11–27–20; 8:45 am]

BILLING CODE 7710–FW–P

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

RAILROAD RETIREMENT BOARD

Proposed Collection; Comment Request

Summary: In accordance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 which provides opportunity for public comment on new or revised data collections, the Railroad Retirement Board (RRB) will publish periodic summaries of proposed data collections.

Comments are invited on: (a) Whether the proposed information collection is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the RRB's estimate of the burden of the collection of the information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden related to the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Title and purpose of information collection: Availability for Work; OMB 3220–0164.

Under Section 1(k) of the Railroad Unemployment Insurance Act (45 U.S.C. 231k), unemployment benefits are not payable for any day for which the claimant is not available for work.

Under Railroad Retirement Board (RRB) regulation 20 CFR 327.5, ''available for work'' is defined as being willing and ready for work. A claimant

is ''willing'' to work if willing to accept and perform for hire such work as is reasonably appropriate to his or her employment circumstances. A claimant is ''ready'' for work if he or she (1) is in a position to receive notice of work and is willing to accept and perform such work, and (2) is prepared to be present with the customary equipment at the location of such work within the time usually allotted.

Under RRB regulation 20 CFR 327.15, a claimant may be requested at any time to show, as evidence of willingness to work, that reasonable efforts are being made to obtain work. In order to determine whether a claimant is; (a) available for work, and (b) willing to work, the RRB utilizes Forms UI–38, UI Claimant's Report of Efforts to Find Work, and UI–38s, School Attendance and Availability Questionnaire, to obtain information from the claimant and Form ID–8k, Questionnaire—Reinstatement of Discharged or Suspended Employee, from the union representative. One response is completed by each respondent. The RRB proposes the following changes to the Forms UI–38 and UI–38s. The RRB proposes no changes to Forms UI–38, UI–38s, and ID–8k.

ESTIMATE OF ANNUAL RESPONDENT BURDEN

Form No.	Annual responses	Time (minutes)	Burden (hours)
UI–38s (in person) *	59	6	6
UI–38s (by mail) *	119	10	20
UI–38	3,485	11.5	668
ID–8k	6,461	5	538
Total	10,124		1,232

Additional Information or Comments: To request more information or to obtain a copy of the information collection justification, forms, and/or supporting material, contact Kennisha Tucker at (312) 469–2591 or *Kennisha.Tucker@rrb.gov.* Comments regarding the information collection should be addressed to Brian Foster, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611–1275 or emailed to *Brian.Foster@rrb.gov.* Written comments should be received within 60 days of this notice.

Brian D. Foster,

Clearance Officer.

[FR Doc. 2020–26414 Filed 11–27–20; 8:45 am]

BILLING CODE 7905–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission Asset Management Advisory Committee (''AMAC'') will hold a public meeting on Tuesday, December 1, 2020 at 9:00 a.m.

PLACE: The meeting will be conducted by remote means. Members of the public may watch the webcast of the meeting on the Commission's website at *www.sec.gov.*

STATUS: The meeting will begin at 9:00 a.m. and will be open to the public by webcast on the Commission's website at *www.sec.gov.*

MATTERS TO BE CONSIDERED: On November 9, 2020, the Commission issued notice of the meeting (Release No. 34–90376), indicating that the meeting is open to the public and inviting the public to submit written comments to AMAC. This Sunshine Act notice is being issued because a majority of the Commission may attend the meeting.

The meeting will include a discussion of matters in the asset management industry relating to (1) the Private Investments Subcommittee; (2) the ESG Subcommittee, including a discussion of potential recommendations from that Subcommittee; and (3) the Diversity and Inclusion Subcommittee, including a panel discussion on improving diversity and inclusion.

The meeting will also include a discussion of AMAC's administrative matters during a portion of the meeting that will not be open to the public.

CONTACT PERSON FOR MORE INFORMATION: For further information, please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

Dated: November 24, 2020.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–26413 Filed 11–25–20; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90478; File No. SR–PEARL–2020–26]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 2618, Risk Settings and Trading Risk Metrics

November 23, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 13, 2020, MIAX PEARL, LLC (''MIAX PEARL'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange is filing a proposed rule change to provide Equity Members [3] the Net Notional Trade Value risk setting, an additional optional risk setting under Exchange Rule 2618 when trading equity securities on the Exchange's equity trading platform (referred to herein as ''MIAX PEARL Equities''). The Exchange also proposes to make a non-

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Rule 1901 for the definition of Equity Member.

substantive technical clarifications to paragraphs (a)(5) and (6) of Exchange Rule 2618.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/pearl* at MIAX PEARL's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to adopt the ''Net Notional Trade Value'' risk setting, which would provide Equity Members an additional optional risk setting under Exchange Rule 2618 when trading equity securities on MIAX PEARL Equities.[4] The Exchange also proposes to make a non-substantive technical clarifications to paragraphs (a)(5) and (6) of Exchange Rule 2618.

Net Notional Risk Setting

The Exchange recently adopted the Gross Notional Trade Value risk setting to help Equity Members manage their risk.[5] In that proposal, the Exchange also proposed to allow an Equity Member that does not self-clear the ability to allocate and revoke[6] the responsibility of establishing and adjusting the risk settings identified in proposed paragraph (a)(2) of Exchange Rule 2618, which presently only includes the Gross Notional Trade Value risk setting, to a Clearing Member[7] that clears transactions on behalf of the Equity Member, if designated in a manner prescribed by the Exchange.[8]

The Exchange now proposes to offer Net Notional Trade Value, an additional optional risk setting that would authorize the Exchange to take automated action if a designated limit for an Equity Member is breached. Like Gross Notional Trade Value, Net Notional Trade Value would provide Equity Members with enhanced abilities to manage their risk with respect to orders on the Exchange. The Exchange proposes to set forth Net Notional Trade Value under paragraph (a)(2) of Rule 2618 as follows:

- The ''Net Notional Trade Value'' which refers to a pre-established maximum daily dollar amount for purchases and sales across all symbols, where purchases are counted as positive values and sales are counted as negative values. For purposes of calculating the Net Notional Trade Value, only executed orders are included.

Like Gross Notional Trade Value, the proposed Net Notional Trade Value risk setting is similar to credit controls measuring net exposure provided for in paragraph (a)(1)(A) of Exchange Rule 2618 and allow limits to be set at the Market Participant Identifier (''MPID''), session, and firm level.[9] Therefore, the proposed risk management functionality would allow an Equity Member to manage its risk more comprehensively and across various level settings. Further, like our existing credit controls measuring gross exposure, the proposed risk setting would also be based on a notional execution value. The Exchange notes that the current gross notional control noted in paragraph (a)(2)(A) of Exchange Rule 2618 will continue to be available in addition to the proposed risk setting.

Like for the Gross Notional Trade Value risk setting,[10] the processes set forth under existing paragraphs (a)(3) through (6) of Exchange Rule 2618 would also apply to the Net Notional Trade Value Risk Setting and are further described below.

Equity Members that do not self-clear may, pursuant to paragraph (a)(4) of Exchange Rule 2618, allocate and revoke[11] the responsibility of establishing and adjusting the Net Notional Trade Value risk settings to a Clearing Member that clears transactions on behalf of the Equity Member in the identical manner as they may do today for the Gross Notional Trade Value risk setting.[12]

By way of background and as explained in its proposal to adopt the Gross Notional Trade Value risk setting,[13] Exchange Rule 2620(a) requires that all transactions passing through the facilities of the Exchange shall be cleared and settled through a Qualified Clearing Agency using a continuous net settlement system.[14] As reflected in Exchange Rule 2620(a), this requirement may be satisfied by direct participation, use of direct clearing services, or by entry into a corresponding clearing arrangement with another Equity Member that clears through a Qualified Clearing Agency (*i.e.,* a Clearing Member). If an Equity Member clears transactions through another Equity Member that is a Clearing Member, such Clearing Member shall affirm to the Exchange in writing, through letter of authorization, letter of guarantee or other agreement acceptable to the Exchange, its agreement to assume responsibility for clearing and settling any and all trades executed by the Equity Member

[4] The proposed rule changes are substantially similar to a recent rule amendment by Cboe BZX Exchange, Inc. (''BZX'') and Cboe EDGX Exchange, Inc. (''EDGX''). *See* Interpretation and Policy .03 to BZX Rule 11.13 *and* Interpretation and Policy .03 to EDGX Rule 11.10. *See* Securities Exchange Act Nos. 88599 (April 8, 2020) 85 FR 20793 (April 14, 2020) (the ''BZX Approval''); and 88783 (April 30, 2020), 85 FR 26991 (May 6, 2020) (the ''EDGX Notice''). *See also* Securities Exchange Act Release Nos. 89032 (June 9, 2020), 85 FR 36246 (June 15, 2020) (SR–CboeBZX–2020–44); *and* 89000 (June 3, 2020), 85 FR 35344 (June 9, 2020) (SR–CboeEDGX–2020–023).

[5] *See* Securities Exchange Act Release No. 89971 (September 23, 2020), 85 FR 61053 (September 29, 2020) (SR–PEARL–2020–16).

[6] As discussed below, if an Equity Member revokes the responsibility of establishing and adjusting the risk settings identified in proposed paragraph (a), the settings applied by the Equity Member would be applicable.

[7] The term ''Clearing Member'' refers to a Member that is a member of a Qualified Clearing Agency and clears transactions on behalf of another Member. *See* Exchange Rule 2620(a). Exchange Rule 2620(a) also: (i) Outlines the process by which a Clearing Member shall affirm its responsibility for clearing any and all trades executed by the Equity Member designating it as its Clearing Firm; and (ii) provides that the rules of a Qualified Clearing Agency shall govern with respect to the clearance and settlement of any transactions executed by the Equity Member on the Exchange.

[8] *See supra* note 5.

[9] One difference between this proposed rule change and those of BZX and EDGX is that both BZX and EDGX only allow the net credit risk limits to be set at the MPID Level or to a subset of orders identified within that MPID (the ''risk group identifier'' level). *See supra* note 4. The Exchange believes allowing for limits to be set at the MPID, session, or firm level provides Equity Members greater flexibility in managing their risk exposure.

[10] *See supra* note 5.

[11] As discussed below, if an Equity Member revokes the responsibility of establishing and adjusting the risk settings identified in proposed paragraph (a), the settings applied by the Equity Member would be applicable.

[12] *See supra* note 5.

[13] *Id.*

[14] The term ''Qualified Clearing Agency'' means a clearing agency registered with the Commission pursuant to Section 17A of the Act that is deemed qualified by the Exchange. *See* Exchange Rule 1901. The rules of any such clearing agency shall govern with the respect to the clearance and settlement of any transactions executed by the Member on the Exchange.

designating it as its clearing firm.[15] Thus, while not all Equity Members are Clearing Members, all Equity Members are required either to clear their own transactions or to have in place a relationship with a Clearing Member that has agreed to clear transactions on their behalf in order to conduct business on the Exchange. Therefore, the Clearing Member that guarantees the Equity Member's transactions on the Exchange has a financial interest in the risk settings utilized within the System[16] by the Equity Member.

Paragraph (a) of Rule 2620 allows Clearing Members an opportunity to manage their risk of clearing on behalf of other Equity Members, if authorized to do so by the Equity Member trading on MIAX PEARL Equities. Such functionality is designed to help Clearing Members to better monitor and manage the potential risks that they assume when clearing for Equity Members of the Exchange. Like it does today for the Gross Notional Trade Value risk setting, an Equity Member may allocate or revoke the responsibility of establishing and adjusting the risk settings for the Net Notional Trade Value risk setting to its Clearing Member in a manner prescribed by the Exchange. By allocating such responsibility, an Equity Member cedes all control and ability to establish and adjust such risk settings to its Clearing Member unless and until such responsibility is revoked by the Equity Member, as discussed in further detail below. Because the Equity Member is responsible for its own trading activity, the Exchange will not provide a Clearing Member authorization to establish and adjust the Net Notional Trade Value risk setting on behalf of an Equity Member without first receiving consent from the Equity Member. The Exchange considers an Equity Member to have provided such consent if it allocates the responsibility to establish and adjust risk settings to its Clearing Member in a manner prescribed by the Exchange. By allocating such responsibilities to its Clearing Member, the Equity Member consents to the Exchange taking action, as set forth in paragraph (a)(6) of Exchange Rule 2618, with respect to the Equity Member's trading activity. Specifically, like for the Gross Notional Trade Value risk setting, if the Net Notional Trade Value risk settings established by the Clearing Member are breached, the Equity Member consents that the Exchange will automatically block new orders submitted and cancel open orders until such time that the applicable risk setting is adjusted to a higher limit by the Clearing Member. An Equity Member may also revoke responsibility allocated to its Clearing Member pursuant to (a)(6) of Exchange Rule 2618 at any time in a manner prescribed by the Exchange.

Like for the Gross Notional Trade Value risk setting, paragraph (a)(3) Exchange Rule 2618 provides that either an Equity Member or its Clearing Member, if allocated such responsibility pursuant to paragraph (a)(4) of Exchange Rule 2618, may establish and adjust limits for the Net Notional Trade Value risk setting. An Equity Member or Clearing Member may establish and adjust limits for the risk setting in a manner prescribed by the Exchange. The risk management web portal page will also provide a view of all applicable limits for each Equity Member, which will be made available to the Equity Member and its Clearing Member, as discussed in further detail below.

Paragraph (a)(5) of Exchange Rule 2618 provides optional alerts to signal when an Equity Member is approaching its designated limit. If enabled, the alerts would generate when the Equity Member breaches certain percentage thresholds of its designated risk limit, including the proposed Net Notional Trade Value risk setting, as determined by the Exchange. Based on current industry standards, in its proposal to adopt the Gross Notional Trade Value risk setting, the Exchange initially set these thresholds at seventy-five or ninety percent of the designated risk limit.[17] These thresholds would also apply to the Net Notional Trade Value risk setting. Both the Equity Member and Clearing Member[18] would have the option to enable the alerts via the risk management tool on the web portal and designate email recipients of the notification. The proposed alert system is meant to warn an Equity Member and Clearing Member of the Equity Member's trading activity, and will have no impact on the Equity Member's order and trade activity if a warning percentage is breached. Proposed paragraph (a)(6) of Exchange Rule 2618 would authorize the Exchange to automatically block new orders submitted and cancel all open orders in the event that a risk setting is breached. The Exchange will continue to block new orders submitted until the Equity Member or Clearing Member, if allocated such responsibility pursuant to proposed paragraph (a)(4) of Exchange Rule 2618, adjusts the risk settings to a higher threshold. The proposed functionality is designed to assist Equity Members and Clearing Members in the management of, and risk control over, their credit risk. Further, the proposed functionality would allow the Equity Member to seamlessly avoid unintended executions that exceed their stated risk tolerance.

Like it did for the Gross Notional Trade Value risk setting,[19] the Exchange does not guarantee that the proposed Net Notional Trade Value risk setting and the processes described in paragraphs (a)(2) through (6) are sufficiently comprehensive to meet all of an Equity Member's risk management needs. Pursuant to Rule 15c3–5 under the Act,[20] a broker-dealer with market access must perform appropriate due diligence to assure that controls are reasonably designed to be effective, and otherwise consistent with the rule.[21] Use of the Exchange's risk settings included in proposed paragraphs (a)(2) through (6) of Exchange Rule 2618 will not automatically constitute compliance with Exchange or federal rules and responsibility for compliance with all Exchange and SEC rules remains with the Equity Member.

Lastly, as the Exchange currently has the authority to share any of an Equity Member's risk settings specified in paragraph (a) of Exchange Rule 2618 under Exchange Rule 2620(f) with the Clearing Member that clears transactions on behalf of the Equity Member. Existing Exchange Rule 2620(f) provides the Exchange with authority to directly provide Clearing Members that clear transactions on behalf of an Equity Member, to share any of the Equity Member's risk settings set forth under paragraph (a) of Exchange Rule 2618.[22] The purpose of such a provision under Exchange Rule 2620(f) was

[15] An Equity Member can designate one Clearing Member per MPID associated with the Equity Member.

[16] *See* Exchange Rule 100 for a definition of ''System.''

[17] *See supra* note 5.

[18] A Clearing Member would have the ability to enable alerts regardless of whether it was allocated responsibilities pursuant to proposed paragraph (a)(4) of Exchange Rule 2618.

[19] *See supra* note 5.

[20] 17 CFR 240.15c3–5.

[21] *See* Division of Trading and Markets, Responses to Frequently Asked Questions Concerning Risk Management Controls for Brokers or Dealers with Market Access, *available at https://www.sec.gov/divisions/marketreg/faq-15c-5-risk-management-controls-bd.htm.*

[22] By using the optional risk settings provided in paragraph (a) of Exchange Rule 2618, an Equity Member opts-in to the Exchange sharing its risk settings with its Clearing Member. Any Equity Member that does not wish to share such risk settings with its Clearing Member can avoid sharing such settings by becoming a Clearing Member. *See, e.g.,* Securities Exchange Act Release No. 89563 (August 14, 2020), 85 FR 51510 (August 20, 2020) (SR–PEARL–2020–03) (''Equities Approval Order'').

implemented to reduce the administrative burden on participants on MIAX PEARL Equities, including both Clearing Members and Equity Members, and to ensure that Clearing Members receive information that is up to date and conforms to the settings active in the System. Further, the provision was adopted because the Exchange believed such functionality would help Clearing Members to better monitor and manage the potential risks that they assume when clearing for Equity Members of the Exchange. Paragraph (f) of Exchange Rule 2620 further authorizes the Exchange to share any of an Equity Member's risk settings specified in paragraph (a)(2) to Exchange Rule 2618 with the Clearing Member that clears transactions on behalf of the Equity Member.

The Exchange notes that the use by an Equity Member of the risk settings offered by the Exchange is optional. By using these proposed optional risk settings, an Equity Member therefore also opts-in to the Exchange sharing its designated risk settings with its Clearing Member. The Exchange believes that its proposal to offer an additional risk setting will allow Equity Members to better manage their credit risk. Further, by allowing Equity Members to allocate the responsibility for establishing and adjusting such risk settings to its Clearing Member, the Exchange believes Clearing Members may reduce potential risks that they assume when clearing for Equity Members of the Exchange. The Exchange also believes sharing a Member's risk settings set forth under paragraph (a)(2) to Exchange Rule 2618, including the proposed Net Notional Trade Value risk setting, directly with Clearing Members reduces the administrative burden on participants on the Exchange, including both Clearing Members and Equity Members, and ensures that Clearing Members are receiving information that is up to date and conforms to the settings active in the System.

Non-Substantive Clarification

The Exchange proposes to clarify that paragraphs (a)(5) and (6) of Exchange Rule 2618 apply only to the existing Gross Notional Trade Value and proposed Net Notional Trade Value risk setting set forth under paragraph (a)(2) of Exchange Rule 2618.[23] This is consistent with the rules of other exchanges, but the Exchange believes this clarification is necessary due to the different structure of the Exchange Rule 2618. The Exchange does not propose to make any other changes to paragraphs (a)(5) and (6) of Exchange Rule 2618.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[24] in general, and furthers the objectives of Section 6(b)(5),[25] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in 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.

Net Notional Trade Value

Specifically, the Exchange believes the proposed amendment will remove impediments to and perfect the mechanism of a free and open market and a national market system because it provides additional functionality for an Equity Member to manage its credit risk. Like for the Gross Notional Trade Value risk setting,[26] the processes set forth under existing paragraphs (a)(3) through (6) of Exchange Rule 2618 would also apply to the Net Notional Trade Value Risk Setting. In addition, the proposed risk setting could provide Clearing Members, who have assumed certain risks of Equity Members, greater control over risk tolerance and exposure on behalf of their correspondent Equity Members, if allocated responsibility pursuant to proposed paragraph (a)(4) of Exchange Rule 2618, while also providing an alert system that would help to ensure that both Equity Members and its Clearing Member are aware of developing issues. As such, the Exchange believes that the proposed risk settings would provide a means to address potentially market-impacting events, helping to ensure the proper functioning of the market.

In addition, the Exchange believes that the proposed rule change is designed to protect investors and the public interest because the proposed functionality is a form of risk mitigation that will aid Equity Members and Clearing Members in minimizing their financial exposure and reduce the potential for disruptive, market-wide events. In turn, the introduction of such risk management functionality could enhance the integrity of trading on the securities markets and help to assure the stability of the financial system.

Further, the Exchange believes that the proposed rule will foster cooperation and coordination with persons facilitating transactions in securities because the Exchange will provide alerts when an Equity Member's trading activity reaches certain thresholds, which will be available to both the Equity Member and Clearing Member. As such, the Exchange may help Clearing Members monitor the risk levels of correspondent Equity Members and provide tools for Clearing Members, if allocated such responsibility, to take action.

The proposal will permit Clearing Members who have a financial interest in the risk settings of Equity Members to better monitor and manage the potential risks assumed by Clearing Members, thereby providing Clearing Members with greater control and flexibility over setting their own risk tolerance and exposure. To the extent a Clearing Member might reasonably require an Equity Member to provide access to its risk settings as a prerequisite to continuing to clear trades on the Equity Member's behalf, the Exchange's proposal to share those risk settings directly reduces the administrative burden on participants on the Exchange, including both Clearing Members and Equity Members. Moreover, providing Clearing Members with the ability to see the risk settings established for Equity Members for which they clear will foster efficiencies in the market and remove impediments to and perfect the mechanism of a free and open market and a national market system. The proposal also ensures that Clearing Members are receiving information that is up to date and conforms to the settings active in the System. The Exchange believes that the proposal is consistent with the Act, particularly Section 6(b)(5),[27] because it will foster cooperation and coordination with persons engaged in facilitating transactions in securities and more generally, will protect investors and the public interest, by allowing Clearing Members to better monitor their risk exposure and by fostering efficiencies in the market and removing impediments to and perfect the mechanism of a free and open market and a national market system.

Finally, the Exchange believes that the proposed rule change does not unfairly discriminate among the Exchange's Members because use of the risk settings is optional and are not a prerequisite for participation on the

[23] *See, e.g.,* Interpretation and Policy .03 to EDGX Rule 11.13.

[24] 15 U.S.C. 78f(b).

[25] 15 U.S.C. 78f(b)(5).

[26] *See supra* note 5.

[27] 15 U.S.C. 78f(b)(5).

Exchange. The proposed risk settings are completely voluntary and, as they relate solely to optional risk management functionality, no Equity Member is required or under any regulatory obligation to utilize them.

Like for the Gross Notional Trade Value risk setting, the processes set forth under existing paragraphs (a)(3) through (6) of Exchange Rule 2618, which were previously filed with the Commission for immediate effectiveness, would also apply to the Net Notional Trade Value risk setting.[28] The proposed rule change is also based on Interpretation and Policy .03 of EDGX Rule 11.10 and Interpretation and Policy .03 of BZX Rule 11.13, with a few minor differences.[29] First, both BZX and EDGX only allow the net credit risk limits to be set at the MPID level or to a subset of orders identified within that MPID (the ''risk group identifier'' level) while the Exchange proposes to allow the risk limits to be set at the MPID, session, and firm level. Second, EDGX proposed additional changes to its Rule 11.13(a) to allow their clearing members access to its members risk settings. The Exchange does not need to include similar changes in this proposal as Exchange Rule 2620(a) already provides Clearing Members this ability and includes text identical to that which EDGX recently adopted.[30] Also unlike EDGX, the Exchange's proposed Net Notional Trade Value and existing credit controls measuring net exposure are both based on notional execution value. The controls noted in paragraph (h) of Interpretation and Policy .03 of the EDGX Rules are applied based on a combination of outstanding orders on the EDGX book and notional execution value, while their Net Credit Risk Limit is based on notional execution value only, as the Exchange proposes herein and currently does so for its Gross Notional Trade Value risk setting. The Exchange notes that it proposes to generate alerts when the Equity Member breaches certain percentage thresholds of its designated risk limit, as determined by the Exchange. Based on current industry standards, the Exchange anticipates initially setting these thresholds at seventy-five or ninety percent of the designated risk limit. The Exchange notes that EDGX stated these thresholds would be set at fifty, seventy, or ninety percent. These differences also exist in the Exchange's proposal to adopt the Gross Notional Trade Value risk setting, which was previously filed for immediate effectiveness and published by the Commission.[31]

Non-Substantive Clarifications

The Exchange also believes its non-substantive, technical clarifications to paragraphs (a)(5) and (6) of Exchange Rule 2618 is consistent with Section 6(b)(5)[32] because they will remove impediments to and perfect the mechanism of a free and open market and a national market system. The proposed clarification to paragraphs (a)(5) and (6) of Exchange Rule 2618 that is applies only to the existing Gross Notional Trade Value and proposed Net Notional Trade Value risk setting set forth under paragraph (a)(2) of Exchange Rule 2618[33] is consistent with the rules of other exchanges, but the Exchange believes this clarification is necessary due to the different structure of the Exchange Rule 2618. These changes to Exchange Rule 2618(a)(5) and (6) promote just and equitable principles of trade by making the Exchange's rules clearer and easier to understand, thereby avoiding potential investor confusion.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. In fact, the Exchange believes that the proposal may have a positive effect on competition because it would allow the Exchange to offer risk management functionality that is comparable to functionality that has been adopted by other national securities exchanges.[34] Further, by providing Equity Members and their Clearing Members additional means to monitor and control risk, the proposed rule may increase confidence in the proper functioning of the markets and contribute to additional competition among trading venues and broker-dealers. Rather than impede competition, the proposal is designed to facilitate more robust risk management by Equity Members and Clearing Members, which, in turn, could enhance the integrity of trading on the securities markets and help to assure the stability of the financial system. Lastly, the proposed clarifications to Exchange Rule 2618(a)(5) and (6) simply seek to make the Exchange's rules clearer and easier to understand, and, therefore, do they impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[35] and Rule 19b–4(f)(6) thereunder.[36]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–PEARL–2020–26 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange

[28] *See supra* note 5.

[29] *See supra* note 4.

[30] *Id.*

[31] *See supra* note 5.

[32] 15 U.S.C. 78f(b)(5).

[33] *See, e.g.,* Interpretation and Policy .03 to EDGX Rule 11.13.

[34] *Id.*

[35] 15 U.S.C. 78s(b)(3)(A).

[36] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–PEARL–2020–26. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*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 filing also will be available for inspection and copying at the principal office of the Exchange. 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–PEARL–2020–26, and should be submitted on or before December 21, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[37]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–26281 Filed 11–27–20; 8:45 am]

BILLING CODE 8011–01–P

[37] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90492]

Statement on Central Counterparties Authorized Under the European Markets Infrastructure Regulation Seeking To Register as a Clearing Agency or To Request Exemptions From Certain Requirements Under the Securities Exchange Act of 1934

AGENCY: Securities and Exchange Commission.

ACTION: Policy statement; guidance.

SUMMARY: The Securities and Exchange Commission (''SEC'') is issuing a policy statement and guidance regarding future applications from a central counterparty (''CCP'') authorized under the European Market Infrastructure Regulation (''EMIR'') and based in the European Union (an ''EU CCP'') that is seeking to register as a clearing agency with the SEC under the Securities Exchange Act of 1934 (''Exchange Act'') and future requests by EU CCPs for exemptions from certain SEC requirements.

DATES: The Commission's policy statement is effective November 30, 2020.

FOR FURTHER INFORMATION CONTACT: Matthew Lee, Assistant Director; Stephanie Park, Senior Special Counsel; or Claire Noakes, Special Counsel; at 202–551–7000 in the Division of Trading and Markets, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The SEC regulates as clearing agencies two EU CCPs authorized under EMIR that provide CCP services for security-based swaps.[1] Where an EU CCP has been authorized under EMIR, it is subject to requirements that are generally consistent with the same international standards for CCPs as are the SEC's requirements for CCPs. Based on these factors, the SEC is issuing this policy statement and guidance to describe the processes for EU CCPs seeking to register as clearing agencies or to request exemptions from SEC requirements. To provide transparency into SEC processes and to highlight efficient ways that EU CCPs can comply with SEC rules, this policy statement and guidance identifies the information that an EU CCP can provide in its registration application and provides a summary of the factors that the SEC will consider, as applicable, with respect to future requests for exemptions. Specifically, with respect to the registration process, EU CCPs can use preexisting materials, including self-assessments, in their applications to demonstrate compliance with EMIR and consistency with SEC requirements for CCPs. Such materials and self-assessments could facilitate both the EU CCP's efficient preparation of the application and the SEC's review of applications for registration. With respect to requests for exemptions, the SEC identifies below specific factors that it will consider if relevant to a particular future request for an exemption by an EU CCP. As an example of one such factor, an EU CCP may request an exemption because it has determined that the application of SEC requirements would impose unnecessary, duplicative, or inconsistent requirements in light of EMIR requirements to which it is subject. Issuing this policy statement and guidance is relevant to the SEC's ongoing dialogue with the European Commission (''EC'') regarding the EC's consideration of whether to find the SEC's regulatory framework for CCPs equivalent to EMIR.

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I. Introduction

The SEC regulates centralized clearance and settlement systems for securities, including those provided by CCPs and central securities depositories (''CSDs''). As part of the Securities Acts Amendments of 1975 (''1975 Amendments''), Congress directed the SEC to facilitate the establishment of a national system for the prompt and accurate clearance and settlement of securities transactions.[2] Since the enactment of the 1975 Amendments, the SEC has given regular consideration to how non-U.S. clearing agencies fit within the SEC's regulatory framework under the Exchange Act.[3] The SEC also acted to facilitate the central clearing of credit default swaps by permitting certain entities that performed CCP services to clear and settle credit default

[1] The Commission has based this statement, in part, on its experience regulating EU CCPs for security-based swaps, and therefore this release primarily discusses the Commission's processes for registration as a clearing agency and for requesting exemptions with respect to such CCPs. However, the Commission notes that the policy and guidance set forth in this statement, by its terms and as set forth below, also applies to an EU CCP that clears securities other than security-based swaps.

[2] *See* 15 U.S.C. 78q–1(a)(2); *see also* Report of the Senate Committee on Banking, Housing & Urban Affairs, S. Rep. No. 94–75, at 4 (1975) (stating that ''[t]he Committee believes the banking and security industries must move quickly toward the establishment of a fully integrated national system for the prompt and accurate processing and settlement of securities transactions'').

[3] *See* Release No. 34–11904 (Dec. 5, 1975), 40 FR 57872 (Dec. 12, 1975) (considering requests for exemptions from non-U.S. clearing agencies).

swaps on a temporary, conditional basis.[4]

In 2010, Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') amended the Exchange Act to provide for the comprehensive regulation of security-based swaps by the SEC.[5] In 2012, the EU adopted the EMIR framework to accomplish many of the same objectives in the EU. The oversight and regulation of security-based swap activity that is centrally cleared by both the SEC and under EMIR occurs through the registration and supervision of clearing agencies, among other things. Under its regulatory framework for clearing agencies, the SEC supervises clearing agencies that are subject to EU regulatory frameworks,[6] including EMIR.

With regard to EU CCPs currently registered with the SEC as clearing agencies,[7] the SEC has applied requirements commensurate and appropriate to the risks posed by the clearing agency functions and activities. The SEC believes that its supervisory approach to these EU CCPs has benefited from the SEC's familiarity with EMIR, including through the rule filing process for self-regulatory organizations (''SROs''),[8] and from ongoing communication and coordination between SEC staff and staff at the relevant national competent authorities (''NCAs'') for EU CCPs. The SEC also recognizes that both EMIR and the SEC's regulatory frameworks are designed to be generally consistent with the Principles for Financial Market Infrastructures (''PFMI''),[9] which are the relevant international standards for CCPs.[10]

Based on these factors, the SEC is issuing this policy statement and guidance to provide transparency into the processes for a new EU CCP applicant to (i) register with the SEC as a clearing agency to provide CCP services, and (ii) request exemptions from certain SEC requirements under the Exchange Act using preexisting materials in their applications that demonstrate compliance with EMIR and also consistency with SEC requirements for CCPs.[11] The SEC is also highlighting efficient ways that EU CCPs can comply with SEC rules.

Part II briefly describes EMIR and the SEC's regulatory framework for CCPs, both of which are generally consistent with common international standards for CCPs, and summarizes the SEC's experience with supervising or otherwise engaging with EU CCPs that the SEC has registered as clearing agencies. Part III describes and provides guidance regarding the process for seeking registration and requesting exemptions from SEC requirements. In particular, Part III.A provides guidance regarding the types of documentation that can be provided to facilitate both the efficient preparation of an application and the SEC's review of the application. Part III.B describes and provides guidance regarding the types of exemptions the SEC has generally provided to EU CCPs in the past and identifies the factors that the SEC will consider, if relevant to a particular request for an exemption, when reviewing future requests for exemptions.

II. Background

A. SEC Requirements for CCPs

SEC requirements for CCPs are codified in 17 CFR 240.17Ad–22 (''Rule 17Ad–22'') and designed to ensure that CCPs operate consistent with the requirements of Section 17A of the Exchange Act, which establishes the national system for clearance and settlement of securities transactions in the United States.[12] As a general matter, Rule 17Ad–22 includes policies and procedures requirements designed to promote the safe and reliable operation of registered clearing agencies, and to improve efficiency, transparency, and access to registered clearing agencies.[13] Rule 17Ad–22(e) establishes an enhanced regulatory framework for clearing agencies that provide the services of CCPs and CSDs.[14] It includes requirements for policies and procedures related to, among other things, financial risk management, governance, recovery planning, operations, and general business risk.[15] In adopting Rule 17Ad–22(e), the SEC noted that it was consistent with the PFMI.[16] In addition, CCPs registered

[4] The SEC authorized five entities to clear credit default swaps, three of which were based in the EU. *See* Exchange Act Release Nos. 60372 (July 23, 2009), 74 FR 37748 (July 29, 2009), 61973 (Apr. 23, 2010), 75 FR 22656 (Apr. 29, 2010) and 63389 (Nov. 29, 2010), 75 FR 75520 (Dec. 3, 2010) (CDS clearing by ICE Clear Europe Limited (''ICEEU''); 60373 (July 23, 2009), 74 FR 37740 (July 29, 2009), 61975 (Apr. 23, 2010), 75 FR 22641 (Apr. 29, 2010) and 63390 (Nov. 29, 2010), 75 FR 75518 (Dec. 3, 2010) (CDS clearing by Eurex Clearing AG); 59578 (Mar. 13, 2009), 74 FR 11781 (Mar. 19, 2009), 61164 (Dec. 14, 2009), 74 FR 67258 (Dec. 18, 2009), 61803 (Mar. 30, 2010), 75 FR 17181 (Apr. 5, 2010) and 63388 (Nov. 29, 2010), 75 FR 75522 (Dec. 3, 2010) (CDS clearing by Chicago Mercantile Exchange, Inc.); 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009), 61119 (Dec. 4, 2009), 74 FR 65554 (Dec. 10, 2009), 61662 (Mar. 5, 2010), 75 FR 11589 (Mar. 11, 2010) and 63387 (Nov. 29, 2010), 75 FR 75502 (Dec. 3, 2010) (CDS clearing by ICE Trust US LLC); 59164 (Dec. 24, 2008), 74 FR 139 (Jan. 2, 2009) (temporary CDS clearing by LIFFE A&M and LCH.Clearnet Ltd.).

[5] *See* Public Law 111–203, 124 Stat. 1376 (2010).

[6] In addition to EU CCPs discussed in this document, the SEC regulates clearing agencies that provide CSD services. *See* Release Nos. 34–38328 (Feb. 24, 1997), 62 FR 9225 (Feb. 28, 1997) (order approving application for exemption from clearing agency registration for Cedel Bank, now Clearstream); 34–39643 (Feb. 11, 1998), 63 FR 8232 (Feb. 18, 1998) (order approving application for exemption from clearing agency registration by Morgan Guaranty Trust Company of New York, Brussels Office, as operator of the Euroclear System, now Euroclear Bank).

[7] As discussed in more detail in Part II.C, the SEC granted ICEEU an exemption from clearing agency registration on July 23, 2009 to clear and settle credit default swaps on a temporary, conditional basis. ICEEU was subsequently deemed a clearing agency registered with the SEC on July 16, 2011. On December 16, 2016, the Commission registered Banque Centrale de Compensation, which conducts business under the name LCH SA (''LCH SA'') as a clearing agency, so that it may provide CCP services for security-based swaps to U.S. persons and LCH SA.

[8] An SRO must submit proposed rule changes to the SEC for review and approval pursuant to 17 CFR 240.19b–4 (''Rule 19b–4''). A stated policy, practice, or interpretation of an SRO would generally be deemed to be a proposed rule change. *See* 15 U.S.C. 78s(b)(1); 17 CFR 240.19b–4.

[9] *See* Committee on Payment and Settlement Systems and Technical Committee of the International Organization of Securities Commissions (''CPSS–IOSCO''), Principles for financial market infrastructures (Apr. 16, 2012), *http://www.bis.org/publ/cpss101a.pdf.* In 2014, the CPSS became the Committee on Payments and Market Infrastructures (''CPMI'').

[10] Title VIII of the Dodd-Frank Act directs the SEC, when prescribing risk management standards for systemically important CCPs, to take into consideration relevant international standards and existing prudential requirements. *See* 12 U.S.C. 5464(a)(2).

[11] Pursuant to the Congressional Review Act, the Office of Information and Regulatory Affairs has designated this statement as not a ''major rule,'' as defined by 5 U.S.C. 804(2). *See* 5 U.S.C. 801 *et seq.*

[12] *See* 17 CFR 240.17Ad–22; *see also* Clearing Agency Standards, Release No. 34–68080 (Oct. 22, 2012), 77 FR 66220, 66225–26 (Nov. 2, 2012) (''Clearing Agency Standards adopting release'').

[13] *See* Clearing Agency Standards adopting release, *supra* note 13, at 66224–25.

[14] *See* 17 CFR 240.17Ad–22(e); Release No. 34–78961 (Sept. 28, 2016), 81 FR 70786 (Oct. 13, 2016) (''CCA Standards adopting release''). While Rule 17Ad–22(e) originally applied to systemically important clearing agencies and clearing agencies for security-based swaps, the Commission amended the approach in 2020 so that Rule 17Ad–22(e) applies to any clearing agency that provides the services of a CCP or CSD. *See* Release No. 34–88616 (Apr. 9, 2020), 85 FR 28853 (May 14, 2020).

[15] *See* CCA Standards adopting release, *supra* note 14.

[16] *See* CCA Standards adopting release, *supra* note 14, at 70789 (stating that ''the PFMI is the relevant international standard for systemically important financial market infrastructures, such as [clearing agencies]. . . . Commission staff co-chaired the working group within CPSS–IOSCO that drafted both the consultative and final versions of the PFMI, and the Commission believes that the requirements applicable to clearing agencies set forth in the Exchange Act and the rules thereunder, including [Rule 17Ad–22(e)], are consistent with the standards set forth in the PFMI. Regulatory authorities around the world are in various stages of updating their regulatory regimes to adopt measures consistent with the PFMI. [Rule 17Ad–22 is] a continuation of the Commission's active effort to foster the development of the national clearance and settlement system, consistent with the

with the SEC as clearing agencies are also SROs under the Exchange Act and subject to the SRO rule filing process for proposed rule changes,[17] and registered clearing agencies are subject to the requirements of Regulation Systems Compliance and Integrity.[18]

With respect to CCPs for security-based swaps, Congress has charged the SEC with oversight of security-based swaps and the obligation to ensure that risk in the U.S. securities markets is appropriately managed, consistent with the purposes of the Exchange Act and Title VII of the Dodd-Frank Act.[19] Security-based swaps, and the CCPs that clear them, present unique risks to the U.S. securities markets, necessitating appropriate risk management by the CCPs and supervision by the SEC.[20] As it does more generally with respect to clearing agencies, the SEC has sought to apply requirements to such CCPs commensurate and appropriate to these risks while recognizing that each CCP has different organizational and operating structures and clears distinct products that warrant a tailored approach to governance and risk management. Accordingly, the SEC's regulatory framework for CCPs is designed to balance imposing appropriate regulatory requirements on CCPs and allowing each CCP, subject to its obligations and responsibilities as an SRO,[21] to implement its own policies and procedures consistent with Rule 17Ad–22.[22]

B. EMIR Requirements for CCPs

EMIR was enacted in 2012 and, among other things, sets out requirements for the clearing of OTC derivatives through authorized CCPs.[23] More specifically, EMIR introduces rules to reduce the counterparty credit risk of derivatives contracts by requiring that: All standardized OTC derivatives contracts must be centrally cleared through CCPs; if a contract is not cleared by a CCP, risk mitigation techniques must be applied; and CCPs must comply with stringent prudential, organizational, and conduct of business requirements. The regulation also requires market participants to monitor and mitigate the operational risks associated with transactions in derivatives, such as fraud and human error, by, for example, using electronic means to promptly confirm the terms of OTC derivatives contracts.[24] Recital 90 of EMIR also notes that EMIR is designed to be generally consistent with the PFMI:

> It is important to ensure international convergence of requirements for CCPs and trade repositories. This Regulation follows the existing recommendations developed by the Committee on Payment and Settlement Systems (CPSS) and International Organization of Securities Commissions (IOSCO) noting that the CPSS–IOSCO principles for financial market infrastructure, including CCPs, were established on 16 April 2012. It creates a Union framework in which CCPs can operate safely. ESMA should consider these existing standards and their future developments when drawing up or proposing to revise the regulatory technical standards as well as the guidelines and recommendations foreseen in this Regulation.

In addition, the European Securities Markets Authority (''ESMA'') issued guidance confirming that EMIR and the relevant Regulatory Technical Standards are ''intended for the EU regulatory framework for CCPs to consistently implement the PFMI, and NCAs have already been applying the PFMI in their supervision of CCPs.'' [25]

C. SEC-Registered Clearing Agencies Based in the EU

The SEC regulates two registered clearing agencies based in the EU that provide CCP services for security-based swaps pursuant to EU regulatory requirements, and the SEC has sought to avoid the application of unnecessary, duplicative, or inconsistent regulatory requirements with respect to these clearing agencies. ICEEU is based in the United Kingdom and was an authorized CCP under EMIR until the UK left the EU on January 31, 2020. The Commission granted ICEEU an exemption from clearing agency registration on July 23, 2009, to clear and settle credit default swaps on a temporary, conditional basis.[26] Congress deemed ICEEU a clearing agency registered with the SEC on July 16, 2011, so that ICEEU could provide CCP services for security-based swaps.[27] LCH SA is based in France and is an authorized CCP under EMIR. LCH SA applied for registration as a clearing agency to provide CCP services for security-based swaps to U.S. persons in 2016, and the SEC registered LCH SA on December 16, 2016.[28]

The SEC's regulatory approach to ICEEU and LCH SA avoids the application of unnecessary, duplicative, or inconsistent regulatory requirements in several ways. First, SEC requirements for clearing agencies generally, and in Rule 17Ad–22 specifically, are principles-based rather than prescriptive, enabling ICEEU and LCH SA to achieve compliance with SEC requirements, through the SRO rule filing process, in a manner that is also consistent with EMIR.[29] Second, the SEC requirements for CCPs, codified in Rule 17Ad–22, are generally consistent with the PFMI,[30] as are the requirements under the EMIR framework.[31] Third, as

requirements of the Exchange Act, and enhance the regulation and supervision of [clearing agencies], consistent with the Clearing Supervision Act.''). Similar to the subparts of Rule 17Ad–22(e), the PFMI includes 23 principles intended to address different potential sources of risk to CCPs and CSDs, including, among other things, legal risk, financial risk management, operational risk, and governance. *See supra* note 9.

[17] See *supra* note 8.

[18] *See* 17 CFR 242.1000 *et seq.;* Release No. 34–73639 (Nov. 19, 2014), 79 FR 72251 (Dec. 5, 2014).

[19] *See id.* at 70800.

[20] *See, e.g., id.* at 70854–55 (noting that certain requirements in Rule 17Ad–22(e) are applied specifically to CCPs for security-based swaps to protect against the risks associated with the jump-to-default risk and nonlinear payoffs associated with security-based swaps).

[21] *See supra* notes 8, 17, and accompanying text (discussing the SRO rule filing process in further detail).

[22] *See* CCA Standards adopting release, *supra* note 14, at 70875.

[23] Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, as amended, *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02012R0648-20200101.* The Commission notes that it would take substantially the same approach set out in this document for other jurisdictions that have adopted a regulatory framework that is substantially similar to EMIR.

[24] *See* EC, ''Derivatives/EMIR,'' *https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-markets/post-trade-services/derivatives-emir_en#eu-rules-on-derivatives-contracts.*

[25] *See* ESMA, Guidelines and Recommendations regarding the implementation of the CPSS–IOSCO Principles for Financial Market Infrastructures in respect of Central Counterparties (Apr. 9, 2014), *https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-1133_en.pdf.*

[26] The Commission granted the exemption in connection with its efforts to facilitate the central clearing of credit default swaps prior to the enactment of the Dodd Frank Act. *See* Release Nos. 34–60373 (July 23, 2009), 74 FR 37740 (July 29, 2009), 61975 (Apr. 23, 2010), 75 FR 22641 (Apr. 29, 2010) and 63390 (Nov. 29, 2010), 75 FR 75518 (Dec. 3, 2010).

[27] Section 763(b) of the Dodd-Frank Act amended Section 17A of the Exchange Act by adding new paragraph (*l*), 15 U.S.C. 78q–1(*l*), which provides that (i) a depository institution registered with the CFTC that cleared swaps as a multilateral clearing organization prior to the date of enactment of the Dodd-Frank Act and (ii) a derivatives clearing organization registered with the CFTC that cleared swaps pursuant to an exemption from registration as a clearing agency prior to the date of enactment of the Dodd-Frank Act will be deemed registered with the Commission as a clearing agency solely for the purpose of clearing security-based swaps.

[28] *See* Release No. 34–79707 (Dec. 29, 2016), 82 FR 1398 (Jan. 5, 2017) (''LCH SA registration order'').

[29] Both ICEEU and LCH SA are subject to Section 19(b) of the Exchange Act, which requires a registered clearing agency to submit proposed rule changes to the SEC for public comment and SEC review and approval. *See supra* notes 8 and 17 (further discussing the requirements of the rule filing process under Rule 19b–4).

[30] *See supra* note 16 and accompanying text.

[31] *See supra* note 25 and accompanying text.

discussed further below and in Part III.B, the SEC has exempted both clearing agencies from certain SEC requirements that may be unnecessary, duplicative, or inconsistent in light of EMIR requirements to which the EU CCPs are subject.[32] Fourth, the SEC remains engaged in a collaborative regulatory dialogue with the NCAs for each CCP, including the Bank of England for ICEEU and the Autorité des Marchés Financiers, Autorité de Contrôle Prudentiel et de Résolution, and Banque de France for LCH SA. The following sections provide a brief overview of the SEC's experience with each clearing agency, including examples of how the SEC has used its supervisory authority to avoid imposing unnecessary, duplicative, or inconsistent requirements on each clearing agency.

1. ICEEU

Pursuant to the Exchange Act and Rule 19b–4 thereunder, the SEC has published, reviewed, and approved a number of proposed rule changes submitted by ICEEU that, based on the information and representations made by ICEEU, were intended to facilitate its efforts to comply with EMIR, in addition to the Exchange Act. These proposed rule changes addressed topics including: (i) Segregation and portability of customer positions and margin; (ii) risk modeling; (iii) back testing; (iv) stress testing; (v) default management; and (vi) liquidity risk management.[33] In a number of instances, the SEC found good cause to provide accelerated approval [34] for proposed rule changes derived from EMIR requirements.[35] The SEC has also published notice of certain other immediately effective ICEEU rule filings [36] that were submitted in connection with other EU-based regulatory requirements for EU CCPs, including the General Data Protection Regulation,[37] the revised Markets in Financial Instruments Directive (''MiFID II''),[38] and the Markets in Financial Instruments Regulation (''MiFIR'').[39]

2. LCH SA

When the SEC approved LCH SA's registration as a clearing agency, LCH petitioned for, and the SEC granted, exemptions from certain requirements in the Exchange Act for aspects of LCH SA's U.S. operations, referencing the fact that LCH SA is subject to oversight by regulators in other jurisdictions.[40] Specifically, the SEC granted exemptions from requirements in Rule 17a–22 (concerning the filing by clearing agencies of certain supplemental material provided to participants), Rule 17Ad–22(c)(2) and (c)(2)(iii) (relating to annual audited financial statements), Section 19(b) of the Exchange Act and Rule 19b–4 thereunder (relating to SRO rule filings),[41] and Sections 5 and 6 of the Exchange Act (relating to registration as an exchange).[42] In addition, as part of its oversight of LCH SA, the SEC routinely evaluates representations made in proposed rule changes submitted by LCH SA that state as their purpose a need to comply with EMIR regulatory requirements, and the SEC has been able to approve multiple rule filings after finding that they were consistent with the Exchange Act, enabling LCH SA to achieve compliance with both the Exchange Act and EMIR.[43]

III. SEC Process for Review of Applications for Registration as a Clearing Agency and Requests for Exemptions by EU CCPs

For the reasons discussed above, the SEC is describing, and providing transparency into, its processes to assist EU CCPs seeking registration or requesting exemptions. The guidance includes information that an EU CCP can provide in its application and a summary of the factors that the SEC will consider, if applicable to a particular request, with respect to future exemption requests.

A. Applications for Registration as a Clearing Agency

To register as a clearing agency, an EU CCP must submit an application for registration on Form CA–1 in accordance with Section 17A of the Exchange Act and Rule 17Ab2–1 thereunder.[44] Form CA–1 requires an applicant to complete the elements of the form itself and submit nineteen exhibits. Specifically, the form itself, and Schedule A thereto, contain questions that are designed to elicit general information about the types of activities in which the applicant proposes to engage and the identity of the applicant's direct and indirect owners and other control persons, as

[32] *See infra* notes 40–42, 55–57, and accompanying text.

[33] *See* Release Nos. 34–73075 (Sept. 11, 2014), 79 FR 55848 (Sept. 17, 2014); 34–72756 (Aug. 4, 2014), 79 FR 46479 (Aug. 8, 2014); 34–72755 (Aug. 4, 2014), 79 FR 46481 (Aug. 8, 2014); 34–72754 (Aug. 4, 2014), 79 FR 46477 (Aug. 8, 2014).

[34] *See* 15 U.S.C. 78s(b)(2)(C)(iii).

[35] *See, e.g.,* ICEEU Notice of Filing Amendment Nos. 1 and 2 and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, to Revise the ICE Clear Europe Clearing Rules Relating to the Application of Default Provisions in the Event of a Resolution Proceeding, Release No. 34–80304 (Mar. 24, 2017) *https://www.sec.gov/rules/sro/iceeu/2017/34-80304.pdf;* ICEEU Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change Relating to Amendments to the ICE Clear Europe CDS Risk Policy, Release No. 34–81680 (Sep. 22, 2017), *https://www.sec.gov/rules/sro/iceeu/2017/34-81680.pdf;* ICEEU Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Relating to Amendments to the ICE Clear Europe Clearing Rules and Procedures for Indirect Clearing, Release No. 34–82422 (Dec. 29, 2017), *https://www.sec.gov/rules/sro/iceeu/2017/34-82422.pdf;* ICEEU Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1, Relating to Intraday Margining, Release No. 34–84375 (Oct. 5, 2018), *https://www.sec.gov/rules/sro/iceeu/2018/34-84375.pdf.*

[36] *See* ICEEU Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Accounts Categories for Positions of Clearing Member Affiliates, Release No. 34–77809 (May 11, 2016), *available at: https://www.sec.gov/rules/sro/iceeu/2016/34-77809.pdf;* ICEEU Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Certain Default Management Requirements under Applicable Law, Release No. 34–78762 (Sep. 2, 2016), *available at: https://www.sec.gov/rules/sro/iceeu/2016/34-78762.pdf.*

[37] *See, e.g.,* ICEEU Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Amendments to the Clearing Rules to Implement the European Union General Data Protection Regulation, Release No. 34–83311 (May 23, 2018), *https://www.sec.gov/rules/sro/iceeu/2018/34-83311.pdf;* ICEEU Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to the Clearing Rules, Release No. 34–85247 (Mar. 5, 2019), *https://www.sec.gov/rules/sro/iceeu/2019/34-85247.pdf.*

[38] *See* ICEEU Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the ICE Clear Europe Clearing Rules and Procedures, Release No. 34–86753 (Aug. 23, 2019), *https://www.sec.gov/rules/sro/iceeu/2019/34-86753.pdf.*

[39] *See* ICEEU Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Relating to Amendments to the ICE Clear Europe Clearing Rules and Procedures for Indirect Clearing, Release No. 34–82422 (Dec. 29, 2017), *https://www.sec.gov/rules/sro/iceeu/2017/34-82422.pdf.*

[40] *See* LCH SA registration order, *supra* note 28, at 1398.

[41] *See supra* notes 8, 17, and 29 (further discussing the requirements of the rule filing process under Rule 19b–4 for registered clearing agencies).

[42] *See* LCH SA registration order, *supra* note 28, at 1414–15; *see also* Release No. 34–64795 (July 1, 2011), 76 FR 39927, 39934–35 (July 7, 2011) (further describing exemptions from Sections 5 and 6 of the Exchange Act for clearing agencies for security-based swaps).

[43] *See* LCH SA Order Granting Accelerated Approval of a Proposed Rule Change Relating to the Implementation of the Markets in Financial Instruments Regulation, Release No. 34–82421 (Dec. 29, 2017), *https://www.sec.gov/rules/sro/lchsa/2017/34-82421.pdf;* LCH SA Order Granting Approval on an Accelerated Basis of Proposed Rule Change Relating to Self-Referencing Transactions, Release No. 34–82883 (Mar. 15, 2018), *https://www.sec.gov/rules/sro/lchsa/2018/34-82883.pdf; see also* LCH SA Order Granting Accelerated Approval of a Proposed Rule Change Relating to the Implementation of the Markets in Financial Instruments Regulation, Release No. 34–82421 (Dec. 29, 2017), *https://www.sec.gov/rules/sro/lchsa/2017/34-82421.pdf.*

[44] 15 U.S.C. 78q–1; 17 CFR 240.17Ab2–1. Rule 17Ab2–1 directs applicants for registration as a clearing agency or applicants for an exemption from registration to apply on Form CA–1.

well as all affiliates engaged in the clearing agency activity. Exhibits A through R request specific information related to the applicant's business organization, financial information, operational capacity and access to services.[45]

The SEC is providing guidance to reference the types of documents that could be submitted in preparing responses to the exhibits required by Form CA–1. For example, an EU CCP may submit to the SEC preexisting documentation or a self-assessment demonstrating that (i) the EU CCP is in compliance with EMIR and (ii) the EU CCP's compliance with EMIR also satisfies the Exchange Act requirements for registration.[46] The use of existing documentation or a self-assessment could help facilitate the efficient preparation of an EU CCP's application to the SEC, as well as the SEC's efficient review of the application, potentially resulting in shorter application preparation and review periods. The use of self-assessments may help facilitate the SEC's review process by substantiating and supplementing any preexisting documentation provided in response to the Form CA–1.

Accordingly, the SEC is providing guidance to articulate methods that future EU CCPs can use to facilitate an efficient process for clearing agency registration. First, the SEC encourages future EU CCP applicants to engage with SEC staff and submit drafts of the application for SEC staff to review while an EU CCP prepares the Form CA–1 and accompanying exhibits. SEC staff can provide technical advice regarding how to answer the questions on the form itself and to prepare the required exhibits, which could help facilitate the efficient preparation of a Form CA–1 application. The SEC will also look to coordinate with the EU CCP's NCA for the purposes of analyzing and evaluating any documentation submitted by the EU CCP.[47]

Second, the SEC believes that much of the material requested by the Form CA–1 and its exhibits has likely been memorialized in preexisting documents that an EU CCP already provides or has provided to NCAs or other regulatory authorities in the EU. In particular, an EU CCP may use materials generated in the course of its oversight by its NCA to prepare its application on Form CA–1, so long as those materials are accurate and current in all material respects.[48] In addition, these documents could be attached to a Form CA–1 application as responsive to particular exhibits, which can facilitate the efficient preparation of the form.

Third, future EU CCP applicants could prepare self-assessments to facilitate the efficient preparation of Form CA–1 and the SEC's review of the application to determine that the applicant meets each of the requirements set forth in Section 17A(b)(3) of the Exchange Act to register a clearing agency.[49] In a self-assessment, an EU CCP can describe how satisfaction of regulatory requirements under EMIR supports an SEC finding that the applicant has met the requirements for registration as a clearing agency in Section 17A(b)(3). In the SEC's view, based on its experience supervising EMIR-authorized EU CCPs registered as clearing agencies and its familiarity with the PFMI, such self-assessment could significantly facilitate the SEC's review in order to make the determinations required in the Exchange Act. As an example, a self-assessment could explain how the EU CCP's compliance with EMIR corresponds to the requirements in the Exchange Act and applicable SEC rules thereunder, such as Rule 17Ad–22 and Regulation SCI.[50]

B. Requests for Exemptions

An EU CCP may submit a request for an exemption to the SEC in one of two ways: through the Form CA–1 application or through a separate petition to the SEC. First, an EU CCP may submit a request for an exemption from registration as part of Exhibit S to its Form CA–1 application, either when it seeks to register as a clearing agency or at any time following registration by submitting an amendment to its application including such request. Exhibit S requires an applicant to provide a statement demonstrating why the approval of the requested exemption would be consistent with the public interest, the protection of investors, and the purposes of Section 17A of the Exchange Act.[51]

Second, for other exemption requests, an EU CCP may submit a petition to the SEC requesting exemptions from certain SEC requirements for clearing agencies under the Exchange Act pursuant to the SEC's authority in Section 17A(b)(1) or Section 36 of the Exchange Act, as applicable. For example, an EU CCP may request an exemption because it has determined that the application of certain SEC requirements would impose unnecessary, duplicative, or inconsistent requirements in light of EMIR requirements to which the EU CCP is already subject. As outlined above, the SEC previously has made determinations related to such issues.[52]

As discussed in the CCA Standards adopting release, whether the SEC approves an exemption is dependent on several factors, many of which were identified as relevant to a potential request for an exemption by an EU CCP.[53] Based on the SEC's supervision of EU CCPs to date, and to provide certainty to EU CCPs that request exemptions, the SEC believes it is appropriate to make clear that it will consider the following factors—as applicable to a particular request—in assessing whether to grant an exemption to an EU CCP: (i) The nature of the EU CCP's activities as a clearing agency; (ii) the anticipated level or volume of activity that the applicant seeks to effect within the United States; (iii) the structure of, scope of, and requirements under EMIR to which the applicant is subject in its home jurisdiction; (iv) the extent to which the application of EMIR is relevant to the findings the SEC must make in considering an exemption under Section 17A(b)(1) of the Exchange Act; and (v) the extent to which the SEC and the relevant EU authority or authorities have appropriate cooperative arrangements in place to communicate and cooperate to fulfill their respective regulatory mandates. In addition, as noted in the CCA Standards adopting release, the Commission will also consider the extent to which the EU CCP is subject to appropriate supervision and enforcement by the NCA or other relevant authorities in the

[45] As discussed further in Part III.A, Exhibit S is required for requests for an exemption from registration as a clearing agency. In addition to completing the Exhibit S, an EU CCP may also submit a petition to request an exemption from certain SEC requirements outside of the registration process. *See* supra note 40, *infra* note 55, and accompanying text.

[46] To register a clearing agency, the SEC must find that the clearing agency meets each of the requirements in Section 17A(b)(3) of the Exchange Act. *See* 15 U.S.C. 78q–1(b)(3)(A)–(I).

[47] Any such cooperative arrangements entered as a precondition to this process could be useful for ongoing coordinated or joint supervisory matters between the SEC and the NCA.

[48] For example, an EU CCP could include any preexisting documents prepared for use by its NCA as an attachment to its Form CA–1 application and reference said attachment in response to the requested exhibit. Such an approach would be consistent with the requirements of the Form CA–1.

[49] *See supra* note 46.

[50] *See supra* notes 12–15 (describing the requirements in Rule 17Ad–22 applicable to CCPs), 18 (citing to the requirements of Regulation SCI), and accompanying text.

[51] *See supra* note 6 (noting exemptions from registration as a clearing agency provided to Clearstream and Euroclear Bank).

[52] *See supra* notes 40–42 and accompanying text; *infra* notes 55–57 and accompanying text.

[53] CCA Standards adopting release, *supra* note 14, at 70791.

context of comparable EMIR requirements.[54]

As discussed in Part II.C.2, LCH SA petitioned the SEC to request exemptions under the Exchange Act from the application of Rule 17a–22 and Rules 17Ad–22(c)(2) and (c)(2)(iii), and the SEC approved this request based on factors similar to those discussed above.[55] The SEC has also provided exemptions to LCH SA with respect to application of Section 19(b) of the Exchange Act and Rule 19b–4 thereunder,[56] and to LCH SA and ICEEU with respect to the application of Sections 5 and 6 of the Exchange Act.[57]

IV. Conclusion

The SEC has structured its regulatory framework for clearing agencies that are EU CCPs to achieve an appropriate balance between (i) applying the levels of oversight and supervision for clearing agencies that ensure consistency with the Exchange Act and, at the same time, (ii) avoiding the application of certain SEC requirements that are unnecessary, duplicative, or inconsistent relative to EMIR requirements that have already been applied to the EU CCP in the EU. Accordingly, this policy statement and guidance is designed to provide transparency into the SEC's processes and to describe the processes available to EU CCPs that seek to register as clearing agencies or request exemptions from certain SEC requirements. This policy statement and guidance also highlight efficient ways that EU CCPs can comply with SEC rules and describe how an EU CCP can facilitate the efficient preparation of its application and the SEC's review of such application, potentially resulting in shorter application preparation and review periods. It also identifies the factors that the SEC will consider with respect to future requests for exemptions, as applicable to a particular request. The SEC looks forward to continuing its dialogue with the EC regarding its consideration of whether to find the SEC's regulatory framework for CCPs equivalent to EMIR.

By the Commission.

Dated: November 23, 2020.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–26285 Filed 11–27–20; 8:45 am]

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[54] *See id.* (discussing as a relevant factor the particular system of supervision and oversight in a non-U.S. jurisdiction for purposes of evaluating any non-U.S. framework).

[55] *See supra* note 40 and accompanying text.

[56] *See supra* note 41 and accompanying text.

[57] *See supra* note 42 and accompanying text.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90481; File No. SR–DTC–2020–012]

Self-Regulatory Organizations; The Depository Trust Company; Order Approving a Proposed Rule Change To Establish the ClaimConnect™ Service and Update the Settlement Service Guide

November 23, 2020.

I. Introduction

On October 8, 2020, The Depository Trust Company (''DTC'') 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] proposed rule change SR–DTC–2020–012. The proposed rule change was published for comment in the **Federal Register** on October 21, 2020.[3] The Commission did not receive any comment letters on the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description of the Proposed Rule Change

The proposed rule change[4] will (i) adopt a new DTC service guide to establish the ClaimConnect service at DTC (''ClaimConnect Service Guide''), and (ii) update the existing DTC Settlement Service Guide[5] (''Settlement Guide'') to (A) make conforming changes to the Settlement Guide to reflect the ClaimConnect service, and (B) update certain address and contact information in the Copyright section of the Settlement Guide.

A. Background

DTC is the central securities depository (''CSD'') for substantially all corporate and municipal debt and equity securities available for trading in the United States. As a covered clearing agency that provides CSD services,[6] DTC provides a central location in which securities may be immobilized, and interests in those securities are reflected in accounts maintained for its Participants, which are financial institutions such as brokers or banks.

DTC's CSD services include cash claims or cash claim transactions, which are cash entitlements (*i.e.,* a request for cash) from one Participant to another Participant. Currently, cash claims arise as a result of trading exceptions from a Corporate Action event,[7] where a cash entitlement needs to be delivered from one holder to another. Today, such claims are settled away from DTC, except for some stock loan and repurchase (''repo'') substitution payments, which can be settled via DTC's Adjustment Payment Orders (''APOs''). DTC stated that it developed the ClaimConnect service so Participants can settle cash claims in one centralized location, using the DTC system.[8]

B. Proposed ClaimConnect Service

The proposed ClaimConnect service will be an optional service available to all DTC Participants.[9] The service will enable DTC Participants to bilaterally match and settle cash claim transactions at DTC.[10]

ClaimConnect will be a validation and matching engine that continually

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 90203 (October 15, 2020), 85 FR 67018 (October 21, 2020) (SR–DTC–2020–012) (''Notice'').

[4] Capitalized terms not defined herein are defined in the Rules, By-Laws and Organization Certificate of DTC (''Rules'') *available at http://www.dtcc.com/~/media/Files/Downloads/legal/rules/dtc_rules.pdf,* or in the hereby proposed ClaimConnect Service Guide, included as Exhibit 5 to this proposed rule change filing.

[5] *Available at http://www.dtcc.com/~/media/Files/Downloads/legal/service-guides/Settlement.pdf.*

[6] A covered clearing agency is defined as a registered clearing agency that provides the services of a central counterparty (''CCP'') or CSD. *See* 17 CFR 240.17Ad–22(a)(5). CSD services means services of a clearing agency that is a securities depository as described in Section 3(a)(23)(A) of the Exchange Act. *See* 17 CFR 240.17Ad-22(a)(3). Specifically, the definition of a clearing agency includes, in part, ''any person, such as a securities depository that (i) acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry without physical delivery of securities certificates, or (ii) otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates.'' 15 U.S.C. 78c(a)(23)(A).

[7] Trading exceptions include, but are not limited to, trades outside of the markets' agreed upon settlement cycle, lack of due bill fail tracking, stock loan or repo transaction discrepancy, or tax treaty differences. *See* Notice, *supra* note 3, 85 FR at 67019.

[8] *See* Notice, *supra* note 3, 85 FR at 67019. Based on discussions with its Participants, DTC estimates that ClaimConnect may process approximately 212,000 claims its first year, increasing to approximately 425,000 claims by its fifth year. *See id.*

[9] DTC stated that a fee associated with Participants' use of the ClaimConnect service will be the subject of a separate, subsequent rule filing with the Commission. *See* Notice, *supra* note 3, 85 FR at 67019.

[10] To join ClaimConnect, a Participant needs to request to be a ''Claim Participant,'' and DTC will then indicate that the Participant is now a member of the service (*i.e.,* a User). *See* Notice, *supra* note 3, 85 FR at 67019.

monitors claims throughout their lifecycle in order to settle and close claims through DTC's settlement process. This continuous processing will allow for both the manual matching of claims (*i.e.,* Affirmation) by ClaimConnect users (''Users'') and the systematic matching of two like claims by ClaimConnect based on the alignment of certain data elements (*i.e.,* Auto-matching).

ClaimConnect will offer various claim processing functions, including end-of-day settlement of cash claims through systematic Securities Payment Orders (''SPOs'') generated and submitted by ClaimConnect at set times intraday (''settlement time'') on a settlement date. If overpaid or underpaid a cash entitlement due to a trading exception, a User will be able to create a claim against a claim counterparty through ClaimConnect. To create a claim, the ClaimConnect system will require the inclusion of certain data elements, while other data elements will be optional.[11]

Validation, the process of confirming claim data elements, will happen in two ways, as described below: (i) When a claim is Affirmed, as described below, or (ii) when ClaimConnect Auto-matches two claims. Users can also modify or Cancel claims. However, not all data elements can be modified after submission.

First, if a counterparty receives a claim and agrees with its details (*i.e.,* the data elements), then the counterparty could Affirm the claim. Affirming a claim will be a confirmation of the claim's data elements and would move the claim into a Matched state. Affirmation will usually occur only when one side of a claim is submitted because it affords the counterparty enough time to Affirm the claim. Once Affirmed, the claim will be settled on the date the parties agree to. Second, if both parties to a claim submit their respective sides to the claim (*i.e.,* a debit claim and a credit claim), the two sides of the claim are Auto-matched.

The SPO will credit the payee Participant and debit the payor Participant the claim amount and will then be incorporated into DTC's end-of-day settlement process. ClaimConnect SPOs will be subject to DTC's Risk Controls (*i.e.,* Collateral Monitor and Net Debit Cap) and will ''recycle'' (*i.e.,* pend) if the SPO cannot satisfy those controls.

To assist Users with the management of their claims, ClaimConnect will offer an Approval feature. The Approval feature will require certain actions on a claim to be approved by a separate User employee, if the claim amount meets or exceeds a predetermined dollar threshold set by the User, before that action can be completed. This feature is designed to enable Users to better monitor and manage certain cash debits that are leaving their account to satisfy claims. Users can activate the Approval feature by updating their ClaimConnect client profile. When doing so, the User must then set the dollar threshold that will trigger the Approval process.

C. Updates to the DTC Settlement Guide

DTC has an existing DTC Settlement Guide, which describes its existing services related to settlement. DTC will update the existing Settlement Guide to (A) make conforming changes to the Settlement Guide to reflect the establishment of the ClaimConnect service (specifically, to clarify that the RAD process would not apply to cash claims as they would go through ClaimConnect), and (B) update certain address and contact information in the Copyright section of the Settlement Guide.

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act [12] directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and rules and regulations thereunder applicable to such organization. After carefully considering the proposed rule change, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to DTC. In particular, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act,[13] for the reasons described below.

A. Consistency With Section 17A(b)(3)(F)

Section 17A(b)(3)(F) of the Act requires, in part, that the rules of a clearing agency, such as DTC, be designed to promote the prompt and accurate clearance and settlement of securities transactions, and foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions.[14] The Commission believes that the Proposed Rule Change is consistent with Section 17A(b)(3)(F) of the Act.[15]

First, DTC proposes to introduce a new ClaimConnect service. As noted above, the ClaimConnect service will be an optional service, and DTC stated that it developed the service based on discussions with Participants. ClaimConnect would enable Participants to bilaterally match and settle cash claim transactions at DTC. While settlement of cash claims occurs today, it does so away from DTC, in a dispersed fashion. ClaimConnect would establish a centralized and coordinated location for Participants to settle such claims. By offering a centralized and coordinated location for Participants to settle cash claims, with various functionality available, the Commission believes that the ClaimConnect service is designed to foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions.

Second, DTC will update the existing Settlement Guide to (A) make conforming changes to the Settlement Guide to reflect the ClaimConnect service, and (B) update certain address and contact information in the Copyright section of the Settlement Guide. By making conforming changes and updating the Settlement Guide with more current information about where Participants and others may direct inquiries about the DTC service guides, the Settlement Guide will provide the most up-to-date information and should help Participants to submit questions or comments about the service guides. Accordingly, the Commission believes that the updates to the Settlement Guide are designed to promote the prompt and accurate clearance and settlement of securities transactions.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and, in particular, with the requirements of Section 17A of the Act [16] and the rules and regulations promulgated thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act [17] that proposed rule change SR–DTC–2020–012, be, and hereby is, *approved*.[18]

[11] Once submitted, claims can exist in several different ''states'' depending upon the actions taken by the parties to the claim. The applicable rules will describe the different states that a claim could take. *See* Notice, *supra* note 3, 85 FR at 67019.

[12] 15 U.S.C. 78s(b)(2)(C).

[13] 15 U.S.C. 78q–1(b)(3)(F).

[14] *Id.*

[15] *Id.*

[16] 15 U.S.C. 78q–1.

[17] 15 U.S.C. 78s(b)(2).

[18] In approving the proposed rule change, the Commission considered the proposals' impact on

Continued

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–26282 Filed 11–27–20; 8:45 am]

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efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90482; File No. SR–CBOE–2020–110]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing of a Proposed Rule Change Amending Rule 5.52(d) in Connection With a Market-Maker's Electronic Volume Transacted on the Exchange

November 23, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 13, 2020, Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') proposes to amend Rule 5.52(d) in connection with a Market-Maker's electronic volume transacted on the Exchange. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 5.52(d) in connection with a Market-Maker's electronic volume transacted on the Exchange. Current Rule 5.52(d)(1) provides that if a Market-Maker never trades more than 20% of the Market-Maker's contract volume electronically in an appointed class during any calendar quarter, a Market-Maker will not be obligated to quote electronically in any designated percentage of series within that class pursuant to subparagraph (d)(2) (which governs the continuous electronic quoting requirements for Market-Makers in their appointed classes). That is, once a Market-Maker surpasses the 20% electronic volume threshold in an appointed class, the Market-Maker is required to provide continuous electronic quotes in that appointed classes going forward. Neither Rule 5.52(d)(1) nor (d)(2) permit a Market-Maker to reduce its electronic volume after surpassing the 20% threshold in order to reset the electronic volume trigger or otherwise undo the resulting obligation to stream electronic quotes once the 20% threshold is triggered in an appointed class.

Market-Makers accustomed to executing volume on the trading floor have sophisticated and complicated risk modeling associated with their floor trading activity, including quoting, monitoring, and responding to the trading crowd. However, the Exchange understands that while such Market-Makers do have separate systems or third-party platforms for quoting, monitoring and responding to electronic markets, because these Market-Makers are almost exclusively floor-based, their technology or other platforms enabling them to quote electronically do not achieve the level of sophistication or complexity as the systems used by Market-Makers accustomed to quoting electronically. Indeed, to satisfy the continuous electronic quoting requirements, a Market-Maker must provide continuous bids and offers for 90% of the time the Market-Maker is required to provide electronic quotes in an appointed option class on a given trading day and must provide continuous quotes in 60% of the series of the Market-Maker's appointed classes. The Exchange determines compliance by a Market-Maker with this quoting obligation on a monthly basis. In addition to this, a Market-Makers must, among other things, compete with other Market-Makers in its appointed classes, update quotations in response to changed market conditions in its appointed classes, maintain active markets in its appointed classes, and, overall, engage in a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market. Market-Makers that are predominantly floor-based generally do not have the technology or electronic trading sophistication to fully satisfy the continuous electronic quoting obligations, as well as other heightened standards required of a Market-Maker in its appointed classes electronically, once the 20% electronic volume threshold is triggered.

The Exchange has observed that in the past year, particularly given the significant increase in market volatility and unpredictability of market conditions in the months leading up to and during the COVID–19 pandemic,[3] Market-Makers that almost exclusively execute their volume in open outcry and had not prior triggered an electronic quoting obligation pursuant to Rule 5.52(d)(2), incidentally breached the 20% electronic volume threshold in certain appointed classes during a single quarter and were thereby obliged to provide continuous electronic quotes in those classes going forward. As stated above, once a Market-Maker surpasses the electronic volume threshold in an appointed class, and the electronic quoting obligation is triggered, Rules 5.52(d)(1) and (d)(2) do not permit a Market-Maker to reset the trigger — a Market-Maker is required to stream electronic quotes in that appointed class beginning the next calendar quarter and from there on out. As such, once the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange notes that after volatility and unusual market conditions beginning at the end of 2019 and continuously increasing through 2020 as a result of the impact of COVID19 and related factors, some market participants may have experienced significant trading losses, resulting in their limiting their trading behavior and risk exposure. The Exchange understands that firms, not otherwise highly active in the electronic markets, may have executed electronically in order to close positions, reduce exposure, and otherwise mitigate losses and reduce risk in light of market conditions experienced at various points throughout the year. These firms may have also reduced open outcry activity as part of the same risk-reducing strategy, resulting in a coincidental change in the mix of electronic versus open outcry volume for such generally floor-based Market-Makers.

20% threshold was surpassed by Market-Makers accustomed to quoting on the trading floor, these Market-Makers had to be equipped to uphold continuous electronic quoting obligations by just the next calendar quarter, production of which was exacerbated by the volatile and unusual market conditions present in the markets over the past year. As a result, the Exchange has observed that at least one Market-Maker [4] has been unable to successfully fulfill its new continuous electronic quoting obligations in subsequent months. The Exchange understands this is due to the Market-Maker not having the appropriate technology to successfully provide continuous electronic quotes. The Exchange believes requiring a Market-Maker not accustomed to and lacking the appropriate technology to provide continuous electronic quotes may potentially pose risk to the maintenance of fair and order markets as well as risk to the Market-Makers themselves as they are not able to compete in the electronic markets.

Therefore, the Exchange proposes to amend Rule 5.52(d)(1) in a manner that allows Market-Makers that, up until recently, have not before been obliged to provide continuous electronic quotes in their appointed classes to essentially reset the trigger on their electronic volume threshold in Rule 5.52(d)(1). Specifically, the proposed rule change adopts Rule 5.52(d)(1)(B) [5] which provides that if, between October 1, 2019 and December 31, 2020, a Market-Maker (i) has, for the first time, traded more than 20% of the Market-Maker's contract volume electronically in an appointed class during any calendar quarter and, subsequently, (ii) has not provided electronic continuous quotes pursuant to subparagraph (d)(2) below for any two consecutive months, then, beginning January 1, 2021, the Market-Maker will be subject to subparagraph (d)(1)(A) above. Proposed Rule 5.52(d)(1)(A) amends the current language in Rule 5.52(d)(1) to provide that if a Market-Maker never trades more than 20% of the Market-Maker's contract volume electronically in an appointed class during any two consecutive calendar quarters, a Market-Maker will not be obligated to quote electronically in any designated percentage of series within that class pursuant to subparagraph (d)(2).[6] In this way, the proposed rule change allows those Market-Makers that predominantly provide liquidity on the trading floor and surpassed the electronic volume threshold only in the past year due to extraordinary and extreme volatility, and, subsequently, are not able to satisfy the continuous electronic quoting requirement on a monthly basis going forward, to again be subject only to open outcry quoting requirements so they may focus on providing liquidity in open outcry in accordance with their business models.[7]

The proposed rule change to change the electronic volume threshold trigger from one calendar quarter to two consecutive calendar quarters is designed to mitigate any potential future risk that Market-Makers accustomed to providing liquidity on the trading floor that incidentally trigger the threshold as market volatility and unusual market conditions arise have to quote electronically. The proposed rule change provides a grace period for such Market-Makers to reduce their electronic volume in the subsequent quarter, thus not automatically subjecting them to the continuous electronic quoting requirements and providing them the opportunity to continue to focus on providing liquid markets in open outcry in accordance with their business models. As such, the proposed rule change is designed to maintain fair and orderly markets, in that, it reduces the likelihood that Market-Makers not equipped to compete and stream quotes in the electronic markets at competitive prices because their business models apply primarily to open outcry trading are not compelled to attempt do so. The Exchange believes imposing continuous electronic quoting obligations on such Market-Makers may result in their inability to consistently stream electronic quotes on a monthly basis going forward and to comply with their other Market-Maker responsibilities, including engaging in a course of dealings that must be reasonably calculated to contribute to the maintenance of a fair and orderly market, refraining from making bids or offers that are inconsistent with such course of dealings, and updating quotations in response to changed market conditions. The proposed rule change instead allows those Market-Makers to continue to provide liquidity to their appointed classes in open outcry. By allowing for a grace period for a Market-Maker to reduce their electronic volume if the electronic volume threshold is triggered in a preceding quarter, the proposed rule change is intended to support the overall purpose of the rule in providing open outcry Market-Makers the opportunity to continue to provide liquid markets on the Exchange's trading floor without having to quote electronically in accordance with their intended business model. The Exchange notes that the proposed rule change would not impact streaming quotes and liquidity in the electronic markets, as any Market-Maker subject to the continuous electronic quoting obligation prior to October 1, 2019 will continue to be subject this obligation.

Finally, the proposed rule change also removes the rollout period for new classes in Rule 5.52(d)(1), which currently provides that for a period of 90 days commencing immediately after a class begins trading on the System, this subparagraph (d)(1) governs trading in that class. The rollout period was implemented in connection with the transition of certain classes to the Exchange's former Hybrid System.[8] As of 2018, all classes listed for trading on the Exchange now trade on the same platform, the Exchange's System. Therefore, a rollout period is no longer necessary. All Market-Makers in new classes and likewise all new Market-Makers will be equally subject to the electronic volume threshold pursuant to Rule 5.52(d)(1) and (d)(2) upon starting out.

[4] The Exchange is aware of at least two Market-Makers which have (1) triggered the 20% electronic volume threshold in the proposed timeframe and (2) have subsequently been unable to satisfy the continuous electronic quoting obligations for at least two consecutive months within the same timeframe. One such Market-Maker has been registered as a Market-Maker on the Exchange since 1997 (however, such firm has recently been dissolved) and one has been registered as a Market-Maker on the Exchange since 2001. The Exchange also notes that there are other Market-Makers that are not currently subject to the continuous electronic quoting requirements in their appointed classes. For example, the Exchange is aware of at least three Market-Makers that are not currently obligated to provide continuous electronic quotes in SPX.

[5] The proposed rule change also updates the format of Rule 5.51(d)(1) by adopting the title ''Electronic Volume Threshold'' and Rule 5.51(d)(1)(A) to govern the provision under current Rule 5.51(d)(1), and adopts the title ''Continuous Electronic Quotes'' for Rule 5.52(d)(2).

[6] The proposed rule change also updates Rule 5.52(d)(2) to reflect the proposed two consecutive quarter language where the Rule refers to the electronic volume threshold.

[7] The Exchange notes that the proposed rule change does not preclude the application of Rule 13.15(g)(14)(A), which, as part of the Minor Rule Violation Plan (''MRVP''), allows the Exchange to impose a fine on Market-Makers for failure to meet their continuous quoting obligations, including on any Market-Maker that is able to ''reset'' on January 1, 2021. The Exchange additionally notes that the proposed rule change also does not preclude the Exchange from referring matters covered under the MRVP for formal disciplinary action, pursuant to Rule 13.15(f), whenever it determines that any violation is intentional, egregious or otherwise not minor in nature.

[8] *See* Securities Exchange Act Release No. 47959 (May 30, 2003), 68 FR 34441 (June 9, 2003) (SR–CBOE–2002–05).

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[9] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [10] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [11] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the proposed rule change is consistent with the Act in that it removes impediments to and perfects the mechanism of a free and open market and in general protects investors by allowing Market-Makers accustomed to quoting on the trading floor and, therefore, not readily equipped to successfully stream electronic quotes on a continuous basis going forward, to essentially reset the trigger on their electronic volume threshold. As described above, the Exchange understands that certain Market-Makers who primarily operate on the trading floor do not support systems with the level of sophistication and complexity that would allow them to compete in the electronic markets or satisfy the continuous electronic quoting obligations month-to-month pursuant to the Exchange Rules. Therefore, the Exchange believes the proposed rule change to essentially reset the electronic volume threshold for any Market-Maker that breached the threshold since October 1, 2019 (in which the markets regularly experienced periods of high volatility and overall unusual market conditions) and to implement two consecutive quarters in connection with the 20% electronic volume threshold will assist in the maintenance of a fair and orderly market, and the protection of investors generally, by reducing the likelihood that Market-Makers without sufficient equipment to stream competitive electronic quotes on an ongoing basis that may incidentally trigger the electronic volume threshold, especially in light of market volatility and unusual market conditions that continue to arise as a result of the ongoing COVID–19 pandemic, are not necessarily required to do so. In turn, the Exchange believes the proposed rule change will provide these Market-Makers with the opportunity to continue to focus on providing liquidity on the trading floor and satisfy their obligation to engage in a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market and their other Market-Maker obligations. Therefore, the Exchange also believes the proposed rule change furthers the objectives of Section 6(c)(3) of the Act,[12] which authorizes the Exchange to, among other things, prescribe standards of financial responsibility or operational capability and standards of training, experience and competence for its Trading Permit Holders and person associated with Trading Permit Holders.

In addition to this, the Exchange believe that the proposed rule change is reasonably designed to apply to those Market-Makers that incidentally breached the electronic volume threshold during a specific timeframe in which the Exchange observed regular periods of volatility and overall unusual market conditions, which led to higher volume that the Exchange believes resulted in certain Market-Makers triggering the continuous electronic quoting requirement threshold. The Exchange also believes that the specific timeframe and application of proposed rule does not affect Market-Makers that fall outside the scope of the proposed rule, as such Market-Makers were, prior to the proposed timeframe, already obliged to provide continuous electronic quotes in their appointed classes and will continue to be obligated to satisfy such monthly quoting requirements. The Exchange believes that the proposed rule change will generally protect investors as it is designed to support the overall purpose of the rule in permitting open outcry Market-Makers to continue to conduct their business as intended—providing liquid markets on the Exchange's trading floor without having to quote electronically.

Finally, the Exchange believes that the proposed rule change to remove the rollout provision for new classes will remove impediments to and perfect the mechanism of a free and open market and national market system because it removes a provision that is no longer necessary as a result of the full transition of all classes listed on the Exchange to trading on the Exchange's System. All Market-Makers in new classes, and likewise all new Market-Makers, will continue to have the opportunity to acclimate to their market making obligations in newly appointed classes as they will be equally subject to the electronic volume threshold pursuant to Rule 5.52(d)(1) and (d)(2) upon starting out.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act, because the proposed rule change will apply in the same manner to all Market-Makers that, for the first time ever, reached the electronic volume threshold between October 1, 2019 and December 31, 2020. The proposed 20% threshold will continue to apply equally to all Market-Makers, yet Market-Makers that incidentally reach the threshold may have a grace period to realign their volume in accordance with their intended business model—providing liquid markets on the Exchange's trading floor without having to quote electronically. The Exchange also does not believe that the proposed rule change would impose any significant burden on those Market-Makers that do not fall within the scope of the proposed rule because all such Market-Makers will continue to be obligated to provide continuous electronic volume in their appointed classes as they do today. In addition to this, the proposed deletion of the new class rollout period would not impose any burden on competition as it merely removes a rollout period related to the Exchange's prior transition of classes to its former Hybrid System that is no longer necessary. All new classes and all new Market-Makers will be equally subject to the electronic volume threshold pursuant to Rule 5.52(d)(1) and (d)(2) upon starting out.

The Exchange does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the electronic volume threshold applies only for the purposes of

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] *Id.*

[12] 15 U.S.C. 78f(c)(3).

determining when a Market-Maker is subject to certain quoting obligations on the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve or disapprove such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2020–110 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2020–110. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. 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–CBOE–2020–110 and should be submitted on or before December 21, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–26279 Filed 11–27–20; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90490; File No. SR–DTC–2020–016]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Reorganizations Service Guide and the Guide to the Fee Schedule

November 23, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 19, 2020, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the clearing agency. DTC filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rules 19b–4(f)(2) and (f)(4) thereunder.[4] 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

The proposed rule change[5] would amend the Reorganizations Guide and the Fee Guide to (i) postpone the retirement of DTC's legacy computer to computer facility (''CCF'') files for corporate actions entitlements and allocations (''CCF Entitlements and Allocations Files'')[6] to January 1, 2022, and (ii) amend the Fee Guide to apply the CCF File Fee to Participants that continue to consume CCF Entitlements and Allocations Files between January 1, 2021 and December 31, 2021, as more fully described below.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The clearing agency 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 proposed rule change would amend the Reorganizations Guide and the Fee Guide to (i) postpone the retirement of CCF Entitlements and Allocations Files to January 1, 2022, and (ii) amend the Fee Guide to apply the CCF File Fee to Participants that continue to consume CCF Entitlements and Allocations Files between January 1, 2021 and December 31, 2021, as more fully described below.

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[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(2) and (f)(4).

[5] Each term not otherwise defined herein has its respective meaning as set forth in the Rules, By-Laws and Organization Certificate of DTC (the ''Rules''), the Guide to the DTC Fee Schedule (''Fee Guide''), and the Reorganizations Service Guide (''Reorganizations Guide''), *available at http://www.dtcc.com/legal/rules-and-procedures.aspx.*

[6] Each of the CCF Entitlements and Allocations Files falls into one of two categories (each, a ''File Category''): (i) Pre-allocation (''Pre-Allocation CCF Files''), which includes files containing a Participant's allocation projections and entitlements, or (ii) allocation/post-allocation (''Allocation/Post-Allocation CCF Files''), which includes files containing information on a Participant's allocations and pending allocations. *See* Important Notice 13851–20 (August 27, 2020), *available at https://www.dtcc.com/legal/important-notices.*

(i) Retirement of CCF Entitlements and Allocations Files

A. Background

Today, DTC handles essential aspects of processing corporate action events by routinely receiving and distributing information to its Participants through ISO 20022 messaging. In parallel, however, DTC supports Participants' use of legacy CCF corporate actions files that have not yet been retired.[7]

The transition from CCF files to the use of the ISO 20022 standard reduces risk and improves transparency in the announcement and processing of corporate actions. ISO 20022 is a standard that provides the financial industry with a common language to capture business transactions and associated message flows. ISO 20022 is a business-model-based standard for the development of messages for the international financial services industry and can support different messaging syntaxes, including XML. In contrast, CCF files use proprietary function and activity codes, which differ from the market standard codes. With the ISO 20022 standard, corporate actions are identified by a unique corporate action ID and are event based. ISO 20022 standard messages provide more data elements than the CCF files, and they are available in near real-time throughout the day.

Since 2011, DTC has been informing Participants that corporate actions CCF files will be retired and will be replaced by ISO 20022 messaging.[8] Over the years, DTC has phased in parallel production periods for ISO 20022 messaging in order to provide Participants the opportunity to prepare their systems for the transition. DTC has also continued to support Participant migration efforts by providing a robust online learning center, hosting ISO specific monthly calls and offering a dedicated email box for client inquiries.

DTC began discussing specific retirement dates for CCF Announcements Files in 2015. At that time, some Participants asked DTC to continue to support the CCF Announcements Files until they had fully developed their systems to migrate to ISO 20022 messaging. In response, DTC postponed the retirement of CCF Announcements Files and, to encourage prompt transition to the ISO 20022 standard, implemented a $50,000 fee (''CCF File Fee'') per event group,[9] per twelve month period, for Participants that continued to receive the CCF Announcements Files during the fee period.[10] DTC believes that the CCF File Fee provided a strong incentive for Participants to accelerate their migration from the CCF format to the ISO 2002 standard, thereby allowing DTC to retire all of the CCF Announcements Files by December 31, 2018.[11]

B. CCF Entitlements and Allocations Files

With respect to the CCF Entitlements and Allocations Files, DTC began providing Participants with parallel ISO 20022 messaging in 2013 (Distributions), 2015 (Redemptions) and 2017 (Reorganizations). Since 2013, DTC has been working with Participants to support their orderly migration away from the CCF Entitlements and Allocations Files to ISO 20022 messaging.

In 2016, DTC announced a projected retirement timeline for CCF Entitlements and Allocations Files, which was set to begin on January 1, 2017. Since then, at the repeated requests of Participants, DTC postponed the projected retirement date multiple times.[12]

After the multiple postponements, in early 2018, DTC announced a target retirement date of January 1, 2020.

Throughout 2018 and 2019, DTC continued to engage with those Participants that were still consuming CCF Entitlements and Allocations Files. The Participants continued to inform DTC that they were still testing the ISO 20022 messages and reconciling them to the CCF files, and that they were not going to be ready to migrate by January 1, 2020. Some Participants also indicated that they would pay a fee to DTC for continued support of the CCF Entitlements and Allocations Files beyond the December 31, 2019 date, similar to the handling of the CCF Announcements Files.

C. Proposed Rule Change

In October 2019, based on these continued conversations with Participants, DTC announced a target retirement date of January 1, 2022.[13] DTC also communicated to Participants that, in order to encourage Participants to accelerate development and migrate away from the CCF Entitlements and Allocations Files, DTC would institute a fee for those Participants that continued to consume CCF Entitlements and Allocations Files. In August 2020, DTC announced that, subject to regulatory approval, Participants would be charged a fee for (i) the consumption of Pre-Allocation CCF Files and (ii) the consumption of Allocation/Post-Allocation CCF Files between January 1, 2021 and December 31, 2021 (the ''Fee Period''). The fee that would be charged for each File Category would be the same CCF File Fee ($50,000) that was charged to Participants that had continued to consume CCF Announcements Files during the CCF Announcements Files phase-out.

Accordingly, pursuant to this proposed rule change, DTC would charge Participants the CCF File Fee for each File Category of CCF Entitlements

[7] There are three types of CCF files representing the corporate actions lifecycle: Corporate actions announcements (''CCF Announcements Files'') and the CCF Entitlements and Allocations Files. DTC also accepts corporate actions instructions from Participants through CCF files (''CCF Corporate Actions Instructions Files''). CCF Corporate Actions Instructions Files are not subject to this proposed rule change.

[8] *See* Securities Exchange Act Release No. 63886 (February 10, 2011), 76 FR 9070 (February 16, 2011) (SR–DTC–2011–02). The rule filing indicated that DTC will continue to support its legacy proprietary CCF files until 2015.

[9] There are three event groups for CCF Announcements Files for corporate actions. Participants subscribe to the CCF files for each event group separately. The event groups are (i) distributions (''Distributions''), such as cash and stock dividends, principal and interest, and capital gain distributions; (ii) redemptions (''Redemptions''), such as full and partial calls, final paydowns, and maturities; and (iii) reorganizations (''Reorganizations''), which include both mandatory and voluntary reorganizations such as exchange offers, conversions, Dutch auctions, mergers, puts, reverse stock splits, tender offers, and warrant exercises.

[10] *See* Securities Exchange Act No. 76811 (December 31, 2015), 81 FR 826 (January 7, 2016) (SR–DTC–2015–013).

[11] *See* Securities Exchange Act Release No. 79746 (January 5, 2017), 82 FR 3372 (January 11, 2017) (SR–DTC–2016–014).

[12] In 2016, DTC began communicating with Participants about the timeframe for the retirement of CCF Entitlements and Allocations Files. DTC indicated that the CCF Entitlements and Allocations Files for Distributions events would be retired on January 1, 2017, and CCF Entitlements and Allocations Files for Redemptions events would be retired on January 1, 2018. No date was given for the retirement of the CCF Entitlements and Allocations Files for Reorganizations events. *See* Important Notice 2538–16 (January 21, 2016), *supra* note 6. Subsequently, DTC postponed the retirement of all CCF Entitlements and Allocations Files to December 31, 2018, and indicated that Participants that continued to consume CCF Entitlements and Allocations Files for Distributions and Redemptions Files between January 1, 2018 and December 31, 2018 would be charged a fee. *See* Important Notice 43810–16 (November 4, 2016), *supra* note 6. In 2017, DTC announced that there would not be any fee. *See* Important Notice 5099–17 (February 2017), *supra* note 6. In early 2018, in order to provide additional time for testing to ensure a smooth transition from CCF Entitlements and Allocation Files, DTC postponed the retirement date to June 30, 2019, and indicated that no fee would be charged to Participants that continued to consume the files until the retirement date. *See* Important Notice 7488–18 (February 28, 2018), *supra* note 6. Subsequently, in October 2018, to provide Participants additional time to ensure a smooth transition, DTC postponed the retirement date to December 31, 2019. *See* Important Notice 9861–18 (October 9, 2018), *supra* note 6.

[13] *See* Important Notice 12492–19 (October 29, 2019), *supra* note 6.

and Allocations Files that they consume between January 1, 2021 and December 31, 2021. The CCF File Fee would be charged to the Account of the Participant, upon the Participant's first receipt of CCF Entitlements and Allocations Files in a particular File Category during the Fee Period. The CCF File Fee would cover all CCF Entitlements and Allocations Files within that File Category during the Fee Period. In addition, DTC would amend the description of the CCF File Fee in the Fee Guide to conform with the proposed rule change. DTC would also amend the Reorganizations Guide to reflect the January 1, 2022 retirement date for CCF Entitlements and Allocations Files. Specifically, in the ''Preparing to Use the Services'' subsection of the ''How Reorganizations Work'' section of the Reorganizations Guide, DTC is proposing to insert an asterisk after ''Computer to Computer Facility (CCF) file transmissions'' and insert the following after the list: ''*CCF files associated with entitlements and allocations will be retired as of January 1, 2022.''

2. Statutory Basis

Section 17A(b)(3)(F) of the Act requires, *inter alia,* that the Rules be designed to promote the prompt and accurate clearance and settlement of securities transactions.[14]

As described above, the proposed rule change would (i) postpone the retirement of CCF Entitlements and Allocations Files to January 1, 2022, and (ii) apply the CCF File Fee to Participants that continue to consume CCF Entitlements and Allocations Files during the Fee Period. By postponing the retirement of CCF Entitlements and Allocations Files to January 1, 2022, the proposed rule change would allow Participants to minimize potential business interruptions by undertaking an orderly and organized migration from CCF files to the more efficient ISO 20022 standard. Similarly, by charging a CCF File Fee to those Participants that continue to receive CCF Entitlements and Allocations Files after December 31, 2020, the proposed rule change would encourage Participants to accelerate system development and the adoption of the ISO 20022 standard. In this manner, the proposed rule change would encourage and facilitate the transition to the ISO 20022 standard, which provides efficiencies and enhanced transparency in processing corporate actions and the settlement activities related thereto.

Accordingly, DTC believes that the proposed rule change would promote the prompt and accurate clearance and settlement of securities transactions, consistent with the requirements of Section 17A(b)(3)(F) of the Act, cited above.

Section 17A(b)(3)(D) of the Act requires that the Rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Participants.[15] DTC believes that the proposed rule change to apply the CCF File Fee to Participants that continue to consume CCF Entitlements and Allocations Files during the Fee Period would provide for the equitable allocation of reasonable fees.

DTC believes that the proposed application of the CCF File Fee would be equitably allocated because the CCF File Fee (i) would only be charged to those Participants that have delayed their migration from CCF Entitlements and Allocations beyond December 31, 2020[16] and (ii) would be applied in accordance with the Participant's use of a particular File Category.

Further, DTC believes that the proposed application of the $50,000 CCF File Fee would be reasonable. As discussed above, the $50,000 CCF File Fee was designed specifically to incentivize Participants to accelerate their migration from CCF Announcements Files to ISO 20022 messaging for corporate actions announcements. DTC's prior experience with the $50,000 CCF File Fee and the successful retirement of CCF Announcements Files illustrates that a CCF File Fee in the amount of $50,000 provides the necessary encouragement for Participants to accelerate their system development for their adoption of the ISO 20022 standard for entitlements and allocations information.[17] Further, during the application of the CCF File Fee to CCF Announcements Files, DTC had not received any negative feedback from Participants suggesting that the $50,000 fee was overly burdensome; nor did DTC receive any objections in August 2020 when it announced that, subject to regulatory approval, it intended to apply the $50,000 CCF Fee to Participants that continue to consume CCF Entitlements and Allocations Files during the Fee Period.

Therefore, DTC believes that the proposed rule change regarding the CCF File Fee provides for the equitable allocation of reasonable dues, fees, and other charges among its Participants, consistent with Section 17A(b)(3)(D) of the Act, cited above.

(B) Clearing Agency's Statement on Burden on Competition

DTC believes that the proposed rule change with respect to postponing the retirement of CCF Entitlements and Allocations Files to January 1, 2022 would not have any impact on competition. The proposed rule change would provide any Participant that has not completed its migration from CCF Entitlements and Allocation Files with additional time to complete its testing and development of its systems, and finalize the transition to ISO 20022 messaging. Therefore, DTC believes that the proposed rule change with respect to postponing the retirement of CCF Entitlements and Allocations Files to January 1, 2022 would not have a burden on competition.[18]

DTC believes that the proposed rule change with respect to amending the Fee Guide to apply the CCF File Fee to Participants that continue to consume CCF Entitlements and Allocations Files during the Fee Period could have an impact on competition because it could create a burden on competition.[19] Although the proposed application of the CCF File Fee is designed to incentivize Participants to accelerate their adoption of the ISO 20022 standard, DTC recognizes and appreciates that charging the fee could negatively affect such Participants' operating costs. However, DTC believes that any burden on competition would not be significant and would be necessary and appropriate in furtherance of the purposes of the Act, as permitted by Section 17A(b)(3)(I) of the Act.[20]

DTC believes any burden on competition would not be significant because (i) the fee would only be charged once per File Category, upon the Participant's first receipt of CCF

[14] 15 U.S.C. 78q–1(b)(3)(F).

[15] 15 U.S.C. 78q–1(b)(3)(D).

[16] As discussed above, DTC has been communicating with Participants about the migration from CCF files to the ISO 20022 standard for corporate actions events since 2011. Since 2013, DTC has been communicating with Participants about targeted retirement dates for CCF Entitlements and Allocations Files and has, at the request of Participants, postponed the projected dates numerous times. Before October 2018, DTC had always told Participants that there would not be any charges for the continued consumption of CCF Entitlements and Allocations Files. Many Participants did use these extensions to complete development and fully adopt the ISO 20022 standard for entitlements and allocations information. However, some Participants did not, which strongly suggests that they require additional encouragement. *See supra* note 12.

[17] The CCF File Fee is not designed to cover costs incurred by DTC as a result of continuing to service CCF files.

[18] 15 U.S.C. 78q–1(b)(3)(I).

[19] *Id.*

[20] *Id.*

Entitlements and Allocations Files for a File Category during the Fee Period, and (ii) the application of the CCF File Fee for a File Category would cover the consumption of all CCF Entitlements and Allocations Files within that File Category during the Fee Period. In addition, based on DTC's prior use of the CCF File Fee for CCF Announcements Files, DTC has no indication that the amount of the fee creates a significant burden on any Participant.

DTC believes that any burden on competition that may be created by the proposed change to amend the Fee Guide to apply the CCF File Fee to Participants that continue to consume CCF Entitlements and Allocations Files during the Fee Period would be necessary and appropriate in furtherance of the purposes of the Act, as permitted by Section 17A(b)(3)(I) of the Act.[21] DTC believes that this proposed change would be necessary because some Participants have yet to adopt the ISO 20022 standard, despite at least seven years of communication and prompting on the issue.[22] As noted above, the ISO 20022 standard provides efficiencies and enhanced transparency in processing corporate actions and the settlement activities related thereto. Thus, DTC believes that the proposed rule change would promote the prompt and accurate clearance and settlement of securities transactions, consistent with Section 17A(b)(3)(F) of the Act.[23]

DTC believes that the proposed rule change to apply the CCF File Fee to Participants that continue to consume CCF Entitlements and Allocations Files during the Fee Period would be appropriate in furtherance of the purposes of the Act, as permitted by Section 17A(b)(3)(I) of the Act.[24] DTC's prior experience with the $50,000 CCF File Fee and the successful retirement of CCF Announcements Files illustrates that a $50,000 CCF File Fee provides the necessary encouragement for Participants to accelerate their system development for the full adoption of the ISO 20022 standard. Further, during the application of the CCF File Fee to CCF Announcements Files, DTC had not received any negative feedback from Participants that suggested that the $50,000 fee was overly burdensome; nor did DTC receive any objections in August 2020 when it announced that, subject to regulatory approval, it intended to apply the $50,000 CCF Fee to Participants that continue to consume CCF Entitlements and Allocations Files during the Fee Period. Accordingly, DTC believes that application of the $50,000 CCF File Fee would be appropriate here in order to incentivize Participants to accelerate their migration to the ISO 20022 standard. In addition, as discussed above, DTC believes that the proposed application of the CCF File Fee would be equitably allocated because the CCF File Fee (i) would only be charged to those Participants that have delayed their migration from CCF Entitlements and Allocations beyond December 31, 2020[25] and (ii) would be applied in accordance with the Participant's use of a particular File Category.

Therefore, for these reasons, DTC believes that a perceived competitive burden of the proposed rule change to apply the CCF File Fee to Participants that continue to consume CCF Entitlements and Allocations Files during the Fee Period would be necessary and appropriate in furtherance of the purposes of the Act, as permitted by Section 17A(b)(3)(I) of the Act.[26]

(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. DTC will notify the Commission of any written comments received by DTC.

III. Date of Effectiveness of the Proposed Rule Change, and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)[27] of the Act and paragraph (f)[28] of Rule 19b–4 thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–DTC–2020–016 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–DTC–2020–016. 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 the filing also will be available for inspection and copying at the principal office of DTC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). 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–DTC–2020–016 and should be submitted on or before December 21, 2020.

[21] *Id.*

[22] *See supra* note 12.

[23] 15 U.S.C. 78q–1(b)(3)(F).

[24] 15 U.S.C. 78q–1(b)(3)(I).

[25] As noted above, DTC has been working with Participants since 2013 to support their orderly migration away from the CCF Entitlements and Allocations Files to ISO 20022 messaging. *See supra* note 12.

[26] 15 U.S.C. 78q–1(b)(3)(I).

[27] 15 U.S.C 78s(b)(3)(A).

[28] 17 CFR 240.19b–4(f).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[29]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–26280 Filed 11–27–20; 8:45 am]

BILLING CODE 8011–01–P

[29] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #16704 and #16705; CALIFORNIA Disaster Number CA–00328]

Presidential Declaration Amendment of a Major Disaster for the State of California

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 2.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of California (FEMA–4569–DR), dated 10/16/2020.

Incident: Wildfires.

Incident Period: 09/04/2020 through 11/17/2020.

DATES: Issued on 11/20/2020.

Physical Loan Application Deadline Date: 12/15/2020.

Economic Injury (EIDL) Loan Application Deadline Date: 07/16/2021.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for the State of California, dated 10/16/2020, is hereby amended to establish the incident period for this disaster as beginning 09/04/2020 and continuing through 11/17/2020.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Cynthia Pitts,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2020–26265 Filed 11–27–20; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #16643 and #16644; LOUISIANA Disaster Number LA–00104]

Presidential Declaration Amendment of a Major Disaster for Public Assistance Only for the State of Louisiana

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 3.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of LOUISIANA (FEMA–4559–DR), dated 09/05/2020.

Incident: Hurricane Laura.

Incident Period: 08/22/2020 through 08/27/2020.

DATES: Issued on 11/20/2020.

Physical Loan Application Deadline Date: 11/04/2020.

Economic Injury (EIDL) Loan Application Deadline Date: 06/07/2021.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Louisiana, dated 09/05/2020, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Parishes: Catahoula, Iberia.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Cynthia Pitts,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2020–26270 Filed 11–27–20; 8:45 am]

BILLING CODE 8026–03–P

SOCIAL SECURITY ADMINISTRATION

[Docket No: SSA–2020–0062]

Agency Information Collection Activities: Proposed Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes a revision of an OMB-approved information collection.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB) Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, Email address: *OIRA_Submission@omb.eop.gov.*

(SSA) Social Security Administration, OLCA, Attn: Reports Clearance Director, 3100 West High Rise, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–966–2830, Email address: *OR.Reports.Clearance@ssa.gov.*

Or you may submit your comments online through *www.regulations.gov,* referencing Docket ID Number [SSA–2020–0062].

The information collection below is pending at SSA. SSA will submit it to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than January 29, 2021. Individuals can obtain copies of the collection instrument by writing to the above email address.

Electronic Consent Based Social Security Number Verification—20 CFR 400.100—0960 0817. The electronic Consent Based Social Security Number Verification (eCBSV) is a fee-based Social Security Number (SSN) verification service that allows permitted entities (a financial institution as defined by Section 509 of the Gramm-Leach-Bliley Act. 42 U.S.C. 405b(b)(4), Public Law 115–174, Title II, 215(b)(4), or service provider, subsidiary, affiliate, agent, subcontractor, or assignee of a financial institution), to verify that an individual's name, date of birth (DOB), and SSN match our records based on the SSN holder's signed—including electronic—consent in connection with a credit transaction or any circumstance described in section 604 of the Fair Credit Reporting Act (15 U.S.C. 1681b).

Background

We created this service due to section 215 of the Economic Growth, Regulatory Relief, and Consumer Protection Act of

2018 (Banking Bill), Public Law 115–174. Permitted entities are able to submit an SSN, name, and DOB to SSA for verification via an application programming interface. The purpose of the information collection is for SSA to verify for the permitted entity that the submitted SSN, name and DOB matches, or does not match, the data contained in our records. After obtaining number holder's consent, a permitted entity submits the names, DOBs, and SSNs of number holders to the eCBSV service. SSA matches the information against our Master File, using SSN, name, and DOB. The eCBSV service will respond in real time with a match/no match indicator (and an indicator if our records show that the individual issued the SSN died). SSA does not provide specific information on what data elements did not match, nor does SSA provide any SSNs. The verification does not authenticate the identity of individuals or conclusively prove the individuals we verify are who they are claiming to be.

Consent Requirements

Under the eCBSV process, the permitted entity does not submit the number holder's consent forms to SSA. SSA requires each permitted entity to retain a valid consent for each SSN verification request submitted for a period of 5 years. The permitted entity retains the consent in an electronic format.

SSA requires a wet or electronic signature on the consent. A permitted entity may request verification of an SSN Holder's SSN on behalf of a financial institution pursuant to the terms of the Banking Bill, the user agreement between SSA and the permitted entity, and the SSN Holder's consent. In this case, the permitted entity ensures that the financial institution agrees to the terms in the user agreement, which require the SSN verification be used only for the purpose stated in the consent, and prohibits entities from further using or disclosing the SSN verification. This relationship is subject to the terms in the user agreement between SSA and the permitted entity.

Compliance Review

SSA requires each permitted entity to undergo compliance reviews. An SSA approved certified public accountant (CPA) conducts the compliance reviews. The compliance reviews are designed to ensure that the permitted entities meet all terms and conditions of the user agreement, including that the permitted entities obtain valid consent from [number holders]. The permitted entity pays all compliance review costs through the eCBSV fees. In general, we request annual reviews with additional reviews as necessary. The CPA follows review standards established by the American Institute of Certified Public Accountants and contained in the Generally Accepted Government Auditing Standards (GAGAS).

This information collection request is for the expanded rollout of eCBSV. The previous eCBSV clearance was for an initial rollout to 10 selected permitted entities. During the initial rollout, we wanted to troubleshoot the service and make any necessary adjustments prior to opening eCBSV to all permitted entities. The respondents to the eCBSV information collection are the permitted entities; members of the public who consent to SSN verifications; and CPAs who provide compliance review services.

Type of Request: Revision of an OMB-approved information collection.

Time Burden

Requirement	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Total annual opportunity cost (dollars) **
(a) Complete eCBSV enrollment process ***	113	1	120	226	* $37.56	** $8,489
(a) Configure customer system for ability to send in verification requests	113	1	2,400	4,520	* 37.56	** 169,771
(a) People whose SSNs SSA will verify—Reading and Signing	1,100,000,000	1	3	55,000,000	* 10.73	** 590,150,000
(a) Sending in the verification request, calling our service, getting a response	1,100,000,000	1	1	18,333,333	* 37.56	** 688,599,987
(b) Follow SSA requirements to configure application program interface	113	1	4,800	9,040	* 37.56	** 339,542
(c) CPA Compliance Review and Report ****	113	1	4,800	9,040	* 38.23	** 345,599
Totals	2,200,000,452			73,356,159		** 1,279,613,388

* We based these figures on average Business and Financial operations occupations (*https://www.bls.gov/oes/current/oes130000.htm*), and Accountants and Auditors hourly salaries (*https://www.bls.gov/oes/current/oes132011.htm*), as reported by Bureau of Labor Statistics data, and average DI payments, as reported in SSA's disability insurance payment data (*https://www.ssa.gov/legislation/2020Fact%20Sheet.pdf*).

** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

*** The enrollment process is automated within the eCBSV Customer Connection, and entails providing consent for SSA to verify the EIN, electronically signing the eCBSV User Agreement and the permitted entity certification, selecting their annual tier level, and linking to pay.gov to make payment for services.

**** There will be one CPA firm respondent (an SSA-approved contractor) to conduct compliance reviews and prepare written reports of findings on the 113 permitted entities.

Cost Burden

The public cost burden is dependent upon the number of permitted entities using the service and the annual transaction volume. In FY 2019, 10 companies enrolled out of 123 applications received to participate in eCBSV. We based the cost estimates below on 123 participating permitted entities in FY 2021 submitting an anticipated volume of 1,100,000,000

transactions. The total cost for developing the service is $45,000,000, and SSA will recover the cost over a five-year period, assuming projected enrollments and transaction volumes materialize.

eCBSV TIER FEE SCHEDULE

Tier	Annual volume threshold	Annual fee
1	Up to 1,000	$400
2	Up to 10,000	3,030
3	Up to 200,000	14,300
4	Up to 50 million	276,500
5	Up to 2 billion	860,000

Each enrolled permitted entity will be required to remit the above tier based subscription fee for the 365-day agreement period and the appropriate administrative fee. Newly enrolled entities will be charged a startup administrative fee of $3,693. After the initial year, the entities will be charged a renewal administrative fee of $1,691 each time the agreement is renewed or amended. Fees are calculated based on forecasted systems and operational expenses; agency oversight, overhead and CPA audit contract costs.

In addition, SSA will periodically recalculate costs to provide eCBSV services, and revise the tier fee schedule accordingly. We will notify companies of the tier fee schedule in effect at the renewal of eCBSV user agreements and via notice in the **Federal Register**; companies have the opportunity to cancel the agreement or renew service according to the new tier fee schedule.

Dated: November 24, 2020.

Faye Lipsky,

Director, Office of Regulations and Reports, Clearance, Social Security Administration.

[FR Doc. 2020–26292 Filed 11–27–20; 8:45 am]

BILLING CODE 4191–02–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2020–0060]

Notice Announcing Addresses for Service of Process

AGENCY: Social Security Administration.

ACTION: Notice; correction.

SUMMARY: We published notices in the **Federal Register** on October 28, 2019, March 2, 2020, and August 27, 2020, which announced the addresses for service of process. These documents contained the incorrect suite number in the address for the Office of the Regional Chief Counsel, Region VI, Social Security Administration. We are correcting the suite number in this notice.

FOR FURTHER INFORMATION CONTACT: Michael Haar, Office of the General Counsel, Office of Program Law, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235–6404, (410) 965–2521. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our internet site, Social Security Online, at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of October 28, 2019 in FR Doc. 2019–23478, on page 57801, in the second column, correct the address for the Office of the Regional Chief Counsel, Region VI, Social Security Administration to 1301 Young Street, Ste. 350, Mailroom 104, Dallas, TX 75202–5433.

In the **Federal Register** of March 2, 2020 in FR Doc. 2020–04246, on page 12373, in the first column, correct the address for the Office of the Regional Chief Counsel, Region VI, Social Security Administration to 1301 Young Street, Ste. 350, Mailroom 104, Dallas, TX 75202–5433.

In the **Federal Register** of August 27, 2020 in FR Doc. 2020–18898, on page 53059, in the third column, correct the address for the Office of the Regional Chief Counsel, Region VI, Social Security Administration to 1301 Young Street, Ste. 350, Mailroom 104, Dallas, TX 75202–5433.

The Commissioner of the Social Security Administration, Andrew Saul, having reviewed and approved this document, is delegating the authority to electronically sign this document to Faye I. Lipsky, who is the primary Federal Register Liaison for SSA, for purposes of publication in the **Federal Register**.

Faye I. Lipsky,

Federal Register Liaison, Office of Legislation and Congressional Affairs, Social Security Administration.

[FR Doc. 2020–26294 Filed 11–27–20; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 11269]

30-Day Notice of Proposed Information Collection: Request to Change End-User, End-Use and/or Destination of Hardware

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the information collection described below to the Office of Management and Budget (OMB) for approval. 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 up to December 30, 2020.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: 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 Andrea Battista, who may be reached at *BattistaAL@state.gov* or 202–663–3136.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Request to Change End-User, End-Use and/or Destination of Hardware.
- *OMB Control Number:* 1405–0173.
- *Type of Request:* Extension of a Currently Approved Collection.
- *Originating Office:* Directorate of Defense Trade Controls, Bureau of Political Military Affairs, Department of State (T/PM/DDTC).
- *Form Number:* DS–6004.
- *Respondents:* Individuals and companies registered with DDTC and engaged in the business of manufacturing, brokering, exporting, or temporarily importing defense hardware or defense technology data.
- *Estimated Number of Respondents:* 1,563.
- *Estimated Number of Responses:* 1,563.
- *Average Time per Response:* 1 hour.
- *Total Estimated Burden Time:* 1,563 hours.
- *Frequency:* On occasion.
- *Obligation to Respond:* Voluntary.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.

• Enhance the quality, utility, and clarity of the information to be collected.

• Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

The Request to Change End-User, End-Use and/or Destination of Hardware information collection is used to request DDTC approval prior to any sale, transfer, transshipment, or disposal, whether permanent or temporary, of classified or unclassified defense articles to any end-user, end-use or destination other than as stated on a license or other approval.

Methodology

Applicants are referred to ITAR 123.9 for guidance on information to submit regarding the request to change end-user, end-use and/or destination of hardware. A DS–6004 may be submitted electronically through DDTC's case management system, The Defense Export Control and Compliance System (DECCS), accessed through DDTC's website.

Paula Harrison,

Senior Management Analyst, Directorate of Defense Trade Controls, Department of State.

[FR Doc. 2020–26372 Filed 11–27–20; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2020–0385]

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Competition Plans, Passenger Facility Charges

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request Office of Management and Budget (OMB) approval to renew an information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on April 21, 2020.

DATES: Written comments should be submitted by December 30, 2020.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Amanda Shotto by email at: *amanda.j.shotto@faa.gov;* phone: 202–267–8744

SUPPLEMENTARY INFORMATION: The Federal Aviation Administration (FAA), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the FAA assess the impact of its information collection requirements and minimize the public's reporting burden.

The FAA invites comment on any aspect of this information collection, including (a) whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information.

OMB Control Number: 2120–0661.

Title: Competition Plans, Passenger Facility Charges.

Form Numbers: There are no FAA forms associated with this collection.

Type of Review: Renewal of an Information Collection.

Background: The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on April 21, 2020 (85 FR 22244). The DOT/FAA will use any information submitted in response to this requirement to carry out the intent of Title 49, Sections 40117(k) and 47106(f). These rules assure that a covered airport has, and implements, a plan that provides opportunities for competitive access by new entrant air carriers or air carriers seeking to expand. The affected public includes public agencies controlling medium or large hub airports.

Respondents: 5 affected airports annually.

Frequency: On occasion.

Estimated Average Burden per Response: Approximately 150 hours.

Estimated Total Annual Burden: Approximately 750 hours annually.

Issued in Washington, DC, on November 23, 2020.

David F. Cushing,

Manager, Airports Financial Assistance Division, APP–500.

[FR Doc. 2020–26263 Filed 11–27–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2000–7363; FMCSA–2002–12844; FMCSA–2004–17195; FMCSA–2004–18885; FMCSA–2004–19477; FMCSA–2006–26066; FMCSA–2008–0106; FMCSA–2008–0231; FMCSA–2010–0354; FMCSA–2011–0379; FMCSA–2014–0007; FMCSA–2014–0010; FMCSA–2014–0299; FMCSA–2016–0033; FMCSA–2016–0209; FMCSA–2016–0347; FMCSA–2018–0017; FMCSA–2018–0018; FMCSA–2018–0208]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew exemptions for 26 individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these individuals to continue to operate CMVs in interstate commerce without meeting the vision requirements in one eye.

DATES: Each group of renewed exemptions are applicable on the dates stated in the discussions below and will expire on the dates stated in the discussions below. Comments must be received on or before December 30, 2020.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA–2000–7363, Docket No. FMCSA–2002–12844, Docket No. FMCSA–2004–17195, Docket No. FMCSA–2004–18885, Docket No. FMCSA–2004–19477, Docket No. FMCSA–2006–26066, Docket No. FMCSA–2008–0106, Docket No. FMCSA–2008–0231, Docket No. FMCSA–2010–0354, Docket No. FMCSA–2011–0379, Docket No.

FMCSA–2014–0007, Docket No. FMCSA–2014–0010, Docket No. FMCSA–2014–0299, Docket No. FMCSA–2016–0033, Docket No. FMCSA–2016–0209, Docket No. FMCSA–2016–0347, Docket No. FMCSA–2018–0017, Docket No. FMCSA–2018–0018, or Docket No. FMCSA–2018–0208 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Dockets Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2000–7363; FMCSA–2002–12844; FMCSA–2004–17195; FMCSA–2004–18885; FMCSA–2004–19477; FMCSA–2006–26066; FMCSA–2008–0106; FMCSA–2008–0231; FMCSA–2010–0354; FMCSA–2011–0379; FMCSA–2014–0007; FMCSA–2014–0010; FMCSA–2014–0299; FMCSA–2016–0033; FMCSA–2016–0209; FMCSA–2016–0347; FMCSA–2018–0017; FMCSA–2018–0018; FMCSA–2018–0208), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* put the docket number, FMCSA–2000–7363; FMCSA–2002–12844; FMCSA–2004–17195; FMCSA–2004–18885; FMCSA–2004–19477; FMCSA–2006–26066; FMCSA–2008–0106; FMCSA–2008–0231; FMCSA–2010–0354; FMCSA–2011–0379; FMCSA–2014–0007; FMCSA–2014–0010; FMCSA–2014–0299; FMCSA–2016–0033; FMCSA–2016–0209; FMCSA–2016–0347; FMCSA–2018–0017; FMCSA–2018–0018; FMCSA–2018–0208, in the keyword box, and click ''Search.'' When the new screen appears, click on the ''Comment Now!'' button and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

B. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to *http://www.regulations.gov.* Insert the docket number, FMCSA–2000–7363; FMCSA–2002–12844; FMCSA–2004–17195; FMCSA–2004–18885; FMCSA–2004–19477; FMCSA–2006–26066; FMCSA–2008–0106; FMCSA–2008–0231; FMCSA–2010–0354; FMCSA–2011–0379; FMCSA–2014–0007; FMCSA–2014–0010; FMCSA–2014–0299; FMCSA–2016–0033; FMCSA–2016–0209; FMCSA–2016–0347; FMCSA–2018–0017; FMCSA–2018–0018; FMCSA–2018–0208, in the keyword box, and click ''Search.'' Next, click the ''Open Docket Folder'' button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

C. Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.transportation.gov/privacy.*

II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The physical qualification standard for drivers regarding vision found in 49 CFR 391.41(b)(10) states that a person is physically qualified to drive a CMV if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of a least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing red, green, and amber.

The 26 individuals listed in this notice have requested renewal of their exemptions from the vision standard in § 391.41(b)(10), in accordance with FMCSA procedures. Accordingly, FMCSA has evaluated these applications for renewal on their merits and decided to extend each exemption for a renewable 2-year period.

III. Request for Comments

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of

the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b), FMCSA will take immediate steps to revoke the exemption of a driver.

IV. Basis for Renewing Exemptions

In accordance with 49 U.S.C. 31136(e) and 31315(b), each of the 26 applicants has satisfied the renewal conditions for obtaining an exemption from the vision standard (see 65 FR 45817; 65 FR 77066; 67 FR 68719; 67 FR 71610; 68 FR 2629; 69 FR 17263; 69 FR 31447; 69 FR 53493; 69 FR 64742; 69 FR 64806; 69 FR 64810; 69 FR 71100; 70 FR 2705; 70 FR 44946; 71 FR 43557; 71 FR 62148; 71 FR 63379; 71 FR 66217; 72 FR 1051; 72 FR 1053; 72 FR 1056; 73 FR 35201; 73 FR 42403; 73 FR 46973; 73 FR 48275; 73 FR 54889; 73 FR 61925; 73 FR 74565; 73 FR 76439; 73 FR 76440; 73 FR 78423; 75 FR 38602; 75 FR 44051; 75 FR 59327; 75 FR 72863; 75 FR 77949; 75 FR 77951; 75 FR 79083; 75 FR 79084; 75 FR 80887; 76 FR 2190; 77 FR 15184; 77 FR 27850; 77 FR 46153; 77 FR 68202; 77 FR 74273; 77 FR 74730; 77 FR 74734; 77 FR 75496; 77 FR 76167; 78 FR 800; 79 FR 21996; 79 FR 38659; 79 FR 46153; 79 FR 51643; 79 FR 53514; 79 FR 64001; 79 FR 65759; 79 FR 73397; 79 FR 73686; 79 FR 73687; 79 FR 73689; 79 FR 7416879 FR 74169; 80 FR 603; 80 FR 9304; 81 FR 1474; 81 FR 48493; 81 FR 59266; 81 FR 70251; 81 FR 74494; 81 FR 81230; 81 FR 90050; 81 FR 96165; 81 FR 96178; 81 FR 96180; 83 FR 28325; 83 FR 34661; 83 FR 40638; 83 FR 45750; 83 FR 53724; 83 FR 53727; 83 FR 56137; 83 FR 60954; 84 FR 2305; 84 FR 2311; 84 FR 2326; 84 FR 2328). They have submitted evidence showing that the vision in the better eye continues to meet the requirement specified at § 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past 2 years indicates each applicant continues to meet the vision exemption requirements. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of 2 years is likely to achieve a level of safety equal to that existing without the exemption.

In accordance with 49 U.S.C. 31136(e) and 31315(b), the following groups of drivers received renewed exemptions in the month of January and are discussed below. As of January 3, 2021, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 13 individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (65 FR 45817; 65 FR 77066; 67 FR 71610; 69 FR 64810; 71 FR 66217; 73 FR 35201; 73 FR 46973; 73 FR 48275; 73 FR 54889; 73 FR 74565; 75 FR 44051; 75 FR 77949; 75 FR 77951; 77 FR 15184; 77 FR 27850; 77 FR 46153; 77 FR 68202; 77 FR 74730; 79 FR 21996; 79 FR 38659; 79 FR 46153; 79 FR 51643; 79 FR 53514; 79 FR 64001; 79 FR 65759; 79 FR 73689; 81 FR 1474; 81 FR 48493; 81 FR 59266; 81 FR 70251; 81 FR 74494; 81 FR 81230; 81 FR 90050; 81 FR 96165; 81 FR 96178; 81 FR 96180; 83 FR 28325; 83 FR 34661; 83 FR 40638; 83 FR 45750; 83 FR 53724; 83 FR 53727; 83 FR 56137; 83 FR 60954; 84 FR 2305; 84 FR 2311; 84 FR 2326; 84 FR 2328):

Darrin E. Bogert (NY)
Ronald A. Bolyard (WV)
Robert J. Clarke (NY)
Lane D. Fuller (KS)
J. W. Keener (PA)
Darrell D. Kropf (CA)
Donald L. Minney (OH)
Donald L. Nisbet (WA)
Jose H. Rivas (NM)
Pedro T. Tellez Alvarez (CA)
Roy F. Varnado, Jr. (LA)
Wade W. Ward (WY)
Christopher R. Whitson (NC)

The drivers were included in docket numbers FMCSA–2000–7363; FMCSA–2008–0106; FMCSA–2008–0231; FMCSA–2011–0379; FMCSA–2014–0007; FMCSA–2014–0010; FMCSA–2016–0033; FMCSA–2016–0209; FMCSA–2016–0347; FMCSA–2018–0017; FMCSA–2018–0018; FMCSA–2018–0208. Their exemptions are applicable as of January 3, 2021, and will expire on January 3, 2023.

As of January 9, 2021, and in accordance with 49 U.S.C. 31136(e) and 31315, the following four individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (71 FR 63379; 72 FR 1051; 73 FR 78423; 75 FR 79083; 77 FR 74734; 79 FR 73686; 81 FR 96165; 84 FR 2311):

David L. Cattoor (NV)
Ronald C. Morris (NV)
Kevin L. Truxell (FL)
Lee A. Wiltjer (IL)

The drivers were included in docket number FMCSA–2006–26066. Their exemptions are applicable as of January 9, 2021, and will expire on January 9, 2023.

As of January 10, 2021, and in accordance with 49 U.S.C. 31136(e) and 31315, the following two individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (79 FR 73397; 80 FR 9304; 81 FR 96165; 84 FR 2311):

Jesse L. Lichtenberger (PA); and Frederick E. Schaub (IA)

The drivers were included in docket number FMCSA–2014–0299. Their exemptions are applicable as of January 10, 2021, and will expire on January 10, 2023.

As of January 12, 2021, and in accordance with 49 U.S.C. 31136(e) and 31315, the following three individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (69 FR 53493; 69 FR 64742; 71 FR 62148; 73 FR 61925; 75 FR 59327; 75 FR 72863; 76 FR 2190; 77 FR 74273; 79 FR 73687; 81 FR 96165; 84 FR 2311):

Thomas L. Oglesby (GA); David W. Ward (NC); and Ralph W. York (NM)

The drivers were included in docket numbers FMCSA–2004–18885; FMCSA–2010–0354. Their exemptions are applicable as of January 12, 2021, and will expire on January 12, 2023.

As of January 14, 2021, and in accordance with 49 U.S.C. 31136(e) and 31315, the following individual has satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (69 FR 64806; 70 FR 2705; 72 FR 1056; 73 FR 76439; 75 FR 79084; 77 FR 75496; 79 FR 74169; 81 FR 96165; 84 FR 2311):

Francis M. McMullin (PA)

The driver was included in docket number FMCSA–2004–19477. Their exemption is applicable as of January 14, 2021, and will expire on January 14, 2023.

As of January 17, 2021, and in accordance with 49 U.S.C. 31136(e) and 31315, the following individual has satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (67 FR 68719; 68 FR 2629; 69 FR 71100; 72 FR 1053; 73 FR 76440; 75 FR 80887; 77 FR 76167; 79 FR 74168; 81 FR 96165; 84 FR 2311):

Howard F. Breitkreutz (MN)

The driver was included in docket number FMCSA–2002–12844. Their exemption is applicable as of January 17, 2021, and will expire on January 17, 2023.

As of January 31, 2021, and in accordance with 49 U.S.C. 31136(e) and 31315, the following two individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (69 FR 17263; 69 FR 31447; 70 FR 44946; 71 FR 43557;

73 FR 42403; 75 FR 38602; 75 FR 72863; 76 FR 2190; 78 FR 800; 80 FR 603; 81 FR 96165; 84 FR 2311):

Jose M. Suarez (TX); and Richard L. Zacher (OR)

The drivers were included in docket numbers FMCSA–2004–17195; FMCSA–2010–0354. Their exemptions are applicable as of January 31, 2021, and will expire on January 31, 2023.

V. Conditions and Requirements

The exemptions are extended subject to the following conditions: (1) Each driver must undergo an annual physical examination (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the requirements in 49 CFR 391.41(b)(10), and (b) by a certified medical examiner (ME), as defined by § 390.5, who attests that the driver is otherwise physically qualified under § 391.41; (2) each driver must provide a copy of the ophthalmologist's or optometrist's report to the ME at the time of the annual medical examination; and (3) each driver must provide a copy of the annual medical certification to the employer for retention in the driver's qualification file or keep a copy of his/her driver's qualification if he/she is self-employed. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VI. Conclusion

Based upon its evaluation of the 26 exemption applications, FMCSA renews the exemptions of the aforementioned drivers from the vision requirement in **§ 391.41(b)(10), subject to the requirements cited above. In accordance with 49 U.S.C. 31136(e) and 31315(b), each exemption will be valid for 2 years unless revoked earlier by FMCSA.**

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020–26355 Filed 11–27–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2013–0442; FMCSA–2014–0216; FMCSA–2015–0322; FMCSA–2015–0323; FMCSA–2016–0007; FMCSA–2016–0008; FMCSA–2018–0056]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew exemptions for 11 individuals from the requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) that interstate commercial motor vehicle (CMV) drivers have ''no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV.'' The exemptions enable these individuals who have had one or more seizures and are taking anti-seizure medication to continue to operate CMVs in interstate commerce.

DATES: Each group of renewed exemptions were applicable on the dates stated in the discussions below and will expire on the dates stated in the discussions below. Comments must be received on or before December 30, 2020.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA–2013–0442, Docket No. FMCSA–2014–0216, Docket No. FMCSA–2015–0322, Docket No. FMCSA–2015–0323, Docket No. FMCSA–2016–0007, Docket No. FMCSA–2016–0008, or Docket No. FMCSA–2018–0056 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Dockets Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
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FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2013–0442, FMCSA–2014–0216, FMCSA–2015–0322, FMCSA–2015–0323, FMCSA–2016–0007, FMCSA–2016–0008, or FMCSA–2018–0056), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* put the docket number, FMCSA–2013–0442, FMCSA–2014–0216, FMCSA–2015–0322, FMCSA–2015–0323, FMCSA–2016–0007, FMCSA–2016–0008, or FMCSA–2018–0056, in the keyword box, and click ''Search.'' When the new screen appears, click on the ''Comment Now!'' button and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

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C. Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.transportation.gov/privacy.*

II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The physical qualification standard for drivers regarding epilepsy found in 49 CFR 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria [1] to assist medical examiners (MEs) in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce.

The 11 individuals listed in this notice have requested renewal of their exemptions from the epilepsy and seizure disorders prohibition in § 391.41(b)(8), in accordance with FMCSA procedures. Accordingly, FMCSA has evaluated these applications for renewal on their merits and decided to extend each exemption for a renewable 2-year period.

III. Request for Comments

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b), FMCSA will take immediate steps to revoke the exemption of a driver.

IV. Basis for Renewing Exemptions

In accordance with 49 U.S.C. 31136(e) and 31315(b), each of the 11 applicants has satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition. The 11 drivers in this notice remain in good standing with the Agency, have maintained their medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous 2-year exemption period. In addition, for Commercial Driver's License (CDL) holders, the Commercial Driver's License Information System and the Motor Carrier Management Information System are searched for crash and violation data. For non-CDL holders, the Agency reviews the driving records from the State Driver's Licensing Agency. These factors provide an adequate basis for predicting each driver's ability to continue to safely operate a CMV in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of 2 years is likely to achieve a level of safety equal to that existing without the exemption.

In accordance with 49 U.S.C. 31136(e) and 31315(b), the following groups of drivers received renewed exemptions in the month of December and are discussed below.

As of December 3, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following seven individuals have satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition in the FMCSRs for interstate CMV drivers:

Nicolas Donez, Jr. (CO)
Michael C. Grant (SC)
Larry G. Hediger (IL)
Thomas K. Mitchell (MS)
Isaac E. Rogers (IL)
Donald J. Smith (NY)
Joseph A. Thomas (MD)

The drivers were included in docket number FMCSA–2013–0442, FMCSA–2014–0216, FMCSA–2015–0322, FMCSA–2016–0007, and FMCSA–2018–0056. Their exemptions are applicable as of December 3, 2020, and will expire on December 3, 2022.

As of December 21, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following four individuals have satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition in the FMCSRs for interstate CMV drivers:

Douglas Cantwell (TN)
Kenneth B. Elder (KY)
Ronnie D. Moody (NC)
Tara VanHorne (PA)

The drivers were included in docket number FMCSA–2015–0323 and FMCSA–2016–0008. Their exemptions are applicable as of December 21, 2020, and will expire on December 21, 2022.

V. Conditions and Requirements

The exemptions are extended subject to the following conditions: (1) Each driver must remain seizure-free and maintain a stable treatment during the 2-year exemption period; (2) each driver must submit annual reports from their treating physicians attesting to the stability of treatment and that the driver has remained seizure-free; (3) each driver must undergo an annual medical examination by a certified ME, as defined by § 390.5; and (4) each driver must provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy of his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized

[1] These criteria may be found in APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section H. *Epilepsy:* § 391.41(b)(8), paragraphs 3, 4, and 5, which is available on the internet at *https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf.*

Federal, State, or local enforcement official. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VII. Conclusion

Based on its evaluation of the 11 exemption applications, FMCSA renews the exemptions of the aforementioned drivers from the epilepsy and seizure disorders prohibition in § 391.41(b)(8). In accordance with 49 U.S.C. 31136(e) and 31315(b), each exemption will be valid for 2 years unless revoked earlier by FMCSA.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020–26354 Filed 11–27–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2016–0180]

Commercial Driver's License (CDL) Testing; Application for Exemption: State of Minnesota

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of application for exemption; request for comments.

SUMMARY: FMCSA announces that the State of Minnesota seeks reconsideration of its application for exemption from regulations governing commercial driver's license (CDL) skills testing procedures and practices that was denied on May 9, 2017. Minnesota believes it can deliver its CDL skills testing more efficiently in an alternative manner. It asserts that its method of delivering skills testing will maintain the testing standards enumerated by the regulations. FMCSA requests public comment on Minnesota's application for reconsideration.

DATES: Comments must be received on or before December 30, 2020.

ADDRESSES: You may submit comments identified by Federal Docket Management System Number FMCSA–2016–0180 by any of the following methods:

- *Federal eRulemaking Portal:* Go to *www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Dockets Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Dockets Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.
- *Fax:* 1–202–493–2251.

Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *www.regulations.gov,* including any personal information included in a comment. Please see the *Privacy Act* heading below.

Docket: For access to the docket to read background documents or comments, go to *www.regulations.gov* at any time or visit Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

The on-line Federal document management system is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

FOR FURTHER INFORMATION CONTACT: Ms. Pearlie Robinson, FMCSA Driver and Carrier Operations Division; Office of Carrier, Driver and Vehicle Safety Standards; Telephone: 202–366–4325. Email: *MCPSD@dot.gov.* If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation and Request for Comments

FMCSA encourages you to participate by submitting comments and related materials.

Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA–2016–0180), indicate the specific section of this document to which the comment applies, and provide a reason for suggestions or recommendations. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so the Agency can contact you if it has questions regarding your submission.

To submit your comments online, go to *www.regulations.gov* and put the docket number, ''FMCSA–2016–0180'' in the ''Keyword'' box, and click ''Search.'' When the new screen appears, click on ''Comment Now!'' button and type your comment into the text box in the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope. FMCSA will consider all comments and material received during the comment period and may grant or not grant this application based on your comments.

II. Legal Basis

FMCSA has authority under 49 U.S.C. 31136(e) and 31315 to grant exemptions from the Federal Motor Carrier Safety Regulations (FMCSRs) (49 CFR part 350 *et seq.*). FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews the safety analyses and the public comments, and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). The decision of the Agency must be published in the **Federal Register** (49 CFR 381.315(b)) with the reason for the grant or denial, and, if granted, the specific person or class of persons receiving the exemption, and the regulatory provision or provisions from which exemption is granted. The notice must also specify the effective period of the exemption (up to 5 years), and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

III. Background

The Commercial Motor Vehicle Safety Act of 1986 (CMVSA) [49 U.S.C. chapter 313, implemented by 49 CFR part 383] was designed to improve highway safety by ensuring that truck and bus drivers are qualified to drive a commercial motor vehicle (CMV). States issue drivers' licenses to CMV operators, but the Federal government sets minimum requirements for the issuance of a commercial driver's license (CDL). Subpart H of part 383 of the FMCSRs sets forth the principal requirements governing State testing of applicants for a CDL.

On August 1, 2016, FMCSA published a notice in the **Federal Register** requesting public comment on Minnesota's application for exemption from certain testing requirements in § 383.133 (81 FR 50592). Under § 383.133(c)(6) the CDL skills test must be conducted in three parts in the following order: pre-trip inspection, vehicle control skills, and on-road driving. Minnesota asked that it be allowed to combine the second and third parts (vehicle control skills and on-road driving) and thus reduce the skills tests to two parts. It also requested to be exempted from using the American Association of Motor Vehicle Administrators (AAMVA) 2005 Test Model Score Sheet. Finally, it requested to be exempted from the requirement that applicants must pass the pre-trip inspection portion of the exam before proceeding to the balance of the test.

The Agency received 12 comments. Many commenters voiced opposition to Minnesota's request for relief from using the AAMVA Score Sheet during testing. Most commenters opposed allowing Minnesota to shorten the testing to two parts and to allow applicants who fail the initial portion of the test to proceed to the on-road testing. Generally, those opposed felt that granting the exemptions would compromise the standardization of testing among the various States. On May 9, 2017, FMCSA denied Minnesota's application for exemption for the following reasons:

- FMCSA opposed allowing a State to amend the AAMVA test model score sheet, which has been tested and validated for use by all States in testing prospective CMV drivers. When a CDL driver moves to a new State and seeks to transfer his or her CDL to that State, universal use of the score sheet assures the new State that the driver met a baseline standard for safety when his or her CDL was first issued.
- FMCSA opposed combining the skills test. Under the proposed exemption, an individual could pass Minnesota's combined test even though he or she has exceeded the maximum point deduction allowed when the two portions (basic controls or on-the road) of the skills test are given separately.
- FMCSA opposed allowing CDL applicants to operate CMVs at highway speeds when they have not demonstrated the proper handling of the vehicle at lower speeds during the basic controls test.

Request for Reconsideration of Agency Decision

Minnesota requests that FMCSA reconsider its denial of the exemption described. The State asks to be exempt from using the AAMVA 2005 Test Model Score Sheet and asserts that FMCSA's position is moot because Minnesota's score sheet evaluates the same driving skills and contains the same inspection elements as the AAMVA scoresheet. Details are provided in the State's request for reconsideration.

Minnesota asks that it be allowed to combine vehicle control skills and on-road driving and thus have two parts to its skills test. Minnesota argues that FMCSA's finding in the denial letter does not accurately describe how its scoring is applied.

Finally, Minnesota asks to be exempted from the requirement that applicants must pass the pre-trip inspection portion of the exam before proceeding to the balance of the test. Minnesota contends that the order in which the elements of the CDL test are conducted does not result in unsafe conditions or the operation of a CMV at highway speeds. Minnesota explained that exam stations are located in low traffic speed residential and downtown areas across the State. Once the vehicle inspection is completed, drivers travel at low speeds per traffic signs to the location where backing exercises are conducted. The basic controls segment consists of backing maneuvers with potential pull ups and is performed at very low speed. Consequently, drivers do not proceed to highway speeds prior to completing the basic control skills.

A copy of FMCSA's May 9, 2017, letter denying Minnesota's original application and of the State's request for reconsideration is in the docket listed at the beginning of this notice.

V. Request for Comments

In accordance with 49 U.S.C. 31315(b)(6), FMCSA requests public comment from all interested persons on Minnesota's request for reconsideration of its application for an exemption. All comments received before the close of business on the comment closing date indicated at the beginning of this notice will be considered and will be available for examination in the docket at the location listed under the **ADDRESSES** section of this notice. Comments received after the comment closing date will be filed in the public docket and will be considered to the extent practicable. In addition to late comments, FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should continue to examine the public docket for new material.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020–26353 Filed 11–27–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

FEDERAL RESERVE SYSTEM

FEDERAL DEPOSIT INSURANCE CORPORATION

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury; Board of Governors of the Federal Reserve System (Board); and Federal Deposit Insurance Corporation (FDIC).

ACTION: Joint notice and request for comment.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA), the OCC, the Board, and the FDIC (the agencies) may not conduct or sponsor, and the respondent is not required to respond

to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The Federal Financial Institutions Examination Council (FFIEC), of which the agencies are members, has approved the agencies' publication for public comment of a proposal to revise and extend the Consolidated Reports of Condition and Income (Call Reports) (FFIEC 031, FFIEC 041, and FFIEC 051), which are currently approved collections of information. The agencies are requesting comment on an adjustment to the measurement date for certain total asset thresholds that trigger additional reporting requirements in the Call Reports for report dates in 2021 only due to institution asset growth in 2020 related to participation in various coronavirus disease 2019 (COVID–19) related stimulus activities.

DATES: Comments must be submitted on or before January 29, 2021.

ADDRESSES: Interested parties are invited to submit written comments to any or all of the agencies. All comments, which should refer to the ''Call Report Reporting Revisions,'' will be shared among the agencies.

OCC: You may submit comments, which should refer to ''Call Report Reporting Revisions,'' by any of the following methods:

- *Email: prainfo@occ.treas.gov.*
- *Mail:* Chief Counsel's Office, Office of the Comptroller of the Currency, Attention: 1557–0081, 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 ''1557–0081'' 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.

You may review comments and other related materials that pertain to this information collection beginning on the date of publication of the second notice for this collection by the following method:

- *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 ''1557–0081.'' 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.

Board: You may submit comments, which should refer to ''Call Report Reporting Revisions,'' by any of the following methods:

- *Agency website: http://www.federalreserve.gov.* Follow the instructions for submitting comments at: *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Email: regs.comments@federalreserve.gov.* Include ''Call Report Reporting Revisions'' in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments are available on the Board's website at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information.

FDIC: You may submit comments, which should refer to ''Call Report Reporting Revisions,'' by any of the following methods:

- *Agency Website: https://www.fdic.gov/regulations/laws/federal/.* Follow the instructions for submitting comments on the FDIC's website.
- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: comments@FDIC.gov.* Include ''Call Report Reporting Revisions'' in the subject line of the message.
- *Mail:* Manuel E. Cabeza, Counsel, Attn: Comments, Room MB–3128, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- *Hand Delivery:* Comments may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7:00 a.m. and 5:00 p.m.
- *Public Inspection:* All comments received will be posted without change to *https://www.fdic.gov/regulations/laws/federal/* including any personal information provided. Paper copies of public comments may be requested from the FDIC Public Information Center by telephone at (877) 275–3342 or (703) 562–2200.

Additionally, commenters may send a copy of their comments to the OMB desk officers for the agencies by mail to the Office of Information and Regulatory Affairs, U.S. Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503; by fax to (202) 395–6974; or by email to *oira_submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: For further information about the proposed revisions to the information collections discussed in this notice, please contact any of the agency staff whose names appear below. In addition, copies of the report forms for the Call Reports can be obtained at the FFIEC's website (*https://www.ffiec.gov/ffiec_report_forms.htm*).

OCC: Kevin Korzeniewski, Counsel, Chief Counsel's Office, (202) 649–5490.

Board: Nuha Elmaghrabi, Federal Reserve Board Clearance Officer, (202) 452–3884, Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551. Telecommunications Device for the Deaf (TDD) users may call (202) 263–4869.

FDIC: Manuel E. Cabeza, Counsel, (202) 898–3767, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

I. Report Summary

The agencies propose to extend for three years, with revision, the FFIEC 031, FFIEC 041, and FFIEC 051 Call Reports.

Report Title: Consolidated Reports of Condition and Income (Call Report).

Form Number: FFIEC 031 (Consolidated Reports of Condition and Income for a Bank with Domestic and Foreign Offices), FFIEC 041 (Consolidated Reports of Condition and Income for a Bank with Domestic Offices Only), and FFIEC 051 (Consolidated Reports of Condition and Income for a Bank with Domestic Offices Only and Total Assets Less Than $5 Billion).

Frequency of Response: Quarterly.

Affected Public: Business or other for-profit.

Type of Review: Revision and extension of currently approved collections.

OCC:

OMB Control No.: 1557–0081.

Estimated Number of Respondents: 1,111 national banks and federal savings associations.

Estimated Average Burden per Response: 41.92 burden hours per quarter to file.

Estimated Total Annual Burden: 186,292 burden hours to file.

Board:

OMB Control No.: 7100–0036.

Estimated Number of Respondents: 739 state member banks.

Estimated Average Burden per Response: 45.40 burden hours per quarter to file.

Estimated Total Annual Burden: 134,202 burden hours to file.

FDIC:

OMB Control No.: 3064–0052.

Estimated Number of Respondents: 3,263 insured state nonmember banks and state savings associations.

Estimated Average Burden per Response: 39.96 burden hours per quarter to file.

Estimated Total Annual Burden: 521,558 burden hours to file.

The estimated average burden hours collectively reflect the estimates for the FFIEC 031, the FFIEC 041, and the FFIEC 051 reports for each agency. When the estimates are calculated by type of report across the agencies, the estimated average burden hours per quarter are 85.81 (FFIEC 031), 55.20 (FFIEC 041), and 35.27 (FFIEC 051). The agencies believe the change to the measurement date for the total asset thresholds used to determine additional reporting requirements for report dates in 2021 only that is proposed in this notice will not result in a change in the burden estimates currently approved by OMB. These estimates do not include increases in burden for report dates in 2021 that would have resulted from institutions growing above asset thresholds within the Call Report because these institutions would now be afforded threshold relief. Instead, the agencies periodically reevaluate their burden estimates based on the data items that are regularly completed by institutions. Therefore, the burden estimates for these reports would remain the same if these revisions are finalized. The estimated burden per response for the quarterly filings of the Call Report is an average that varies by agency because of differences in the composition of the institutions under each agency's supervision (*e.g.,* size distribution of institutions, types of activities in which they are engaged, and existence of foreign offices).

Type of Review: Extension and revision of currently approved collections.

Legal Basis and Need for Collections

The Call Report information collections are mandatory: 12 U.S.C. 161 (national banks), 12 U.S.C. 324 (state member banks), 12 U.S.C. 1817 (insured state nonmember commercial and savings banks), and 12 U.S.C. 1464 (federal and state savings associations). At present, except for selected data items and text, these information collections are not given confidential treatment.

Banks and savings associations submit Call Report data to the agencies each quarter for the agencies' use in monitoring the condition, performance, and risk profile of individual institutions and the industry as a whole. Call Report data serve a regulatory or public policy purpose by assisting the agencies in fulfilling their shared missions of ensuring the safety and soundness of financial institutions and the financial system and protecting consumer financial rights, as well as agency-specific missions affecting national and state-chartered institutions, such as conducting monetary policy, ensuring financial stability, and administering federal deposit insurance. Call Reports are the source of the most current statistical data available for identifying areas of focus for on-site and off-site examinations. Among other purposes, the agencies use Call Report data in evaluating institutions' corporate applications, including interstate merger and acquisition applications for which the agencies are required by law to determine whether the resulting institution would control more than 10 percent of the total amount of deposits of insured depository institutions in the United States. Call Report data also are used to calculate institutions' deposit insurance assessments and national banks' and federal savings associations' semiannual assessment fees.

II. Current Action

During 2020, relief measures enacted by Congress through the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) [1] in response to the strains on the U.S. economy and disruptions to the financial markets as a result of COVID–19 have led to unprecedented growth at many institutions, including loans made through the Paycheck Protection Program (PPP). This rapid growth has caused the assets of some institutions to rise above certain asset-based thresholds, and may cause other community institutions to do so in the near future. Much of this growth, especially growth related to PPP lending, is likely to be temporary, and the increase in assets currently held by an institution may not reflect a change in the institution's longer-term risk profile.

The Call Report contains various total asset thresholds that are measured annually as of the June 30 report date and trigger additional reporting requirements once crossed, generally starting with the Call Reports for the first calendar quarter of the next calendar year. These thresholds include the $100 million, $300 million, $1 billion, $5 billion, and $10 billion in total asset threshold within the Call Reports. The agencies are particularly focused on these total asset thresholds set at $10 billion or less, as these thresholds could impact a significant number of smaller community institutions. These institutions may have fewer resources to implement systems changes and incur transition costs to comply with the additional reporting requirements associated with crossing one of those thresholds.

Many community institutions may have unexpectedly crossed these total asset thresholds during 2020 due to participation in CARES Act relief programs or other COVID–19-related stimulus activities, which would otherwise trigger additional reporting obligations starting in calendar year 2021. The agencies expect some of these institutions may fall below the relevant total asset threshold as of June 30, 2021, for example, after forgiveness of PPP loans and redemption of borrowings obtained through the Board's PPP liquidity facility. The agencies do not want to create a short-term increase in burden on these community institutions to comply with the additional reporting for a single year. For community institutions that remain above a total asset threshold as of the June 30, 2021, measurement date, the one-year reporting relief the agencies propose below would assist those institutions in focusing on COVID–19-related stimulus activities in the near term while providing additional time to comply with any additional reporting requirements starting in 2022 rather than 2021.

The agencies are not proposing to permit an alternate measurement date for larger total asset thresholds within the Call Reports, as the additional data items required at higher total assets

[1] Public Law 116–136.

thresholds have increased relevance for agency supervisory monitoring. The agencies also are not proposing to permit an alternate measurement date for other asset thresholds tied to specific activities, such as thresholds based on trading assets, mortgage banking activities, or securitization activities, as levels of these activities generally would not be impacted by an institution's participation in various COVID–19-related stimulus activities.

A. FFIEC 051 Eligibility

The agencies have adopted rules establishing criteria for eligibility to use the FFIEC 051 Call Report.[2] The current Call Report instructions permit an institution to file the FFIEC 051 version of the Call Report if it meets certain criteria consistent with those rules. One criterion is that an institution must have total consolidated assets of $5 billion or less in its Call Report as of June 30, 2020, when evaluating eligibility to use the FFIEC 051 for report dates in calendar year 2021. Due to the asset growth considerations discussed above, the agencies have revised their rules on FFIEC 051 eligibility [3] and are proposing to temporarily revise the instructions for the FFIEC 051 to permit an institution to use the lesser of the total consolidated assets reported in its Call Report as of December 31, 2019, or June 30, 2020, when evaluating eligibility to use the FFIEC 051 for report dates in calendar year 2021. An institution must still meet the other criteria for eligibility for the FFIEC 051 in the Call Report instructions. The banking agencies also reserve the right to require an institution otherwise eligible to use the FFIEC 051 to file the FFIEC 041 instead based on supervisory needs. The agencies are proposing this relief for calendar year 2021 only. An institution would be required to use the total consolidated assets it reports in its Call Report as of June 30, 2021, when determining eligibility to use the FFIEC 051 in calendar year 2022, consistent with the existing instructions for the FFIEC 051.

B. Community Bank Leverage Ratio Eligibility

The agencies also have adopted rules permitting institutions that meet certain criteria to use the community bank leverage ratio (CBLR) framework to measure their regulatory capital.[4] The agencies have revised these rules [5] to allow institutions that temporarily exceed the $10 billion total asset threshold in those rules to use the CBLR framework from December 31, 2020, to December 31, 2021, provided they meet the other qualifying criteria for this framework. Institutions that elect to use the CBLR framework under this temporary relief would report CBLR information in Call Report Schedule RC–R, Part I, except that item 32 (Total assets) on that schedule should reflect the lesser of the institution's total assets as of December 31, 2019, or as of the quarter-end report date.

C. Call Report Data Item Thresholds

All three versions of the Call Report also include total asset thresholds for reporting certain additional data items. Reporting of these data items in a given calendar year is determined based on whether an institution has crossed the total asset threshold based on the total consolidated assets reported as of June 30 of the prior year. For the reasons described above, the agencies propose to permit an institution to use the lesser of the total consolidated assets reported in its Call Report as of December 31, 2019, or June 30, 2020, when determining whether the institution has crossed a total asset threshold to report additional data items in its Call Reports for report dates in calendar year 2021. The agencies are proposing this relief for calendar year 2021 only. An institution would be required to use the total consolidated assets reported in its Call Report as of June 30, 2021, when determining whether it must complete any additional items subject to the total asset threshold in calendar year 2022. As noted above, the regulatory reporting burden relief is limited to community institutions with total asset thresholds up to $10 billion, as these thresholds are most relevant for community institutions.

The Call Report total asset thresholds that would be impacted by this proposed change in measurement date are:

- For the FFIEC 041 and FFIEC 051 only, the $100 million threshold to report ''Other borrowed money'' in Schedule RC–K, item 13.
- For the FFIEC 041 and FFIEC 051 only, the $300 million threshold [6] to report additional agricultural lending information in Schedule RI, Memorandum item 6; Schedule RI–B, Part I, Memorandum item 3; Schedule RC–C, Memorandum item 1.f.(5); Schedule RC–K, Memorandum item 1; and Schedule RC–N, Memorandum items 1.f.(5) and 4.
- For the FFIEC 031 and FFIEC 041 only, the $300 million threshold to report certain information on credit card lines in Schedule RC–L, items 1.b.(1) and (2).
- For the FFIEC 041 only, the $300 million threshold to report cash and balances due from depository institutions in Schedule RC–A; certain derivatives information in Schedule RI, Memorandum item 10, and Schedule RC–N, Memorandum item 6; and certain additional loan information in Schedule RI–B, Part I, Memorandum items 2.a, 2.c, and 2.d; Schedule RC–C, Part I, items 2.a, 2.b, 2.c, 4.a, 4.b, 9.b.(1), 9.b.(2), 10.a, and 10.b, column A; Schedule RC–C, Part I, Memorandum items 1.e.(1), 1.e.(2), and 5; and Schedule RC–N, Memorandum items 1.e.(1), 1.e.(2), and 3.a through 3.d.
- The $1 billion threshold to report components of deposit fee income in Schedule RI, Memorandum items 15.a through 15.d; disaggregated credit loss allowance data in Schedule RI–C; components of transaction and nontransaction savings consumer deposit account products in Schedule RC–E, Memorandum items 6.a, 6.b, 7.a.(1), 7.a.(2), 7.b.(1), and 7.b.(2); and estimated uninsured deposits in Schedule RC–O, Memorandum item 2.
- For the FFIEC 031 and FFIEC 041 only, the $1 billion threshold to report information on certain income from mutual funds and annuities in Schedule RI, Memorandum item 2; and financial and performance standby letters of credit conveyed to others in Schedule RC–L, items 2.a and 3.a.
- For the FFIEC 031 and FFIEC 041 only, the $10 billion threshold to report additional information on derivatives in Schedule RI, Memorandum items 9.a and 9.b, and Schedule RC–L, items 16.a and 16.b.(1) through 16.b.(8); holdings of asset-backed securities and structured financial products in Schedule RC–B, Memorandum items 5.a through 5.f and 6.a through 6.g; and securitizations in Schedule RC–S, items 6 and 10, and Memorandum items 3.a.(1), 3.a.(2), 3.b.(1), and 3.b.(2).
- For the FFIEC 031 only, the $10 billion threshold to report additional information on deposits in foreign offices in Schedule RC–E, Part II.

[2] *See* definition of *covered depository institutions.* 12 CFR 52.2 (OCC); 12 CFR 208.121 (Board); 12 CFR 304.12 (FDIC).

[3] *https://www.fdic.gov/news/press-releases/2020/pr20127.html.*

[4] *See* 12 CFR 3.12 (OCC); 12 CFR 217.12 (Board); 12 CFR 324.12 (FDIC).

[5] *https://www.fdic.gov/news/press-releases/2020/pr20127.html.*

[6] These same items also have a 5 percent activity threshold for institutions with less than $300 million in total consolidated assets. For these items, an institution would measure the 5 percent threshold as of the same date as of which it measures total consolidated assets.

III. Request for Comment

Public comment is requested on all aspects of this joint notice. Comment is specifically invited on:

(a) Whether the proposed revisions to the collections of information that are the subject of this notice are necessary for the proper performance of the agencies' functions, including whether the information has practical utility;

(b) The accuracy of the agencies' estimates of the burden of the information collections as they are proposed to be revised, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of information collections 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.

Comments submitted in response to this joint notice will be shared among the agencies.

Theodore J. Dowd,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

Board of Governors of the Federal Reserve System.

Michelle Taylor Fennell,

Deputy Associate Secretary of the Board.

Dated at Washington, DC, on or about November 24, 2020.

Federal Deposit Insurance Corporation.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2020–26388 Filed 11–27–20; 8:45 am]

BILLING CODE 4810–33– 6210–01– 6714–01–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Financial Crimes Enforcement Network Due Diligence Programs for Correspondent Accounts for Foreign Financial Institutions and Private Banking Accounts

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The public is invited to submit comments on these requests.

DATES: Comments should be received on or before December 30, 2020 to be assured of consideration.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained from Molly Stasko by emailing *PRA@treasury.gov,* calling (202) 622–8922, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Financial Crimes Enforcement Network (FinCEN)

1. Title: Due diligence programs for correspondent accounts for foreign financial institutions and private banking accounts (31 CFR 1010.610 and 31 CFR 1010.620).

OMB Control Number: 1506–0046.

Type of Review: Extension without change of a currently approved collection.

Description: The legislative framework generally referred to as the Bank Secrecy Act (BSA) consists of the Currency and Financial Transactions Reporting Act of 1970, as amended by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act) (Pub. L. 107–56) and other legislation. The BSA is codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, 31 U.S.C. 5311–5314 and 5316–5332, and notes thereto, with implementing regulations at 31 CFR Chapter X.

The BSA authorizes the Secretary of the Treasury, inter alia, to require financial institutions to keep records and file reports that are determined to have a high degree of usefulness in criminal, tax, and regulatory matters, or in the conduct of intelligence or counter-intelligence activities, to protect against international terrorism, and to implement anti-money laundering (AML) programs and compliance procedures. Regulations implementing Title II of the BSA appear at 31 CFR chapter X. The authority of the Secretary to administer the BSA has been delegated to the Director of FinCEN.

Section 312 of the USA PATRIOT Act added subsection (h) to 31 U.S.C. 5318 of the BSA. Section 312 mandates that each financial institution that establishes, maintains, administers, or manages a correspondent account or a private banking account in the United States for non-U.S. persons subject such accounts to certain anti-money laundering compliance measures. In particular, a financial institution must establish appropriate, specific, and, where necessary, enhanced, due diligence (EDD) or enhanced scrutiny policies, procedures, and controls that are reasonably designed to detect and report instances of money laundering through those accounts. The regulations implementing the due diligence requirements for maintaining foreign correspondent accounts and private banking accounts are found at 31 CFR 1010.610 and 31 CFR 1010.620, respectively, and apply to covered financial institutions defined as banks, brokers or dealers in securities, futures commission merchants, introducing brokers in commodities, and mutual funds.

Form: Not applicable.

Affected Public: Businesses or other for-profit institutions; Not-for-profit institutions.

Estimated Number of Respondents: 16,938.

Frequency of Response: As required.

Estimated Total Number of Annual Responses: 16,938.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 33,876 hours.

(Authority: 44 U.S.C. 3501 *et seq.*)

Dated: November 23, 2020.

Molly Stasko,

Treasury PRA Clearance Officer.

[FR Doc. 2020–26286 Filed 11–27–20; 8:45 am]

BILLING CODE 4810–02–P

UNIFIED CARRIER REGISTRATION PLAN

Sunshine Act Meeting Notice; Unified Carrier Registration Plan Board Subcommittee Meeting

TIME AND DATE: December 3, 2020, from Noon to 2 p.m., Eastern time.

PLACE: This meeting will be accessible via conference call and via Zoom Meeting and Screenshare. Any interested person may call (i) 1–929–205–6099 (US Toll) or 1–669–900–6833 (US Toll) or (ii) 1–877–853–5247 (US Toll Free) or 1–888–788–0099 (US Toll Free), Meeting ID: 965 1818 4622, to listen and participate in this meeting.

The website to participate via Zoom Meeting and Screenshare is *https://kellen.zoom.us/j/96518184622.*

STATUS: This meeting will be open to the public.

MATTERS TO BE CONSIDERED: The Unified Carrier Registration Plan Audit Subcommittee (the ''Subcommittee'') will continue its work in developing and implementing the Unified Carrier Registration Plan and Agreement. The subject matter of this meeting will include:

Proposed Agenda

I. Call to Order—Subcommittee Chair

The Subcommittee Chair will welcome attendees, call the meeting to order, call roll for the Subcommittee, confirm whether a quorum is present, and facilitate self-introductions.

II. Verification of Publication of Meeting Notice—UCR Executive Director

The UCR Executive Director will verify the publication of the meeting notice on the UCR website and distribution to the UCR contact list via email followed by the subsequent publication of the notice in the **Federal Register**.

III. Review and Approval of Subcommittee Agenda and Setting of Ground Rules—Subcommittee Chair

For Discussion and Possible Subcommittee Action

The Subcommittee Agenda will be reviewed, and the Subcommittee will consider adoption.

Ground Rules

➢ Subcommittee action only to be taken in designated areas on agenda

IV. Review and Approval of Minutes From the October 14, 2020 Meeting—Subcommittee Chair

For Discussion and Possible Subcommittee Action

Draft minutes from the October 14, 2020 Subcommittee meeting via teleconference will be reviewed. The Subcommittee will consider action to approve.

V. Independent Auditor's Final Report (2017 and 2018)—UCR Depository Manager

The UCR Depository Manager will discuss the outcome of the financial statement audits for each of the 12-month periods ended December 31, 2018 and 2017 for the Depository.

VI. NRS Testing—Penetration and Vulnerability Testing—UCR Technology Manager and UCR Depository Manager

The UCR Technology Director and UCR Depository Manager will recommend plans to conduct a protocol of tests of the National Registration System (NRS) to include an appropriate audit and penetration and vulnerability testing of the NRS.

VII. Consideration of the Addition of a UCR Auditor/Enforcement Manager—Subcommittee Chair and UCR Depository Manager

For Discussion and Possible Subcommittee Action

The Subcommittee Chair will lead a discussion considering the potential addition of a UCR Auditor/Enforcement Manager. The Subcommittee may take action to recommend to the UCR Board that a UCR Auditor/Enforcement Manager be included in the budget for fiscal year 2021

VIII. Guidance Regarding Steps to be Taken on Foreign Based Motor Carriers' FARs—UCR Subcommittee Chair

For Discussion and Possible Subcommittee Action

The Subcommittee Chair will discuss the unique issues regarding Focused Anomaly Reviews (FARs) associated with Non-United States based motor carriers and motor carriers based in non-participating states. The Subcommittee may take action to recommend to the Board FARs audit procedures to be utilized by participating states for these motor carriers.

IX. Next Steps Regarding the 2019 Audit Deficiencies by Idaho and Utah—Subcommittee Chair

For Discussion and Possible Subcommittee Action

The Subcommittee Chair will discuss the next steps regarding the 2019 Audit Deficiencies by Idaho and Utah with the Subcommittee. The Subcommittee may take action to recommend to the Board that additional steps be taken against these two states.

X. Consideration and Possible Approval of a Recommendation to the Board to Approve an Audit Contract of the NRS by RSM—UCR Executive Director

For Discussion and Possible Subcommittee Action

The UCR Executive Director will lead a discussion around the consideration and possible approval of a recommendation to the Board to approve an audit contract, that includes penetration and vulnerability testing, of the NRS by RSM.

XI. Other Items—Subcommittee Chair

The Subcommittee Chair will call for any other items the committee members would like to discuss.

XII. Adjournment—Subcommittee Chair

The Subcommittee Chair will adjourn the meeting.

The agenda will be available no later than 5:00 p.m. Eastern time, November 24, 2020 at: *https://plan.ucr.gov.*

CONTACT PERSON FOR MORE INFORMATION: Elizabeth Leaman, Chair, Unified Carrier Registration Plan Board of Directors, (617) 305–3783, *eleaman@board.ucr.gov.*

Alex B. Leath,

Chief Legal Officer, Unified Carrier Registration Plan.

[FR Doc. 2020–26465 Filed 11–25–20; 11:15 am]

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FEDERAL REGISTER

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Part II

Department of Health and Human Services

Office of Inspector General

42 CFR Part 1001

Fraud and Abuse; Removal of Safe Harbor Protection for Rebates Involving Prescription Pharmaceuticals And Creation of New Safe Harbor Protection for Certain Point-of-Sale Reductions in Price on Prescription Pharmaceuticals and Certain Pharmacy Benefit Manager Service Fees; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Inspector General

42 CFR Part 1001

RIN 0936–AA08

Fraud and Abuse; Removal of Safe Harbor Protection for Rebates Involving Prescription Pharmaceuticals and Creation of New Safe Harbor Protection for Certain Point-of-Sale Reductions in Price on Prescription Pharmaceuticals and Certain Pharmacy Benefit Manager Service Fees

AGENCY: Department of Health and Human Services, Office of Inspector General (OIG), HHS.

ACTION: Final rule.

SUMMARY: Discounts for prescription pharmaceutical products are central to this final rule, in which the Department of Health and Human Services (Department or HHS) amends the safe harbor regulation concerning discounts. Amending this regulation changes the definition of certain conduct that is protected from liability under the Federal anti-kickback statute of the Social Security Act (the Act). New regulatory text in the amendment revises the discount safe harbor. By excluding from the definition of a discount eligible for safe harbor protection certain reductions in price or other remuneration from a manufacturer of prescription pharmaceutical products to plan sponsors under Medicare Part D or pharmacy benefit managers (PBMs) under contract with them, the Department modifies the existing discount safe harbor in particular contexts. Existing safe harbors otherwise remain unchanged. Safe harbors are also created for two additional types of arrangements. The first protects certain point-of-sale reductions in price on prescription pharmaceutical products, and the second protects certain PBM service fees.

DATES: This final rule is effective on January 29, 2021, except for the amendments to 42 CFR 1001.952(h)(5), which are effective on January 1, 2022.

FOR FURTHER INFORMATION CONTACT: Aaron Zajic, (202) 619–0335.

SUPPLEMENTARY INFORMATION:

Social Security Act citation	United States Code citation
1128B	42 U.S.C. 1320a–7b
1128D	42 U.S.C. 1320a–7d
1102	42 U.S.C. 1302

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I. Executive Summary

A. Purpose and Need for Regulatory Action as Determined by the Secretary

On February 6, 2019, the Department published a Notice of Proposed Rulemaking in the **Federal Register** (84 FR 2340) (Proposed Rule). In that Proposed Rule, the Secretary set forth his concerns with the modern prescription drug distribution model and, in particular, how the current rebate-based system may be increasing financial burdens for beneficiaries. We refer readers to and incorporate by reference Section I of the Proposed Rule, which sets forth in detail the Secretary's determination of the purpose and need for this rulemaking.

The Trump Administration's *American Patients First* blueprint described a new, more transparent drug pricing system that would lower high prescription drug prices and bring down out-of-pocket costs.[1] The blueprint described four strategies: Boosting competition, enhancing negotiation, creating incentives for lower list prices, and reducing out-of-pocket spending.

On July 24, 2020 the President signed an Executive Order[2] directing the Secretary of Health and Human Services to complete the rulemaking process that was commenced with the Proposed Rule. Section 4 of this Executive Order directs the Secretary of the Department of Health and Human Services to confirm—and make public such confirmation—that the action is not projected to increase Federal spending, Medicare beneficiary premiums, or patients' total out-of-pocket costs. The Secretary's confirmation is available at: *https://www.hhs.gov/about/leadership/secretary/priorities/drug-prices/index.html.*

This final rule is an important element to achieving the goals of the blueprint and the Executive Order and

[1] American Patients First: The Trump Administration Blueprint to Lower Drug Prices and Reduce Out-of-Pocket Costs, Dep't Health & Human Servs. (May 2018), *available at https://www.hhs.gov/sites/default/files/AmericanPatientsFirst.pdf.*

[2] Executive Order on Lowering Prices for Patients by Eliminating Kickbacks to Middlemen, Whitehouse.gov (July 24, 2020), *available at https://www.whitehouse.gov/presidential-actions/executive-order-lowering-prices-patients-eliminating-kickbacks-middlemen/. See* 85 FR 45759 (July 29, 2020).

also works in concert with other regulatory provisions finalized by the Department. For example, this final rule creates new safe harbor protection for point-of-sale reductions in price, which will directly reduce beneficiary out-of-pocket spending at the pharmacy counter. It also increases price transparency, which will enable Medicare beneficiaries to better choose a plan that best meets their needs. This final rule addresses a practice that has increased patient costs at the pharmacy counter and will create incentives for drug companies to lower the list prices of their drugs.

This final rule is also important to beneficiary and government spending in Medicare Part D. Part D rebates and other price concessions grew more than three times faster than gross drug expenditures from 2014–2016. Price concessions, including rebates, have the potential to reduce Part D costs for the Federal government, because Part D plan sponsors subtract their estimated rebates from their plan bids. Lower plan bids contribute to lower premiums, and lower premiums contribute to lower government spending on premium subsidies. However, the Proposed Rule described how rebates also may create a perverse incentive that rewards manufacturers for increasing their list price, while subjecting consumers to higher out-of-pocket costs. Since beneficiary out-of-pocket costs are often calculated based on the list price of the drug (*i.e.,* before rebates are paid), beneficiaries pay higher cost-sharing than they would if discounts were reflected at the point of sale. Furthermore, high list prices may result in more beneficiaries more quickly reaching the catastrophic phase, where the Federal government bears 80 percent of the drug costs and the Part D plans only cover 15 percent of the drug costs.

The Department is issuing this final rule to create incentives for manufacturers to lower their list prices; reduce the incentives for Part D plans to choose high-cost, highly rebated drugs over comparable drugs with lower prices; lower beneficiary out-of-pocket spending; and increase transparency to improve plan choice and program integrity.

B. Summary of the Major Provisions

i. Discount Safe Harbor

In this final rule, we amend 42 CFR 1001.952(h) to remove safe harbor protection for reductions in price in connection with the sale or purchase of prescription pharmaceutical products from manufacturers to plan sponsors under Part D, either directly or through PBMs acting under contract with them, unless the reduction in price is required by law. We note that reductions in price negotiated between manufacturers and plan sponsors under Part D (or through PBMs under contract with the plan sponsors) in the form of upfront discounts, rather than after-sale rebates, are eligible for protection under the new safe harbor for point-of-sale reductions in price for prescription pharmaceutical products at § 1001.952(cc).

ii. Point-of-Sale Reductions in Price for Prescription Pharmaceutical Products Safe Harbor

We are finalizing a new safe harbor at § 1001.952(cc) for certain point-of-sale reductions in price offered by manufacturers on prescription pharmaceutical products that are payable under Medicare Part D or by Medicaid managed care organizations (MCOs) that meet certain criteria.

iii. PBM Service Fees Safe Harbor

In this final rule, we create a new safe harbor at § § 1001.952(dd) for fixed fees that manufacturers pay to PBMs for services rendered to the manufacturers that meet specified criteria.

II. Background

A. The Anti-Kickback Statute and Safe Harbors

Section 1128B(b) of the Act, the anti-kickback statute, provides for criminal penalties for whoever knowingly and willfully offers, pays, solicits, or receives remuneration to induce or reward the referral of business reimbursable under any of the Federal health care programs, as defined in section 1128B(f) of the Act. The offense is classified as a felony and is punishable by fines of up to $100,000 and imprisonment for up to 10 years. Violations of the anti-kickback statute may also result in the imposition of civil monetary penalties (CMPs) under section 1128A(a)(7) of the Act (42 U.S.C. 1320a–7a(a)(7)), program exclusion under section 1128(b)(7) of the Act (42 U.S.C. 1320a–7(b)(7)), and liability under the False Claims Act (31 U.S.C. 3729–33).

Congress's intent in placing the term ''remuneration'' in the statute in 1977 was to cover the transfer of anything of value in any form or manner whatsoever. The statute's language makes clear that illegal payments are prohibited beyond merely ''bribes,'' ''kickbacks,'' and ''rebates,'' which were the three terms used in the original 1972 statute. The illegal payments are covered by the statute regardless of whether they are made directly or indirectly, overtly or covertly, in cash or in kind, and regardless of the label that parties may affix to the payment. In addition, prohibited conduct includes not only the payment of remuneration intended to induce or reward referrals of patients but also the payment of remuneration intended to induce or reward the purchasing, leasing, or ordering of, or arranging for or recommending the purchasing, leasing, or ordering of, any good, facility, service, or item reimbursable by any Federal health care program.

Because of the broad reach of the statute, concern was expressed that some relatively innocuous commercial arrangements were covered by the statute and, therefore, potentially subject to criminal prosecution.[3] In response, Congress enacted section 14 of the Medicare and Medicaid Patient and Program Protection Act of 1987, Public Law 100–93, which specifically requires the development and promulgation of regulations, the so-called safe harbor provisions, that would specify various payment and business practices that would not be subject to sanctions under the anti-kickback statute, even though they may potentially be capable of incenting referrals of business for which payment may be made under a Federal health care program.

Section 205 of the Health Insurance Portability and Accountability Act of 1996, Public Law 104–191, established section 1128D of the Act, which includes criteria for modifying and establishing safe harbors. Specifically, section 1128D(a)(2) of the Act provides that, in modifying and establishing safe harbors, the Secretary may consider whether a specified payment practice may result in:

- An increase or decrease in access to health care services;
- an increase or decrease in the quality of health care services;
- an increase or decrease in patient freedom of choice among health care providers;
- an increase or decrease in competition among health care providers;
- an increase or decrease in the ability of health care facilities to provide services in medically underserved areas or to medically underserved populations;
- an increase or decrease in the cost to Federal health care programs;
- an increase or decrease in the potential overutilization of health care services;

[3] *See, e.g.,* Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, 56 FR 35952 (July 29, 1991).

• the existence or nonexistence of any potential financial benefit to a health care professional or provider, which benefit may vary depending on whether the health care professional or provider decides to order a health care item or service or arrange for a referral of health care items or services to a particular practitioner or provider; or

• any other factors the Secretary deems appropriate in the interest of preventing fraud and abuse in Federal health care programs.[4]

Since July 29, 1991, there have been a series of final regulations published in the **Federal Register** establishing safe harbors in various areas.[5] These safe harbor provisions have been developed ''to limit the reach of the statute somewhat by permitting certain non-abusive arrangements, while encouraging beneficial or innocuous arrangements.'' [6]

Healthcare providers and others may voluntarily seek to comply with safe harbors so that they have the assurance that their business practices will not be subject to any anti-kickback enforcement action. In giving the Department the authority to protect certain arrangements and payment practices under the anti-kickback statute, Congress intended the safe harbor regulations to be updated periodically to reflect changing business practices and technologies in the healthcare industry.

B. Summary of the Notice of Proposed Rulemaking

On February 6, 2019, we published the Proposed Rule setting forth certain proposed amendments to the safe harbors under the anti-kickback statute. The Proposed Rule also provided substantial background information to explain why the Department believes these amendments are necessary.

With respect to the proposed amendment to the existing discount safe harbor, we explained that it was designed to address evolving business arrangements and align with the statutory exception's intent to encourage price competition that benefits the Medicare and Medicaid programs.[7] We also emphasized our longstanding position that a discount must be in the form of a reduction in the price of a good or service based on an arms-length transaction. With respect to rebates, we explained the regulatory history regarding our treatment of ''rebates'' under the discount safe harbor. Finally, we noted that the discount safe harbor was finalized in 1991 and has not been updated since 2002, and we highlighted that both the Medicare Part D program and comprehensive regulations governing Medicaid managed care delivery systems were enacted in the intervening years. For a more comprehensive discussion of why these amendments to the discount safe harbor are necessary, we incorporate by reference and refer readers to the discussion in the Proposed Rule.[8]

The Proposed Rule also identified certain specific harms that may be caused by the current rebate framework. First, some beneficiaries experience increased financial burdens. For example, if a beneficiary is paying coinsurance on a drug subject to a rebate, the beneficiary pays a percentage of a price that more closely resembles the list price than the net price. Second, the Proposed Rule explained that rebates may be harming Federal health care programs by increasing list prices, preventing competition to lower drug prices, discouraging the use of lower-cost brand or generic drugs, and skewing formulas used to determine pharmacy reimbursement or Medicaid rebates.[9] Finally, the Proposed Rule expressed concerns about a lack of transparency in the current system. With respect to rebates, we explained that OIG work showed that some Part D plan sponsors had limited information about rebate contracts and rebate amounts that their PBMs negotiated. A lack of transparency could create a potential program integrity vulnerability because compliance with program rules may be more difficult to verify. We also sought to address a lack of transparency to health plans when the health plans' PBMs are being paid by manufacturers for services that the PBMs render to manufacturers related to pharmacy benefit management services that the PBM furnishes to the health plans.[10]

To address the Department's concerns with the current rebate system, the Department proposed and solicited comments on three revisions to the safe harbors. First, the Department proposed to amend the discount safe harbor at 42 CFR 1001.952(h) to exclude from the definition of ''discount'' at § 1001.952(h)(5) all price reductions from manufacturers on prescription pharmaceutical products in connection with their sale to or purchase by plan sponsors under Medicare Part D, Medicaid MCOs, or PBMs acting under contract with plan sponsors under Medicare Part D or Medicaid MCOs, unless the reduction in price is required by law (*e.g.,* rebates under the Medicaid Drug Rebate Program). The Proposed Rule also proposed definitions at § 1001.952(h)(6)–(10) of the terms ''manufacturer,'' ''wholesaler,'' ''pharmacy benefit manager,'' ''prescription pharmaceutical product,'' and ''Medicaid Managed Care Organization.''

Second, the Proposed Rule proposed to add a new safe harbor at § 1001.952(cc) to protect reductions in price between the entities that would be removed from the discount safe harbor at § 1001.952(h) if such reductions in price are given at the point of sale and meet certain other criteria. As proposed, this safe harbor would protect reductions in price on prescription pharmaceutical products offered to plan sponsors under Medicare Part D, Medicaid MCOs, or through a PBM acting under contract with either if: (1) The reduction in price is set in advance; (2) the reduction in price does not involve a rebate, unless the full value of the price reduction is accomplished through chargebacks or is a rebate required by law; and (3) the reduction in price is completely reflected in the price the pharmacy charges to the beneficiary at the point of sale.

Finally, the Proposed Rule proposed to add a second new safe harbor at § 1001.952(dd) specifically designed to protect certain fees a pharmaceutical

[4] *See also* section 1102 of the Act (vesting the Secretary with the authority to make and publish rules and regulations, not inconsistent with the Act, as may be necessary to the efficient administration of his functions under the Act).

[5] Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, 56 FR 35952 (July 29, 1991); Medicare and State Health Care Programs: Fraud and Abuse; Safe Harbors for Protecting Health Plans, 61 FR 2122 (Jan. 25, 1996); Federal Health Care Programs: Fraud and Abuse; Statutory Exception to the Anti-Kickback Statute for Shared Risk Arrangements, 64 FR 63504 (Nov. 19, 1999); Medicare and State Health Care Programs: Fraud and Abuse; Clarification of the Initial OIG Safe Harbor Provisions and Establishment of Additional Safe Harbor Provisions Under the Anti-Kickback Statute, 64 FR 63518 (Nov. 19, 1999); Medicare and State Health Care Programs: Fraud and Abuse; Ambulance Replenishing Safe Harbor Under the Anti-Kickback Statute, 66 FR 62979 (Dec. 4, 2001); Medicare and State Health Care Programs: Fraud and Abuse; Safe Harbors for Certain Electronic Prescribing and Electronic Health Records Arrangements Under the Anti-Kickback Statute, 71 FR 45109 (Aug. 8, 2006); Medicare and State Health Care Programs: Fraud and Abuse; Safe Harbor for Federally Qualified Health Centers Arrangements Under the Anti-Kickback Statute, 72 FR 56632 (Oct. 4, 2007); Medicare and State Health Care Programs: Fraud and Abuse; Electronic Health Records Safe Harbor Under the Anti-Kickback Statute, 78 FR 79202 (Dec. 27, 2013); and Medicare and State Health Care Programs: Fraud and Abuse; Revisions to the Safe Harbors Under the Anti-Kickback Statute and Civil Monetary Penalty Rules Regarding Beneficiary Inducements, 81 FR 88368 (Dec. 7, 2016).

[6] Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, 56 FR at 35958.

[7] 54 FR 3092.

[8] 84 FR 2345–47.

[9] 84 FR 2343.

[10] 84 FR 2349–50.

manufacturer pays to a PBM for services rendered to the manufacturer that relate to the PBM's arrangements to provide pharmacy benefit management services to health plans. As proposed, the safe harbor would protect a payment a pharmaceutical manufacturer makes to a PBM for services the PBM provides to the manufacturer, for the manufacturer's benefit, when those services relate to the PBM's arrangements to provide pharmacy benefit management services to health plans. To receive protection, the proposed safe harbor would require that: (1) The services and compensation be set out in a written agreement; (2) the compensation be consistent with fair market value in an arm's-length transaction; be a fixed payment, not based on a percentage of sales; and not be determined in a manner that takes into account the volume or value of any referrals or business otherwise generated between the parties, or between the manufacturer and the PBM's health plans, for which payment may be made in whole or in part under Medicare, Medicaid, or other Federal health care programs; and (3) the PBM makes annual written disclosures to each health plan with which it contracts regarding the services rendered to each pharmaceutical manufacturer related to the PBM's arrangements to furnish pharmacy benefit management services to the health plan, and make such disclosures to the Secretary upon request.

The Department solicited comments on a range of topics in the course of describing the new proposed safe harbors. For instance, for the proposed safe harbor for point-of-sale reductions in price, the Proposed Rule solicited comments on the sufficiency of the proposed definitions as well as any effects of the proposed safe harbor on competition to the extent pharmacies have sufficient data to reverse engineer the manufacturer's or the PBM's discount structure. For the proposed safe harbor for certain PBM service fees, the Proposed Rule solicited comments on the interpretation of pharmacy benefit management services and the transparency-related requirements that would be a condition of the safe harbor.

III. Summary of Public Comments and Responses

We received responsive comments from approximately 26,000 distinct commenters, including, but not limited to, individuals, pharmaceutical manufacturers, pharmacies, PBMs, wholesalers, plan sponsors under Part D, Medicaid MCOs, and trade associations representing various individuals and entities. Many of these individuals and entities provided comments on multiple topics. Commenters generally agreed with the Department on the need to lower out-of-pocket costs for consumers on prescription drugs, but they diverged in terms of whether they supported or opposed the Proposed Rule. Comments from both those who opposed the rule and those who supported the rule recommended certain changes or requested certain clarifications. We appreciate the robust feedback from the commenters. We have divided the public comment summaries and our responses into discrete sections: The first section covers general comments and responses that may apply to more than one of our proposals, and the following sections summarize and respond to the comments specific to our proposed amendments to the discount safe harbor and our two new proposed safe harbors.

A. General

i. Antitrust

Comment: Several commenters were supportive of the Proposed Rule and contended that antitrust laws do not affect the Proposed Rule or that the Proposed Rule will not lead to anti-competitive discriminatory pricing. A commenter explained that antitrust laws related to differential pricing apply equally to upfront discounts as they do to retrospective rebates. Another commenter explained that the Proposed Rule will result in lower cost-sharing amounts for beneficiaries at the point of sale and will allow for the reestablishment of the nexus between price concessions on a product and the actual price paid by consumers for that product.

Response: We appreciate the commenters' support for the Proposed Rule.

Comment: Several commenters addressed whether and how the policies underlying the Proposed Rule intersect with the Robinson-Patman Act. Some commenters that opposed the proposal suggested that the risk of liability under the Robinson-Patman Act will hinder manufacturers' ability to negotiate up-front discounts. Several of these commenters claimed that the current rebate system resulted from a settlement in the *In re Brand Name Prescription Drugs* litigation, in which pharmacies sued brand-name prescription drug manufacturers and wholesalers for discriminatory pricing practices that favored large, institutional purchasers. These commenters pointed out that under the terms of the 1996 settlement, manufacturers agreed to give pharmacies the same opportunity to earn the favorable discounts given to institutional purchasers, provided that the pharmacies can demonstrate an ability to affect market share in the same or similar manner as the institutional purchasers. The commenters argued that the Department failed to consider this settlement, and stated that absent Congressional action to amend or repeal the Robinson-Patman Act, manufacturers will move to offering lower, unvaried discounts.

Other commenters, however, contended that the antitrust laws do not pose an obstacle to or hinder implementation of the Proposed Rule and that the Proposed Rule would, in fact, further the ultimate goal of antitrust law, which is to promote competition. For instance, one commenter pointed out that the antitrust laws apply equally to up front discounts and retrospective rebates, and the *In re Brand Name Prescription Drugs* litigation did not result in any change in the ability of a prescription drug manufacturer to offer an upfront discount, or create any precedent suggesting that upfront discounts are illegal and retrospective rebates are legal. Another comment similarly questioned the conclusion that moving from a world of PBM rebates to point-of-sale chargebacks would result in anti-competitive discriminatory pricing and pointed out that the Proposed Rule would result in individuals paying less at the pharmacy counter. Yet another commenter contended that transitioning away from rebates to upfront discounts achieves the intended goals of the 1996 settlement.

Response: The Department is not persuaded that the threat of Robinson-Patman Act litigation will dissuade manufacturers from offering pro-competitive price concessions in the form of upfront discounts. In fact, comments submitted by the major association representing pharmaceutical manufacturers rejected the notion that the Robinson-Patman Act prevents prescription pharmaceutical manufacturers from offering upfront discounts and pointed out that rebates do not occupy a unique position insulated from antitrust scrutiny. The Department agrees that neither the 1996 settlement nor the subsequent court rulings made any distinction between retrospective rebates and upfront discounts and did not result in any decision suggesting that the former are less problematic than the latter. Both retrospective rebates and upfront discounts, to the extent that they are true price concessions, could theoretically be applied in a

discriminatory fashion. The Department does not administer antitrust law. However, as the Department understands its application, whether the price discrimination is achieved by something labeled a ''rebate'' versus something labeled a ''discount'' would not be relevant for purposes of Robinson-Patman Act liability.

Comment: A commenter requested, and believed it would be helpful for, the Antitrust Division at the Federal Trade Commission (FTC) or Department of Justice (DOJ) to analyze the Proposed Rule and provide a Competition Advisory Opinion upon which stakeholders could rely.

Response: Parties that want greater certainty may request an advisory opinion from the FTC.

ii. Transparency

Comment: Numerous commenters reiterated the need for greater transparency in our current rebate system, with various commenters asserting that the proposed point-of-sale reduction in price safe harbor would increase transparency and ensure that patients benefit from price reductions. A commenter stated that greater transparency would enable independent pharmacies to negotiate more favorable terms with PBMs and health plan sponsors and inform patients about their drug coverage options, while another commenter stated that greater transparency may put plan sponsors in a better position to exert more influence to lower net drug spending and PBM administrative fees. Another commenter asserted that transparency surrounding discounts would be likely to lower list prices and reduce misaligned incentives. This commenter also stated that patients who know the amount of a plan's discount for a product would be in a better position to select the right plan. Another commenter asserted that this increased transparency surrounding the rebates provided to PBMs and plans would place significant pressure on pharmaceutical manufacturers to lower list prices, stating that manufactures would no longer be able to point to rebates as the reason for high drug prices.

Conversely, other commenters stated that the changes reflected in the Proposed Rule would not increase transparency. Specifically, some commenters asserted that pharmaceutical manufacturers establish drug prices, and that if the rule aims to create transparency, then it should apply to all parties, including pharmaceutical manufacturers, instead of only PBMs and health plans. Another commenter asserted that health plans already provide meaningful transparency surrounding rebates through mechanisms like direct and indirect remuneration (DIR) reporting to CMS, while pharmaceutical manufacturers do not systematically disclose their rebates. Another commenter opposed the proposed point-of-sale reductions in price safe harbor and stated that as long as rebates are a part of our drug pricing system, there will still be confusion among patients and plan sponsors surrounding drug prices.

Response: We appreciate support from commenters who agree that applying manufacturer reductions in price to drug prices at the point of sale would increase transparency. Additionally, we concur that greater transparency surrounding price reductions can enable stakeholders in the drug supply chain to support patients in selecting drugs and plans that minimize their out-of-pocket costs and can lead to lower drug prices.

Many publications document that many Medicare beneficiaries do not make what might appear to be the best decisions when choosing a Part D plan. If the plan premium is the monthly cost of having access to drugs that best meet a beneficiary's needs, then the beneficiary should have visibility into what kind of discounts are being negotiated on their behalf.

While we understand that plan sponsors under Part D already have DIR reporting requirements, we believe that by excluding certain rebates paid by manufacturers from the discount safe harbor and creating a new safe harbor for point-of-sale reductions in price, there will be enhanced transparency regarding reductions in price that pharmaceutical manufacturers negotiate with plan sponsors under Medicare Part D and PBMs under contract with these plans, especially for the consumer, and create new incentives for manufacturers to lower drug prices.

Comment: Other commenters asserted that blaming PBMs for the lack of transparency in the rebate system is misdirected. A PBM commenter stated that its plan sponsors see their respective drug costs at a unit cost level, as well as the savings the PBM generates for plan sponsors, including rebates, and that its plan sponsors have full audit rights to ensure complete transparency. Another commenter noted that PBMs already offer transparent contracts that allow many large employers to pull through some of the value of negotiated rebates to reduce enrollees' drug-related costs, while another commenter noted that the Proposed Rule did not account for these innovative and transparent models that are taking place within the PBM industry.

Conversely, other commenters claimed that the PBM market lacks transparency. Some commenters indicated that rather than excluding certain rebates from the discount safe harbor, OIG should focus on ensuring that PBMs are completely transparent with health plans regarding rebate payments and pass through 100 percent of all rebate payments to Part D plan sponsors, with a commenter noting that increased transparency with respect to PBM rebates may enable plan sponsors to retain some of these rebates that can be used to benefit plan participants and beneficiaries.

Other commenters discussed the impact of increased transparency on the PBM industry generally. Specifically, a commenter advised OIG to ensure the proposed transparency requirements on top of the other regulations that apply to Medicare and Medicaid will not unintentionally stifle new entrants in the PBM market, noting that more choice in PBMs would benefit patients and the government. Conversely, another commenter asserted that greater transparency will invite competition from new PBM entrants, such as nonprofit PBMs and employer self-administered PBMs.

Response: We understand that some programmatic mechanisms are already in place to foster transparency of rebates and drug prices between PBMs and plan sponsors and to CMS. PBMs will need to consider the new requirements in this final rule and may need to adjust their operations in order to comply with the terms of the applicable safe harbor. However, we are persuaded by the comments suggesting that the additional transparency provided by this final rule would be useful. Further, as stated in the Proposed Rule, a 2011 evaluation indicated that certain Part D plan sponsors had limited information regarding rebate contracts and rebate amounts negotiated by their PBMs.[11] A lack of transparency could contribute to program integrity vulnerabilities by making compliance with program rules harder to verify and by allowing hidden incentives that result in higher list prices. We believe that excluding certain rebates paid by manufacturers from the discount safe harbor and creating a new safe harbor for point-of-sale reductions in price will increase transparency, including transparency to plans and beneficiaries, and improve alignment of incentives among parties

[11] 84 FR 2343.

that could result in lower list prices and out-of-pocket costs.

Comment: A commenter recommended restricting or banning PBM spread pricing because spread pricing detracts from the goals of transparency and fair pricing by enabling PBMs to profit by charging plans a higher cost for drugs than they reimburse to pharmacies and retaining the difference. To this end, the commenter recommended that OIG or the Department implement penalties for PBMs to discourage this practice and ensure that the full value of price reductions is passed on to plans.

Response: The scope of the changes that we proposed to the discount safe harbor was limited to remuneration from pharmaceutical manufacturers to plan sponsors under Part D, Medicaid MCOs, and PBMs operating on their behalf. Comments about profits that PBMs may retain by negotiating a difference between what they charge plans and what they reimburse pharmacies are beyond the scope of this rulemaking.

Comment: A commenter suggested that the healthcare system explore other policy actions focused on high list prices, such as prohibiting brand pharmaceutical companies from effectively preventing low-cost generic medications from coming to market. Other commenters noted that our current drug pricing system can only be transparent if beneficiaries are able to predict their out-of-pocket costs and recommended locking in the price of prescription drugs that require coinsurance or requiring at least one drug in each class to be subject to a flat copayment in order to create more stability.

Response: While we appreciate commenters' suggestions for other actions to address high list prices and encourage stability in beneficiaries' out-of-pocket costs, such policy initiatives are outside the scope of this rulemaking.

Comment: Several commenters recommended various additional measures to help promote transparency in the prescription drug supply chain. Specifically, a commenter's recommendations included: Standardized contract terms relating to PBM services and compensation; requiring additional regular disclosures by PBMs to health plans with which they contract regarding their business arrangements with drug manufacturers; disclosure by PBMs to public programs and private plans of discount amounts and other revenue paid to the PBM or related third parties based on the plan sponsor's drug utilization; and an auditable structure that allows plan sponsors to have a complete picture and conduct more fulsome analyses of their drug-related costs and contractual relationships. Another commenter emphasized the need for stakeholders in the prescription drug supply chain to disclose rebate and discount information, financial incentive information, and pharmacy and therapeutics committee information, which the commenter asserted would further improve transparency in this area. Another commenter stated that to further transparency, CMS and OIG should identify, collect, and disseminate data and information that would enable the evaluation of the impact of changes under this rule on beneficiaries.

Other commenters recommended requiring prescription drug manufacturers to be more transparent by making list prices public, with a commenter asserting that patient-level information related to drug pricing must be transparent, democratized, and open source.

Another commenter noted that under the current framework, Medicaid MCOs may negotiate supplemental rebates directly with pharmaceutical manufacturers to minimize costs based on the net cost to the MCO, but the lowest net cost product for the MCO may not always align with the lowest net cost product for the Medicaid program. This commenter recommended mandating transparency of the unit rebate amount (URA) and unit rebate offset amount (UROA) to Medicaid MCOs to help Medicaid MCOs drive toward the lowest net costs to the system.

Response: We appreciate these commenters' feedback. We note that the new safe harbor for PBM service fees requires PBMs to disclose in writing to each health plan with which it contracts at least annually the services rendered to each manufacturer related to the PBM's arrangements to furnish pharmacy benefit management services to the plan. We are not adopting the commenter's recommendation to require additional regular disclosures by PBMs to health plans regarding business arrangements with drug manufacturers. We believe the requirements under the PBM service fees safe harbor allow for appropriate transparency between the parties in order for the remuneration protected under the safe harbor to be sufficiently low risk. We also are not adopting any of the commenters' other recommendations to increase transparency because they are beyond the scope of the Proposed Rule and, in some cases, outside the authorities under the anti-kickback statute. We are mindful of the importance of monitoring the impact of the final rule on beneficiaries.

iii. Relationship to Part D

a. Non-Interference

Comment: A number of commenters contended that the Proposed Rule was an impermissible exercise of the Secretary's authority because it violates the Medicare Part D noninterference provision, section 1860D–11(i) of the Act. These commenters asserted the Proposed Rule seeks to interfere with how manufacturers and Part D plan sponsors negotiate and pay for prescription drugs through the elimination of rebates and the prohibition on using formulary placement as leverage to reduce prices, which are well-established negotiating tools. Commenters also asserted that, by requiring that reductions in price be applied at the point of sale and not applied to premiums, the Proposed Rule violates the prohibition on instituting a price structure for the reimbursement of covered Part D Drugs. A commenter asserted that the proposal, if finalized, also would interfere in Part D plan sponsors' negotiations with pharmacies by mandating that Part D sponsors ensure that pharmacy reimbursement is reduced by the amount of any discounts received by the pharmacy from the manufacturer. In addition, multiple commenters cited CMS rulemakings, which they concluded previously interpreted the non-interference clause as prohibiting the agency from adopting the policies proposed by this rule and asserted that the changed statutory interpretation would require notice and comment.

Response: This rule does not interfere in any negotiations between Part D sponsors, manufacturers, and pharmacies. This final rule changes the circumstances under which certain agreements that implicate the anti-kickback statute fall within the protection of a safe harbor. The parameters of the safe harbor do not institute a price structure, nor do they interfere with negotiations between plans and pharmacies, because they do not have any bearing on the ultimate prices negotiated among the parties. CMS's longstanding position about the non-interference provision is that all aspects of the non-interference provision must be considered in light of other statutory requirements to implement and oversee the Part D program.[12] It has always been the

[12] *See, e.g.,* 79 FR 29844, 29874–75 (May 23, 2014).

Department's view that the non-interference provision does not exist in a vacuum and must be read in concert with Part D statutory obligations in connection with, for example, pharmacy network adequacy, consistency in treatment of drug costs, and the provision of adequate formularies. It is no different when one views the non-interference provision in the broader context of the Secretary's other statutory obligations under the Act, including the mandate to establish and modify safe harbors. This rule, as it is being finalized, does not change the Department's interpretation of the Part D non-interference provision.

b. Impact on Part D Program

Comment: Some commenters made a variety of recommendations to address pharmacy DIR fees. Other commenters recommended that OIG not finalize the Proposed Rule because it would eliminate DIR.

Response: The administration of pharmacy DIR fees is outside the scope of this rulemaking. Nothing in this final rule changes CMS's rules with respect to DIR.

Comment: Several commenters recommended that HHS, CMS, and Congress reform the Part D program by, for example: Implementing a rebate pass-through requirement as part of the Part D program in lieu of the Proposed Rule; allowing for greater flexibility in calculating deductibles; redefining Average Manufacturer Price (AMP) or clarifying how point-of-sale price concessions or chargebacks might apply to AMP; making adjustments to certain cost-sharing requirements for partial point-of-sale rebate and formulary design options; and permitting manufacturers to offer copayment and coinsurance assistance for single-source drugs.

Response: Comments that request Congressional action, pertain to changes to the administration of the Part D program, or ask for guidance with respect to Medicaid pricing rules are outside the scope of this rulemaking. Manufacturer-sponsored copayment assistance programs are also outside the scope of this rulemaking.

Comment: A commenter recommended that OIG work with the Department to develop guidance and procedures for how to identify and avoid 340B and point-of-sale duplicate discounts in Part D and Medicaid managed care prior to implementation of the proposed safe harbor. For example, the commenter recommended similar requirements that the Department of Defense has implemented, such as (1) requiring the use of a National Council for Prescription Drug Programs (NCPDP) modifier to identify 340B transactions within the new system, or (2) requiring, in the safe harbor text or otherwise, that the PBM or other chargeback administrator must exchange information and cooperate as necessary to enable manufacturers to determine whether any 340B discounts are also implicated in the transaction. Another commenter requested confirmation that manufacturers may continue traditional duplicate discount avoidance arrangements and that doing so will not put the safe-harbored status of a point-of-sale reduction in price arrangement at risk. The commenter noted that the new point-of-sale reductions in price safe harbor should not require that manufacturers pay chargebacks for Part D point-of-sale reductions in price when doing so would generate 340B duplicate discounts.

Response: We appreciate commenters' feedback on 340B and the potential for point-of-sale duplicate discounts in Part D. Establishment of mechanisms for avoiding duplicate discounts or resolving disputes or errors regarding rebates is outside the scope of this rule, as is compliance with CMS requirements relating to Prescription Drug Event (PDE) reporting for when a claim is re-processed as a result of such mechanisms. The point-of-sale reduction in price safe harbor requires, as a condition of qualifying for the safe harbor, that the reduction in price be completely reflected at the time the pharmacy dispenses the prescription pharmaceutical product to the beneficiary; it does not specifically require chargebacks. In addition, we note that a violation of the anti-kickback statute must be knowing and willful. Good faith efforts to avoid duplication of discounts or resolve disputes or errors, where such practices are not intending to offer or pay remuneration to induce or reward purchases of federally payable goods or services, likely would not constitute violations.

Comment: Some commenters recommended that OIG review whether and explain how the changes proposed in its Proposed Rule are consistent with a rule that CMS previously proposed, ''Modernizing Part D and Medicare Advantage to Lower Drug Prices and Reduce Out-of-Pocket Expenses.'' [13]

Response: We thank commenters for their recommendation and note that the rule we are finalizing here makes certain changes to the regulatory safe harbors to the anti-kickback statute, which may impact business arrangements of parties participating in the Part D program but do not amend any program requirements.

Comment: A commenter urged CMS and OIG to advance, in both the final rule and corresponding CMS-issued guidance, plan designs or financing pathways for Medicare Advantage plans that allow for the continuation of Medicare Advantage supplemental benefit programs by offsetting the reduction in rebates that the commenter predicted would result from this rule.

Response: This final rule amends the discount safe harbor and adds two new safe harbors to specify types of arrangements that would be protected from liability under the anti-kickback statute. Additional guidance on plan design or financing pathways for Medicare Advantage plans are outside the scope of this rule.

Comment: A number of commenters identified issues related to beneficiary rights that they asserted will require rulemaking or guidance in order to implement the Proposed Rule. These issues include, but are not limited to: How CMS would expect plans to apply formulary and tiering exceptions policies; how CMS will handle beneficiary complaints, appeal rights, and transition fills; application of percentage price concessions to the higher-tier drug; how CMS would expect plans to apply formulary exceptions when approving a no price concession drug; what changes will be reported in the language of the Evidence of Coverage and model marketing materials; whether enrollees will be told the price concession amount at the point of sale, and how it will be accounted for in the cost component of Medication Therapy Management (MTM) (*e.g.,* might previously qualified enrollees no longer qualify as they no longer meet the cost threshold?); whether a plan's Advance Notice of Changes will have to be revised to reflect changes in rebate status.

Response: To the extent parties elect to structure arrangements to fit into the new point-of-sale reduction in price safe harbor, questions may arise about implementation. Questions related to CMS's administration of the Part D program, however, are outside the scope of OIG's authority and this rulemaking. We have coordinated with CMS in the promulgation of this rule and are informed that their formulary review processes will continue to protect beneficiary access and choice. CMS provides Part D plan sponsors with guidance related to bidding, formulary submission, and Medicare Plan Finder instructions, and will continue to work

[13] *See* 83 FR 62152 (Nov. 30, 2018).

with plan sponsors to ensure a smooth transition and minimize disruption.

Comment: Commenters expressed several concerns about formulary structure and benefit design, which the commenters asserted will require rulemaking or guidance from CMS in order to implement changes included in the Proposed Rule, if finalized. For example, a commenter identified various issues related to formulary structure, which the commenter asserted will require rulemaking or guidance by CMS in order to implement the new or amended safe harbors, if finalized. These included: Any potential changes to CMS's formulary review process; what the potential effects will be on formularies due to new arrangements; manufacturers using alternate National Drug Codes for existing drugs (*e.g.,* to allow for price concessions or to reauthorize a branded drug as generic or biosimilar); what happens when an LIS enrollee is in different phases of benefit or tiers of a formulary; whether the *de minimis* premium policy for LIS will be increased. Commenters also suggested that CMS finalize its proposal in the 2020 Draft Call Letter to restrict brand and generic drugs to respective brand and generic tiers and more actively track formularies.

Response: As discussed above, questions about CMS's administration of the Part D program (which includes oversight of policies regarding LIS beneficiaries) are outside the scope of OIG's authority.

Comment: A commenter asked if new costs associated with the Proposed Rule (*e.g.,* to update systems, contracts, and staff call centers) will be included in administrative costs for purposes of medical loss ratio compliance. The commenter stated that plans will need to collect higher premiums and make larger claims payments if there is no exception for new costs.

Response: Whether administrative costs should be taken into account when calculating medical loss ratios are outside the scope of this rulemaking.

Comment: Other commenters predicted that the proposal may result in higher premiums for individuals in self-insured plans. In particular, a commenter asserted that self-funded employer group waiver plans (EGWPs) that enroll Medicare Advantage beneficiaries use rebate dollars to reduce premiums and that with fewer rebate dollars, self-funded EGWPs would have to increase premiums substantially for all enrollees by the amount received in rebates.

Response: The intent of the rule includes the elimination of the distortions in the market that drive up pharmaceutical list prices for EGWPs as well as other MA and Part D plans. As discussed elsewhere in this rule, list prices have been rising to increase the rebates. This change will bring transparency to the plan design and allow beneficiaries and employers funding EGWPs to better understand and negotiate, prior to the effective date of this rule, the benefits they are paying for.

Comment: A commenter stated that MA and Part D plan sponsors should have additional flexibility regarding what drugs to exclude from coverage formularies, what criteria and guidance to follow for coverage decisions, and what restrictions they should be subject to. Because plan sponsors must certify the accuracy, completeness, and truthfulness of all data, another commenter stated that CMS should provide plan sponsors with an alternative good faith compliance approach.

Response: Comments requesting that plan sponsors have increased flexibility in the MA and Part D programs are outside the scope of this rulemaking.

Comment: Commenters suggested that the catastrophic phase of the Part D benefit should be reformed or that a cap should be placed on out-of-pocket costs to beneficiaries.

Response: Comments recommending policy changes to the Part D program or amendments to the governing law are outside the scope of this rulemaking.

Comment: A number of commenters expressed concern about the impact of the Proposed Rule on the Part D bid process and stated that rulemaking or guidance by CMS will be necessary to implement the Proposed Rule, including: How would CMS require plan sponsor negotiated price concessions to be allocated in the bid and when would the Bid Pricing Tool be updated for such price concessions; how would CMS revise the out-of-pocket cost values and Total Beneficiary Cost metrics; how will changes in Part D bid amounts be incorporated into MA–PD submission; will CMS adjust the bidding schedule and beneficiary enrollment period to allow entities to bring their arrangements into compliance; and would CMS require other plan types (*e.g.,* EGWPs) to follow its lead on the bid process? A commenter also recommended certain protections for the 2020 bid submission to limit program disruption and instability such as: Adjust the de minimis threshold, rebate reallocation process, supporting documentation requirements for bids, and risk corridor protections; waive the Total Beneficiary Cost and Medicare Part D out-of-pocket cost rules; allow more flexibility in aggregate and product margin tests as well as the desk review and bid audits; and give consideration to the impact of change on EGWP plans.

Response: Comments related to CMS's administration of the Part D program are outside the scope of this rulemaking. We consulted with CMS in the promulgation of this final rule and anticipate that by finalizing this rule with a January 1, 2022 implementation date for the amendments to the discount safe harbor at § 1001.952(h)(5), we have addressed concerns related to the 2020 bid submission.

Comment: A commenter stated that CMS should oversee plan actuarial equivalence determinations to ensure that beneficiaries with copayments receive the intended benefits of the rule through reduced cost sharing. The commenter further stated that CMS should ensure that plan sponsors and PBMs ''reduce copayments for the tier on which the prescribed medicine is placed that maintains actuarial equivalence with the standard benefit design.''

Response: Comments related to CMS's administration of the Part D program are outside the scope of this rulemaking. However, we are aware that actuarial equivalence requirements in the Part D program may require that plans adjust copayment amounts to reflect discounts that are protected under the point-of-sale safe harbor. Specifically, if the negotiated prices change, the benefit (*i.e.,* cost-sharing structure) must be adjusted to meet actuarial equivalence. Under the defined standard benefit design, lower negotiated prices would result in beneficiaries paying less cost sharing, in absolute terms, in each benefit phase. Under a tiered benefit design, the copayment or coinsurance amounts for the different tiers in each phase could be changed in various ways, as long as the overall cost-sharing structure results in beneficiaries being projected to pay no more in each phase than the beneficiaries' share required under the defined standard for that phase.

Comment: Commenters raised concerns about the impact that changes included in the Proposed Rule could have on data reporting. Specifically, the commenter identified the following issues that the commenter asserted will require rulemaking or guidance by CMS in order to implement the Proposed Rule, citing Medicare Part D reporting requirements: Whether there would be changes to the PDE report, and how claims would be reported where a rebate was provided; what the Proposed Rule's

effect is on PDE data reporting procedures; whether point-of-sale price concessions would be reported on the estimated rebate fields, how they would be used on market shares, or what process would be used to reconcile over- or under-payments of point-of-sale price concessions to enrollees; how PDEs would be reported when wholesalers are involved; how claims would be reported when a rebate was provided that was later determined to be ineligible (*e.g.,* due to 340B, denial, patient recoupment or duplicate claims); how point-of-sale price concessions or rebates would be reflected in DIR reports, and whether DIR reporting procedures would be revised, including to account for new requirements for PBM service fees; and would CMS need to create an agreement to allow for information to be shared by manufacturers to CMS since confidential data are being collected and reported.

Response: Establishment of mechanisms for avoiding duplicate discounts or resolving disputes or errors regarding rebates is outside the scope of this rule. Comments about CMS's administration of the Part D program, including compliance with CMS requirements relating to PDE reporting for when a claim is re-processed as a result of such mechanisms, are outside the scope of this rulemaking.

Comment: A commenter asked whether CMS will adopt the same definitions as OIG, including the definition of a rebated or discounted drug.

Response: Comments about CMS's administration of the Part D program are outside the scope of this rulemaking. This question would be best addressed by CMS.

Comment: Several commenters stated that D–SNP beneficiaries [14] qualify for low income subsidies that reduce their cost-sharing responsibilities for brand and generic drugs to nominal amounts, so the Proposed Rule will most likely not result in a material change in their experience. These commenters are concerned that if premiums increase it could impact coverage affordability for D–SNP beneficiaries. Other commenters requested adopting a broad interpretation of the term ''plan sponsor under Medicare Part D.''

Response: We are finalizing the revisions to the safe harbors as they apply to reductions in price or other remuneration in connection with the sale or purchase of a prescription pharmaceutical product from a manufacturer to a plan sponsor under Medicare Part D, without distinguishing among Part D plan types.

Comment: Several commenters sought guidance on the interaction of the changes in the Proposed Rule with the Part D definition of ''negotiated price.'' A commenter stated that CMS should update its cost-sharing rules to align with the proposed point-of-sale reductions in price safe harbor. The commenter urged CMS to finalize its definition of negotiated price in the MA and Part D proposed rule, ''Modernizing Part D and Medicare Advantage to Lower Drug Prices and Reduce Out-of-Pocket Expenses,'' and to provide additional guidance. Some commenters stated that the definition of ''negotiated price'' at 42 CFR 423.100 would need to be revised for several reasons, including: To incorporate price reductions processed via chargebacks itemized at the point of sale, because changes to the Proposed Rule would eliminate a portion of the DIR currently negotiated, or to ensure stakeholders can comply with not only the new safe harbors, if finalized, but also applicable Part D regulations.

Another commenter stated that CMS should clarify the definition of negotiated price to clearly reflect the discounts protected by the new safe harbor. The commenter also stated that CMS should adjust the Part D benefit design to accommodate the reduced negotiated prices. The commenter further asserted that CMS should recalculate the portion of the overall program cost that beneficiaries are responsible for paying by using the reduced negotiated prices. This adjustment, the commenter stated, would lower the deductible, the initial coverage limit, and the catastrophic threshold to reflect the reduced cost of the standard benefit package. The commenter stated that this adjustment also would likely result in Part D plans lowering copayment amounts on specific formulary tiers, since those are also calculated based on the portion of the negotiated price for drugs placed on those tiers.

Response: Comments related to CMS's administration of the Part D program, including the definition of negotiated price, are outside the scope of this rulemaking. However, we are aware that actuarial equivalence requirements in the Part D program may require that plans adjust copayment amounts to reflect discounts that are protected under the point-of-sale safe harbor. This rule does not change the definition of ''negotiated price'' at 42 CFR 423.100.

Comment: A commenter requested guidance on the application of the provisions of the Proposed Rule to various kinds of pharmacies that the commenter indicated will have different applications and expectations, including LTC, mail-order, and specialty pharmacies.

Response: As the commenter did not provide information on which provisions included in the Proposed Rule would affect categories of pharmacies differently, we are unable to respond more fully to this comment. We note that the amendment to the discount safe harbor does not affect discounts on prescription pharmaceutical products offered to entities such as pharmacies,[15] as long as the arrangement meets all the existing requirements of the safe harbor; the amendment only impacts discounts from a manufacturer directly to a plan sponsor under Medicare Part D or indirectly to the plan sponsor, through a PBM acting under contract with it.

Comment: A commenter recommended that independent community pharmacies should assume no liability for implementation of the changes included in the Proposed Rule. For example, if the system required fees, the commenter stated, the fees should not be paid by pharmacies. The commenter also suggested that independent community pharmacies' reimbursements should not be affected by price reductions that are agreed upon between the plan or PBM and the manufacturer.

Response: The final rule does not require fees, but only provides a safe harbor from liability under the anti-kickback statute for certain fees or other remuneration, under certain conditions. Whether pharmacy reimbursements are affected by price reductions agreed to between manufacturers and PBMs or plans for purposes of compliance under this rule will depend on the particulars of private contracting between the parties.

Comment: Commenters raised questions about implementing the new safe harbor for point-of-sale reductions in price in light of Part D requirements. A commenter stated that CMS should provide guidance on how point-of-sale discounts apply to Medicare Secondary Payer claims, how point-of-sale discounts will impact vaccine administration fees, and whether point-of-sale discounts would change enrollment eligibility for MTM programs based on exceeding a set annual out-of-pocket cost.

Response: We have coordinated with CMS on the promulgation of the point-

[14] Dual Eligible Special Needs Plans (D–SNPs) enroll beneficiaries who are entitled to both Medicare and Medicaid.

[15] 84 FR 2348.

of-sale safe harbor to ensure that this rule can operate effectively in conjunction with the Part D program rules. Requests for CMS to issue guidance regarding the Part D program matters raised by the commenters are outside the scope of this rule.

Comment: A commenter recommended amending the proposed safe harbor for point-of-sale reductions in price to require plans' compliance with tiering and coverage requirements for generic and biosimilar products, including automatic coverage of generic and biosimilar medicines immediately after launch, placement of generic-only tiers, and a dedicated specialty tier for specialty generics and biologics.

Response: We do not believe we can make the suggested changes to the proposed point-of-sale safe harbor because we did not propose them. Moreover, even had we proposed them, we do not believe it would be necessary to include compliance with Part D tiering and coverage requirements for generic and biosimilar products in the safe harbor. We believe the conditions in the final safe harbor are sufficient to address program integrity risk with respect to the specific remuneration being protected. Nothing in the final rule changes any requirement of the Part D program, and parties are required to comply with all applicable CMS rules.

iv. Medicaid

Comment: The majority of commenters who addressed Medicaid in their comments strongly opposed including Medicaid MCOs in the scope of the proposed changes to the discount safe harbor, with commenters positing that the change could harm state Medicaid programs, could impose unnecessary costs on states, and could lead states to make significant cuts to other parts of their Medicaid programs. A commenter highlighted that the changes we proposed would introduce significant uncertainties to states without any clear benefit. Another commenter requested that the Department instead focus on reforming the Medicaid Drug Rebate Program (MDRP).

Several commenters also objected to, or did not understand, the inclusion of Medicaid in the proposed revisions to the discount safe harbor because, according to the commenters, the changes would not achieve the Department's goal of lowering beneficiaries' out-of-pocket spending. Per the commenters, beneficiaries are charged only nominal copayments in Medicaid and, except for a few plans, do not have coinsurance obligations. According to various commenters, because of the limited role of rebates in Medicaid managed care, passing through reductions in price for Medicaid beneficiaries will benefit only a few enrollees by a marginal amount or will be irrelevant. These commenters further questioned whether there would be any incentive for manufacturers to provide point-of-sale price reductions in Medicaid at a level equal to or similar to the savings leveraged through the current framework.

Response: Upon consideration of the comments received, we are persuaded that we should not move forward with our proposal to revise the discount safe harbor to exclude rebates offered to Medicaid MCOs. In the Proposed Rule, the Department articulated its concern that ''rebates are often not applied at the point of sale to offset the beneficiary's deductible or coinsurance or otherwise reduce the price paid at the pharmacy counter,'' which the Department hypothesized could be increasing financial burdens for beneficiaries.[16] For these reasons, the Department proposed to eliminate protection for rebates provided to Medicaid MCOs and to offer protection for point-of-sale reductions in price for a prescription pharmaceutical product payable, in whole or in part, by a Medicaid MCO. As noted by commenters, however, Medicaid beneficiaries generally have nominal cost-sharing obligations for prescription pharmaceutical products. Additionally, although State Medicaid agencies have flexibility to design alternative cost-sharing arrangements for Medicaid beneficiaries, generally Medicaid MCO contracts must meet cost-sharing requirements for drugs in 42 CFR 447.53. *See* 42 CFR 438.108. These requirements set maximum allowable cost-sharing amounts for preferred and non-preferred drugs. Given these circumstances and existing regulatory requirements, we believe that eliminating discount safe harbor protection for reductions in price offered to a Medicaid MCO would have minimal, if any, effect on the amount a Medicaid beneficiary pays when he or she purchases prescription pharmaceutical products at the pharmacy.

Under this final rule, Medicaid MCOs seeking safe harbor protection for discounts have the option to use either the discount safe harbor or the new safe harbor for point-of-sale reductions in price at § 1001.952(cc). As discussed in more detail below, however, we note that neither the discount safe harbor nor the new safe harbor protects rebates or other reductions in price from a manufacturer that are retained by a PBM, even if that PBM is operating on behalf of a Medicaid MCO.

Comment: Some commenters supported application of the changes to the discount safe harbor to Medicaid as well as to Medicare, other Federal health care programs, and the commercial markets.

Response: For the reasons stated above, we have decided not to move forward with our proposal to revise the discount safe harbor as it applies to Medicaid MCOs.

Comment: Several commenters stated that the changes in the Proposed Rule, if finalized, would create an unlevel playing field in Medicaid programs because they would eliminate safe harbor protection for supplemental rebates negotiated by Medicaid MCOs (or PBMs with which they have contracted) while continuing to protect supplemental rebates received by states directly under Medicaid fee-for-service programs. According to several commenters, because states would be able to negotiate supplemental rebates even if the Proposed Rule were finalized, the changes in the Proposed Rule would incentivize states to carve out the outpatient prescription drug benefit or to adopt a state-mandated preferred prescription drug list to maximize supplemental rebates. A commenter also stated that states may seek larger supplemental rebates, which a commenter noted do not count towards Best Price. Commenters that raised this issue listed several concerns with this result. For example, they noted that carve-out arrangements inhibit Medicaid MCOs' ability to manage the full range of healthcare items and services for beneficiaries under their care.

Response: We are not finalizing the changes to the discount safe harbor with respect to Medicaid MCOs, which addresses the commenters' concerns.

Comment: Multiple commenters discussed the importance of supplemental rebates to the Medicaid program and Medicaid MCOs. Numerous commenters noted that Medicaid supplemental rebates are an important tool for states in controlling drug spending, with a commenter noting that 46 states and the District of Columbia have supplemental rebate agreements and collected about $1.2 billion in supplemental rebates during fiscal year 2017.

Additionally, various commenters requested clarification relating to the treatment of supplemental rebates paid by manufacturers to Medicaid MCOs and supplemental rebates paid by manufacturers to state Medicaid

[16] 84 FR 2341–42.

agencies. Specifically, several commenters sought clarification as to how Medicaid drug payment provisions in section 1927 of the Act relate to protection for supplemental rebates under the Proposed Rule and, in particular, whether such supplemental rebates are ''required by law,'' which was a carve out to our exception in our proposal to eliminate discount safe harbor protection for reductions in price from manufacturers to Medicaid MCOs. Certain commenters asserted that manufacturers' legal obligations under the MDRP also extend to Medicaid supplemental rebates, which the commenters used to support the position that the discount safe harbor would continue to protect supplemental rebates negotiated between states and manufacturers. Other commenters recommended that, if OIG moves forward with including Medicaid MCOs in the changes to the discount safe harbor, OIG should clarify that supplemental rebates negotiated by Medicaid MCOs but received directly by state Medicaid agencies are protected.

In addition, several commenters noted that Medicaid MCOs often retain full risk in connection with prescription drug coverage and use supplemental rebates to lower overall costs for state Medicaid programs or to defray capitation costs. Another health plan commenter asserted that with reduced flexibilities to manage drug costs through Medicaid supplemental rebates, the Medicaid program may become less attractive to MCOs, which may decrease health insurance choices for consumers. In the alternative, a commenter recommended that OIG prohibit all supplemental rebates negotiated across Medicaid fee-for-service and Medicaid managed care.

Commenters noted their concerns about the potential for state Medicaid program drug expenditures to increase if the changes in the Proposed Rule limit the existing ability of Medicaid programs to negotiate supplemental rebates. Other commenters estimated that Medicaid costs may rise because of the loss of safe harbor protection for supplemental rebates to Medicaid MCOs, which could lead states to decrease other benefits, cut provider payments, or make other cuts to state Medicaid programs to make up for these higher costs. Another commenter raised concerns that in the absence of PBMs, states will not be able to adapt and negotiate directly with manufacturers for supplemental rebates. Another commenter noted that many PBMs operating on behalf of Medicaid MCOs already pass through the entire supplemental rebate to health plans they contract with, which are bound by federal and state rate setting and reporting requirements, so eliminating supplemental rebates to Medicaid MCOs will not create any additional transparency in this area. However, another commenter stated that more transparency regarding supplemental Medicaid rebates collected by PBMs and Medicaid MCOs is still needed for states to completely capture the value of Medicaid supplemental rebates paid to PBMs.

Response: As discussed in detail above, we are not finalizing the changes to the discount safe harbor with respect to Medicaid MCOs, which addresses many of the commenters' concerns. We reiterate that this final rule does not alter obligations under the statutory provisions for Medicaid prescription drug rebates under section 1927 of the Act, including without limitation the provisions related to best price, the additional rebate amounts required for certain drugs based on the rate of increase in AMP and the increase in the consumer price index for all urban consumers (CPI–U), or provisions regarding supplemental rebates negotiated between states and manufacturers.

Comment: Several commenters raised a number of concerns about administrative burdens that would be imposed on states and Medicaid MCOs with respect to implementing and operationalizing this rule; for example, a commenter noted that states would be required to set and certify new Medicaid MCO rates. Another commenter stated that affected entities (*e.g.,* Medicaid MCOs, states, PBMs, pharmacies) will all need to renegotiate their contracts, some of which may require state legislative or agency approval. Another commenter explained that Medicaid managed care contracts are generally effective for several years and states often operate on a fiscal year that differs from the calendar year. The commenter believes that providing states limited time to renegotiate multi-year contracts, or to make midyear adjustments, would be potentially unfeasible.

Response: We are not finalizing the changes to the discount safe harbor with respect to Medicaid MCOs, which addresses the commenters' concerns.

Comment: A number of commenters raised various questions or concerns with respect to the implications of the changes included in the Proposed Rule for calculations of AMP, Best Price, and Federal Upper Limits. For example, several commenters stated that the Proposed Rule would result in increased costs to taxpayers because of changes to AMP calculations. According to a number of commenters, if changes in the Proposed Rule lower the AMP, it will result in reductions to drug rebate revenue under the MDRP, which will increase Medicaid program costs. Similarly, commenters expressed concern that a lower AMP might reduce Federal Upper Limits or the National Average Drug Acquisition Cost invoice pricing data and, in turn, could reduce Medicaid reimbursement to pharmacies. A commenter contended that it is critical that the change to point-of-sale discounts not affect AMP.

As a result of these concerns and questions, a number of commenters requested that CMS issue guidance regarding whether point-of-sale chargebacks are included in calculations of AMP. Commenters who did not want these chargebacks to be included in AMP calculations generally recommended that such guidance explain that point-of-sale chargebacks fit into one of several types of statutorily excluded discounts to AMP. Another commenter posited that the Proposed Rule was ambiguous and could allow a point-of-sale discount to be construed as a PBM or payor concession, a pharmacy concession, or a direct-to-patient concession, which could have AMP and Best Price implications.

With respect to the calculation of Best Price, a commenter stated its position that point-of-sale chargebacks fall within an exemption to Best Price. Other commenters raised concerns that removing the protection for Medicaid supplemental rebates and moving toward point-of-sale discounts would raise Best Price, which the commenters posited would ultimately reduce the amount manufacturers pay in rebates under the MDRP. Another commenter requested that OIG or HHS confirm whether, and how, the final rule may affect existing regulations regarding the calculations for the Medicaid fee-for-service program Federal Upper Limit calculations as it relates to the formula for the National Average Drug Acquisition Cost and the Cost to Dispense pharmacy dispensing fee.

Response: The Department recognizes that the final rule has the potential to affect calculations of AMP, Best Price, and Federal Upper Limits in ways and to an extent that may be difficult to anticipate. However, we are not finalizing the changes to the discount safe harbor with respect to Medicaid MCOs. We reiterate that the final rule does not alter obligations under the statutory provisions for Medicaid prescription drug rebates under section 1927 of the Act, including AMP, Best Price, and Federal Upper Limits.

Comment: A commenter asserted that brand-name manufacturers launch authorized generics to lower a brand drug's AMP (and thus lower the manufacturer's statutorily required discounts under the MDRP).

Response: We did not propose to alter obligations under the MDRP and the issue raised by the commenters is out of scope of this final rule.

Comment: Commenters raised concerns about the potential effects on value-based arrangements in several Medicaid programs if the Proposed Rule were to be finalized. Several commenters highlighted three value-based contracting models that allow states to align supplemental rebates with outcomes-based and value-based measures.

Response: We believe our decision not to finalize the changes to the discount safe harbor with respect to Medicaid MCOs addresses the commenters' concern.

Comment: A commenter requested that the Department clarify in the final rule that entities that operate under contract with a state are protected under the revised discount safe harbor. The commenter provided an example of multi-state purchasing organizations that create preferred drug lists, and the commenter explained that it is not clear whether these entities would be protected under the revised discount safe harbor because they are not ''states.''

Response: Because we are not moving forward with the proposed changes to the discount safe harbor with respect to Medicaid MCOs, we believe the commenter's concerns are addressed.

Comment: A commenter specifically requested that OIG clarify whether the final rule would explicitly exclude Puerto Rico's Medicaid rebate system from the amendment to the discount safe harbor, because Puerto Rico's Medicaid program does not currently participate in the MDRP.

Response: Because we are not moving forward with the proposed changes to the discount safe harbor with respect to Medicaid MCOs, we believe the commenter's concerns are addressed.

v. Commercial Market

Comment: Numerous commenters supported the extension of this proposal to the commercial market, stating that plans and drug companies will be motivated to maintain high list prices if rebate arrangements continue to permeate the commercial market. According to the commenters, the benefits associated with the proposal, such as reduced out-of-pocket costs and improved access to medication, will be limited if the proposal is not extended to the commercial market. For example, a pharmaceutical-manufacturer commenter in favor of eliminating rebates in the commercial sector explained that rebates and discounts for its products have increased in Part D and the commercial sector, even though the affordability of drugs continues to be a public health issue. Another commenter was opposed to extending the provisions of the Proposed Rule to the commercial market and stated that rebates are an important tool used by PBMs to negotiate lower prices from drug companies on behalf of employers and private health plans.

Response: The scope of the anti-kickback statute is limited to remuneration that is offered, paid, solicited, or received in order to induce or reward Federal health care program business. Commercial, private pay, or self-pay arrangements that do not touch Federal health care program beneficiaries in any manner do not implicate the Federal anti-kickback statute (except in the context of swapping arrangements or pull-through type arrangements in which discounts might be given only on private pay business to induce the referral of Federal health care program business). In other words, the anti-kickback statute generally does not extend to arrangements involving purely commercial business; as a result, it is beyond the scope of this rulemaking to extend such safe harbors to the commercial market.

Comment: Several commenters supported future efforts to extend this proposal to the commercial market but recommended ensuring successful implementation of the rule in Medicare Part D before addressing rebates in the commercial market. A commenter noted that the wholesale conversion of both Federal health care programs and the commercial market could cause confusion in the marketplace and disrupt patient access to medications. Specifically, the commenter noted there would be many new operational and system requirements for applying the point-of-sale discount. In addition, the commenter explained that it is vital to see how health plans may change their benefit designs in response to the rule, which could include changes to formularies and greater cost sharing, before this proposal is extended to the commercial market.

Response: Extension of the revised discount safe harbor and the two new safe harbors to the commercial market is beyond the scope of this rulemaking.

Comment: Several commenters asserted that if the Proposed Rule is finalized, drug-related costs will shift to the commercial market, with a commenter noting that employers may change plan offerings for prescription drugs as a result of these increased costs, which could harm individuals in private plans.

Response: Since the changes under the final rule may result in a range of market responses, the Department respectfully disagrees that drug-related costs will necessarily shift to the commercial market and result in harm to individuals in private plans. Instead, the Department expects that manufacturers will lower list prices, which could result in lower costs across both the Part D and the commercial markets.

Comment: A commenter requested guidance on when rebates that are offered to commercial plans, but not to Medicare or Medicaid, may implicate the anti-kickback statute. Specifically, the commenter requests acknowledgement that OIG rules relating to ''swapping'' do not apply as long as there is no *quid pro quo* between a manufacturer price concession offered on a plan's or PBM's commercial utilization and a price concession offered on such a plan's or PBM's Federal health care program utilization.

Another commenter raised concerns about the statements in the Proposed Rule that indicated commercial rebates outside of Federal health care programs tied to formulary placement across all plans, including Federal health care programs, may not be protected by the current discount safe harbor or proposed revisions. The commenter claimed that this statement could have a chilling effect on negotiations between private health plans and employers or individuals.

Other commenters expressed concern that if the conditions of safe harbors included the Proposed Rule do not apply to the commercial market, rebates in the commercial market could still be used to induce the purchase of products reimbursed by Federal health care programs. To address this concern, commenters recommended that the Department clearly indicate that rebates in the commercial market will be scrutinized to ensure that they are not being offered to influence the purchase of products by Federal health care programs.

Response: While the anti-kickback statute is not implicated in arrangements that involve only commercial, private pay, or self-pay arrangements, we noted in the Proposed Rule that we have ''a long-standing concern about arrangements that 'carve out' referrals of Federal health care

program beneficiaries or business generated by Federal health care programs from otherwise questionable financial arrangements.'' [17] We would have similar concerns with arrangements that involve remuneration offered under the guise of an arrangement limited to commercial-pay or private-pay patients but is, in reality, part of a broader arrangement to induce referrals of Federal health care program business or patients. As we noted in our final rule published in 1999, ''such 'swapping' arrangements, which essentially shift costs to the Federal health care programs, continue to be of concern to this office.'' [18] In any of these circumstances, arrangements would need to be reviewed for compliance with the anti-kickback statute, but whether a specific arrangement constitutes a problematic swapping arrangement depends on the facts and circumstances, and we decline to adopt the *quid pro quo* standard suggested by a commenter. Individuals or entities are free to request protection from sanctions under the anti-kickback statute for specific arrangements through our advisory opinion process.

Comment: A commenter asserted that the Department should not attempt to reform the current commercial market rebate system through the anti-kickback statute and noted that due to the complexity of the commercial market, any changes to the commercial market rebate system should be undertaken carefully and incorporate feedback from a range of stakeholders.

Response: As discussed above, the anti-kickback statute only prohibits remuneration that is offered, paid, solicited, or received to induce or reward Federal health care program business. The statute generally is not implicated when the arrangements involve purely private-pay business.

Comment: Several commenters noted that certain PBMs and insurers have recently announced point-of-sale rebate sharing in the commercial market, which may signify that the infrastructure and capacity to adopt these reforms in the commercial market already exist. However, a commenter indicated that these point-of-sale rebate benefit designs are being offered at a higher premium than standard designs and that it is too early to determine if enrollment in these options will be robust or limited.

Response: We appreciate the commenters' insights into the dynamics of this market. As we discuss above, we understand that some commercial plans may be operationalizing point-of-sale benefit designs and, as the commenters suggest, we believe that some industry stakeholders have the capabilities to operationalize point-of-sale reductions in price that would be protected under the new safe harbor.

vi. Value-Based Arrangements

Comment: Some commenters stated that value-based arrangements would not neatly fit into the new safe harbor for point-of-sale reductions in price because they typically rely on gathering data after the point of sale and making payments after the point of sale. Commenters expressed an interest in allowing value-based arrangements to be protected by a safe harbor, stating that value-based arrangements provide an important opportunity to address drug prices by paying the value of a drug if it achieves the desired outcome, while paying a lower price if it does not work. Other commenters expressed concern that if the changes to the discount safe harbor are finalized but an exception is made so that value-based arrangements continue to receive protection under the discount safe harbor, parties might recast rebate arrangements that otherwise would be prohibited as ''value-based arrangements'' in order to continue to receive protection under the discount safe harbor.

Response: The Department recognizes the importance of value-based contracting for prescription pharmaceutical products as an evolving tool to improve quality of care and potentially reduce costs.[19] Upon reflection, we agree that not all value-based pharmaceutical arrangements for Part D prescription drugs would fit into the revised discount safe harbor or the new safe harbor for point-of-sale reductions in price. We believe that some value-based arrangements involving prescription pharmaceutical products might qualify for protection under the new point-of-sale safe harbor but also could qualify under other safe harbors (*e.g.,* the personal services and management contracts safe harbor, warranties safe harbor). To the extent manufacturers wish to use the new point-of-sale safe harbor for value-based arrangements, the reduction in price on prescription pharmaceutical products must be in the form of a point-of-sale discount. Any value-based arrangement (whether under Part D or another Federal health care program) must be analyzed on a case-by-case basis under the statute and with respect to available safe harbor protection. With respect to the concern about recasting rebate arrangements as value-based arrangements, we note that labeling an arrangement as ''value-based'' does not necessarily make it so, and any arrangement (whether labeled as value-based or otherwise) must still comply with all conditions of a safe harbor.

Comment: Some commenters expressed concern that excluding value-based arrangements from the discount safe harbor may limit the effectiveness of PBMs, plan sponsors, or other third parties that play, or could play, a valuable role in designing effective prescription drug programs, treatments, and therapies, and in ensuring drug manufacturers are held accountable for certain outcomes-based metrics.

Response: We thank the commenters for raising these concerns. As described above, the Department remains committed to promoting value-based arrangements that have the potential to improve the quality of care provided to beneficiaries while lowering overall costs to Federal health care programs. The final rule does not prohibit those entities highlighted by the commenters, including but not limited to PBMs and plan sponsors under Part D, from being able to continue to negotiate value-based arrangements with manufacturers that aim to achieve these goals.

Comment: A commenter suggested that, because value-based arrangements would remain within the safe harbor, value-based arrangements will expand.

Response: As described above, we recognize that the changes to the discount safe harbor may result in certain value-based arrangements no longer being eligible for protection under the discount safe harbor. However, the Department continues to encourage the development and implementation of arrangements that work to transform the health care system into one that better pays for value.

Comment: Several commenters expressed concern that the proposed revision to the discount safe harbor, without further guidance from OIG on its applicability to value-based arrangements, may deter, chill, or impede drug manufacturers, PBMs, or plans from entering into, developing, implementing, negotiating, or continuing under value-based arrangements. Several commenters expressed concern about and described examples of value-based arrangements that may implicate the anti-kickback statute and not be protected under the safe harbors set forth in the Proposed Rule. For example, under an outcomes-based arrangement, drug manufacturers may or must, contractually, provide rebates or refunds if a specific

[17] 84 FR 2347.

[18] 64 FR 63528.

[19] *See, e.g.,* 84 FR 55694, 55704 (Oct. 17, 2019).

medication is not effective—or not as effective as indicated—after an individual has used the specific medication. The commenter then posited that a point-of-sale discount would not be practical or possible because the rebate or refund is contingent upon or influenced by a specific outcome and is provided after the point of sale has already occurred. Other commenters requested that OIG allow flexibility or sufficient time after the effective date of the final rule for drug manufacturers, PBMs, and plans to re-negotiate or terminate value-based arrangements that may not satisfy the conditions of the proposed revisions to the existing discount safe harbor or the new safe harbor at 42 CFR 1001.952(cc). Another commenter expressed concern that, even if value-based arrangements are protected under the proposed amendments to the discount safe harbor and the proposed new safe harbor for point-of-sale reductions in price, drug manufacturers may be deterred from offering certain discounts if competitors know or can determine each other's discount values.

Response: Value-based arrangements, like all arrangements that implicate the anti-kickback statute, must be analyzed on a case-by-case basis. We agree with commenters that not all value-based pharmaceutical arrangements for Part D prescription drugs may qualify for protection under the revised discount safe harbor or the new safe harbor for point-of-sale reductions in price. As we note above, other safe harbors could apply, such as the personal services and management contracts safe harbor or warranties safe harbor. The fact that an arrangement does not fit in a safe harbor does not mean it is necessarily unlawful. The terms of a particular arrangement would drive whether the anti-kickback statute is implicated and any safe harbor that might apply. We remind stakeholders seeking protection for value-based arrangements that the advisory opinion process remains available. Concerns about the effective date and transparency are addressed elsewhere in this preamble.

Comment: Another commenter requested that OIG clarify whether the revised discount safe harbor and/or the safe harbor for GPOs would, in appropriate circumstances, protect value-based contracting between manufacturers and healthcare institutions or wholesalers/distributors, such as contractual arrangements with hospitals and integrated delivery networks.

Response: Whether the GPO safe harbor is appropriate for value-based contracting is beyond the scope of this rulemaking. Whether a value-based arrangement could use the GPO safe harbor would be a fact-specific determination.

vii. Enforcement Issues

Comment: In discussing the operational challenges of implementing the Proposed Rule, several commenters noted that it would create a new regulatory structure and that any mistakes are subject to criminal penalties under the anti-kickback statute. According to a commenter, this risk may prevent stakeholders from proceeding with implementation. As an example, the commenter explained that pharmacies may not operationalize the chargeback proposal because of potential liability under the anti-kickback statute.

Response: Compliance with a safe harbor is voluntary, and arrangements that do not comply with a safe harbor—because of mistakes or otherwise—are analyzed based on their facts and circumstances. The failure to meet the conditions of a new safe harbor does not automatically subject one to criminal penalties. The anti-kickback statute is an intent-based statute; mere errors or mistakes would not trigger concerns absent other facts evidencing unlawful intent to induce referrals. In addition, as with our other safe harbors, the advisory opinion process remains available for parties that seek to determine if an arrangement or proposed arrangement satisfies the criteria of the safe harbor.

Comment: A commenter recommended that OIG work with several agencies, including the DOJ and the FTC, to develop guidance for the industry with respect to a final rule. The commenter explained that this guidance is particularly important as it renegotiates contracts in order to avoid possible civil and criminal penalties. As one example, the commenter requested guidance on various types of swapping arrangements. Another commenter asked for affirmative guidance from OIG on a number of enforcement-related topics. For example, the commenter requested that OIG declare in the final rule that it expects industry-wide compliance with the anti-kickback statute with respect to the reductions in price and service fee arrangements covered under the new safe harbors. The commenter also asked OIG to state that it will subject PBMs to heightened scrutiny for any arrangements conditioned on formulary placement that do not fit within the new safe harbors.

Response: The Department regularly collaborates with our government partners, as appropriate. Any requests for the Secretary to issue sub-regulatory guidance jointly with other agencies or to issue affirmative guidance is outside the scope of this safe harbor rulemaking. OIG publishes guidance from time to time on its web page.

OIG agrees with the commenter that the proper question is whether entities are in compliance with the anti-kickback statute; we reiterate, however, that compliance with a safe harbor is voluntary. Any arrangement that implicates the anti-kickback statute and does not satisfy an exception or safe harbor would be subject to scrutiny; as discussed in more detail below, we reiterate our concern about any kind of payment to buy or provide remuneration tied to formulary placement that is not a safe harbored reduction in price.

Comment: Several pharmaceutical manufacturer commenters raised concerns with respect to PBMs' response to the new safe harbor, stating that PBMs may take aggressive positions on interpretations of the anti-kickback statute or the new safe harbors and require manufacturers to accept that legal position to access the PBMs' beneficiaries. For example, the commenters stated that a PBM might interpret the anti-kickback statute to permit rebates to PBMs or might take the position that safe harbor compliance is not required.

Response: With respect to the commenters' concerns surrounding PBMs' interpretation of changes to the safe harbor provisions, we emphasize that, while compliance with the terms of a safe harbor is voluntary, an arrangement is protected only if all conditions of a safe harbor are met. We want to take this opportunity to confirm our position, as stated in the preamble to the Proposed Rule, that any portion of a payment (whether it is called a ''rebate'' or something else) that a manufacturer pays to a PBM that is retained by the PBM and not passed through to the buyer never was protected under the discount safe harbor.[20] The discount safe harbor protects a reduction in price to a buyer. A PBM is not a buyer, and the portion of a payment from a manufacturer to a payor that is retained by a PBM is not a reduction in price. Dating back to the 1991 Final Rule,[21] we have made a distinction between (i) fees that would fall under personal services contracts and (ii) discounts; a discount is a reduction in price, not payment for a service. Payments to a PBM for services could be protected under other safe

[20] 84 FR 2343 n.36.

[21] 56 FR 35952.

harbors if all relevant safe harbor conditions are met.

PBMs can provide valuable services for health plans and manufacturers and can be compensated for those services. To the extent such compensation implicates the anti-kickback statute, it can be structured to comply with a safe harbor (such as the personal services and management contracts safe harbor or new PBM service fee safe harbor). However, we note generally that we would have significant concerns with arrangements for services that are not necessary, are worthless, or are duplicative and that operate as shams designed to reward a party for referrals of Federal health care program items or services; these concerns apply with equal force to both the payor and the recipient of remuneration, and our approach to enforcement has and will, as business practices and incentives evolve, continue to reflect that. Such arrangements would not be protected under any safe harbor.

Comment: Several commenters requested that OIG engage in some type of enforcement discretion during implementation of a final rule, with a commenter citing to the final rules in 1991 and 1999 as examples of instances where the Department has considered enforcement discretion. A commenter suggested that, if the rule is finalized, OIG should issue a statement of non-enforcement for a period of two years because Part D bids will be based on safe harbor rules in effect at the time of the bids, while the plans may operate under different safe harbors in the plan year. A commenter requested that OIG publish a policy statement that it will not enforce the anti-kickback statute where PBMs serve as point-of-sale chargeback administrators that implement the point-of-sale discounts. Another commenter asked that the Department permit the distribution of rebates where the terms of the rebate arrangement were set prior to January 1, 2020.

Response: As explained elsewhere in this final rule, the amendments to the discount safe harbor at § 1001.952(h)(5) do not take effect until January 1, 2022. We recognize that many parties have previously structured their arrangements based on the advice of an attorney and in good-faith belief that their arrangements were legal under the discount safe harbor, and any arrangements that comply with that safe harbor remain protected until that effective date. The new safe harbor for point-of-sale reductions in price will be effective and available for use 60 days after publication of this final rule. The Department encourages parties to use the new safe harbor as rapidly as possible. We are not issuing an enforcement discretion policy given the length of time parties have under the final rule to come into compliance with the amended safe harbor. We also decline to adopt the commenter's suggestion to exercise enforcement discretion where PBMs serve as point-of-sale chargeback administrators that implement the point-of-sale discounts.

viii. State Law Issues

Comment: Several commenters raised concerns about various state laws, such as state trade secrets or privacy laws, that could be implicated by the Proposed Rule.

Response: We are not in a position to respond to comments on state laws. As we stated in our 1991 rulemaking, ''[i]ssues of state law are completely independent of the federal anti-kickback statute and these [safe harbors]. . . . Thus, conduct that is lawful under the federal anti-kickback statute or [safe harbors] may still be illegal under State law.'' [22] Similarly, state laws governing trade secrets or privacy issues are outside the scope of this rulemaking.

ix. Other Legal Issues

Comment: Some commenters raised Administrative Procedure Act (APA) concerns. For example, a commenter urged the Department to adhere to the duty to review and take into account public comments received. Another commenter stated that the Proposed Rule fails to provide clear examples of the harm that it would remediate. In particular, the commenter claimed that the rule describes a policy rationale, but it does not explain what type of ''inducement'' the Proposed Rule would prevent. A commenter suggested that aspects of the Proposed Rule do not meet the APA's requirement to include sufficient detail to allow for meaningful comment. For example, the commenter stated that the preamble does not provide enough detail to explain how chargebacks would work so that industry stakeholders can meaningfully comment.

Response: The Department reviewed all comment letters, took into account all relevant public comments, and considered relevant impacts and program integrity concerns in developing this final rule. With respect to the questions set forth by commenters about the substantive sufficiency of the Proposed Rule, we respectfully disagree. Discounts of any kind serve as an inducement to purchase an item or service, and the anti-kickback statute specifies that a ''rebate'' is a form of inducement. The Proposed Rule sets forth the authority from Congress for establishing or modifying safe harbors, two of which include an increase or decrease in access to healthcare services and any other factors that the Secretary deems appropriate in the interest of preventing fraud and abuse in Federal health care programs.[23] The Proposed Rule extensively describes the problematic incentives with the current rebate system, including, but not limited to, the incentive to include higher-priced prescription drugs on formularies to capture larger rebates and the impact of higher list prices on beneficiaries.[24] In other sections of the Proposed Rule, such as the discussion of ''chargebacks'' that a commenter referenced, we not only made specific proposals but we also solicited comments on a number of issues. In fact, we received detailed and meaningful comments on chargebacks from almost 50 commenters, to which we respond elsewhere in this final rule. We did not include in the proposed safe harbor overly technical requirements about the administration of the chargeback process in order to provide private parties with the flexibility to design these systems, while offering numerous opportunities to comment.

Comment: Some commenters alleged that the Proposed Rule is arbitrary and capricious for a variety of reasons. For example, a commenter asserted that the Proposed Rule is arbitrary and capricious because it treats similar situations differently by continuing to protect rebates in Medicare Parts A and B without an adequate explanation. A commenter also asserted that there is not a rational connection between the concerns identified in the Proposed Rule and the proposed changes to the safe harbors. In support of this claim, the commenter asserted that a stated objective of the Proposed Rule is to reduce government program costs, but the regulatory impact analysis shows that costs will rise and noted that the rule expresses concern for beneficiary out-of-pocket costs while the impact analysis predicts increased beneficiary premiums. This commenter also claimed the proposed rule was asserting contradictory purposes in seeking to reduce the spread between list and net prices while also seeking to replace rebates from manufacturers to PBMs with discounts provided to beneficiaries at the point of sale. Another commenter expressed concern that the Proposed Rule may be arbitrary and capricious because, in the commenter's view,

[22] 56 FR 35957.

[23] 84 FR 2345.

[24] *See, e.g.,* 84 FR 2340–44.

significant impacts, consequences, and results were overlooked or discarded in developing the Proposed Rule, such as potential effects on future enrollment in Part D and Medicaid MCOs, possible impacts on MCO-negotiated supplemental rebates and the antitrust implications of up-front discount negotiations. A commenter suggested that estimates of the time entities will spend updating systems to comply with the rule was underestimated.

Response: We believe the changes to the safe harbor protections that we are finalizing here are a reasonable and appropriate response to address harmful effects of rebates on beneficiaries in Medicare Part D and other Federal health care programs and will help to ensure that safe harbor protection is available only for non-abusive arrangements that are transparent and reflect an alignment of incentives among plan sponsors, manufacturers, beneficiaries, and the government. We appreciate the concern that the changes we proposed could be construed as treating similar situations differently by removing protection for rebates in some Federal health care programs but not others. However, this characterization disregards the fact that many safe harbors, including the discount safe harbor, differentiate between the protection afforded to arrangements involving different Federal health care programs in order to target protection to non-abusive arrangements. The Proposed Rule was developed in response to certain abusive rebate arrangements that have been identified in the specific context of Medicare Part D, and therefore the proposal was structured to remove protection for those abusive arrangements. Moreover, we solicited comments on whether the amendment also should apply to prescription pharmaceutical products payable under other Federal health care programs.[25] As we discuss elsewhere in this final rule, commenters agreed that the amendment should not be expanded to other programs. Accordingly, we concluded that the amendment should not be expanded to other programs. In particular, as explained above, we are not finalizing our proposal to apply the amendment to Medicaid MCOs.

Similarly, we believe the final rule rationally and effectively advances the regulatory goals of transparency and ''alignment of incentives.'' [26] Specifically, the rule addresses the problem that rebate arrangements among Part D plan sponsors, pharmacy benefit managers, and pharmaceutical manufacturers are not transparent to the government or beneficiaries and incentivize higher list prices for drugs contrary to the interests of the Federal health care programs or beneficiaries. Accordingly, we proposed to eliminate the existing safe harbor protection for those abusive arrangements. We disagree that there is any conflict between seeking to lower list prices and concurrently working to ensure that any negotiated reductions to the list prices of drugs are provided in the form of discounts to beneficiaries at the point of sale. As discussed in the Proposed Rule, the current rebate framework for prescription pharmaceutical products does not appear to translate into lower Medicare per beneficiary spending on prescription drugs, when age and inflation are accounted for. The existing structure may be one of the factors driving list prices higher, which harms patients and Federal health care programs. The final rule directly addresses these issues.

Likewise, we disagree with the commenter who suggested that we ignored or disregarded certain impacts of the proposed changes to safe harbor protection for rebates. In the Proposed Rule, we expressly identified and solicited comment on the potential impacts of our proposals in the areas the commenter alleged we overlooked, including potential effects on future enrollment in Part D and Medicaid MCOs, possible impacts on MCO-negotiated supplemental rebates, and the antitrust implications of up-front discount negotiations. Furthermore, as discussed elsewhere in this final rule, we have taken commenters' feedback into account and have made adjustments to our proposals to ensure that in each of these areas, the impact of the policies adopted in this final rule is not inconsistent with the Department's policy goals, including by narrowing the scope of the amendment to the existing discount safe harbor to allow for continued safe harbor protection of rebate arrangements between manufacturers and Medicaid MCOs.

Comment: Some commenters questioned OIG's authority to promulgate this rule because commenters suggested that the resulting rule would conflict with other Federal laws. For example, a commenter asserted that the Secretary is proposing a rule under one section of the Act that the commenter contends conflicts with another section of the Act, and in doing so it violates a tenet of administrative law (that an agency exceeds its authority when it promulgates a regulation that conflicts with a Federal statute). Another commenter asserted that even if section 1102 of the Act allows the Secretary to interpret terms in a criminal statute, such authority is limited to establishing rules consistent with the Act. This commenter stated that the Proposed Rule is inconsistent with the statutory discount exception and with statutory provisions governing Part D that are within the Act.

Response: We respond to comments highlighting differences between the Proposed Rule and specific statutes elsewhere in this rule. In general, however, we note that the safe harbor regulations are voluntary. Individuals and entities that choose to comply with a particular safe harbor have assurance that their business practice will not be subject to an anti-kickback enforcement action. However, the safe harbor regulations ''impose[] no requirements on anyone'' and therefore do not put stakeholders in a position where they cannot comply with both a safe harbor and a Federal law.

Comment: Certain commenters highlighted specific Federal statutes with which they claim the proposed changes conflict and suggested that the statutes would control. For example, a commenter stated that Congress recognized when enacting the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) that ''price concessions, such as discounts, . . . [and] rebates'' were important factors with respect to providing Part D coverage. Because the MMA specifically allows for different types of price concessions, the commenter asserted that the Department does not have the authority to require that all manufacturer price concessions be passed on at the point of sale. Another commenter noted that the MMA was enacted decades after the anti-kickback statute and includes several references to rebates in the Part D program and, as such, if there was a conflict in the Part D statute and the anti-kickback statute, then Part D's approval of rebates would control, both because it is more specific and because it was later-enacted. Several commenters stated that the proposed changes to the discount safe harbor directly conflict with the Part D program's statutory definition of ''negotiated price.'' Commenters stated that CMS has consistently interpreted the definition of ''negotiated price'' and related Part D disclosure requirements as permitting Part D sponsors to choose how much of the price concessions they negotiate with manufacturers would be passed through to beneficiaries. A commenter stated that Congress confirmed CMS's interpretation in the Patient Protection and Affordable Care

[25] 84 FR 2347.

[26] 84 FR 2343–44.

Act (PPACA) when it established the Coverage Gap Discount Program, which defines ''negotiated price'' to include rebates that the Part D sponsor has elected to pass through at the point of sale.

Response: For reasons stated elsewhere in this final rule, we disagree that the amendment of the safe harbor regulations conflicts with other Federal statutes. As stated previously, the safe harbor regulations impose no requirements and do not mandate any particular behavior, and thus do not conflict with other laws. The Department acknowledges that the Part D statute references manufacturer rebates and that CMS has viewed manufacturer rebates as an important factor in Part D sponsors' provision of the Part D benefit. However, it does not follow that because the Part D statute contemplates, and the Part D program historically has involved, manufacturer rebates, such rebates are always legitimate. Similarly, neither the statutory definition of ''negotiated price'' enacted in the MMA nor the subsequent adoption of another definition of ''negotiated price'' in the PPACA have any bearing on whether manufacturer rebates pose a risk of program abuse. As noted elsewhere in this rule, in recent years manufacturer rebates have become problematic.

It would be unreasonable to construe the Part D statute to permit under the anti-kickback statute rebates that the Secretary has determined pose a risk of program abuse pursuant to authority under the anti-kickback statute simply because they are mentioned in the Part D statute. Therefore, comments contending that the Part D statute ''controls'' are unpersuasive. The Part D statute does not—either expressly or by implication—limit the Secretary's authority to establish and revise safe harbors to curb rebating practices that the Secretary determines are abusive to Federal health care programs and beneficiaries.

Comment: Certain commenters claim that aspects of the Proposed Rule conflict with OIG guidance documents. For example, a commenter was concerned that the language in the point-of-sale reduction in price safe harbor requiring that the reduction in price must be completely applied to the price of the prescription pharmaceutical product charged to the beneficiary at the point of sale could lead manufacturers to apply the entire rebate to a beneficiary's cost sharing, which is contrary to OIG guidance on the use of coupons. Similarly, a commenter requested that the final rule preserve certain pricing exclusions, for example, the value of manufacturer-sponsored drug discount card programs, manufacturer coupons, manufacturer copayment assistance programs, and manufacturer-sponsored programs providing free goods if the benefit is not contingent on other purchases, which are excluded from AMP, Average Sales Price, and Best Price reporting. Other commenters cited the 2003 Compliance Program Guidance for Pharmaceutical Manufacturers,[27] noting that this guidance implicitly acknowledges that price reductions can be contingent on formulary placement by explicitly stating that lump sum payments for formulary placement would be subject to scrutiny. A commenter also stated that OIG has not previously challenged the practice of conditioning discounts on formulary placement. Another commenter noted that the use of formulary position to negotiate reductions in price is a long-recognized practice by plans.

Response: We thank the commenters for their insights. In this final rule we have revised the language of the safe harbor to clarify what we meant in the Proposed Rule when we said that the reduction in price must be completely reflected in the price the pharmacy charges the beneficiary at the point of sale. As we further explain elsewhere, this language was not intended to permit a beneficiary to have cost sharing waived or for the beneficiary to receive the entire dollar value of a discount (unless the beneficiary is in the deductible phase and responsible for paying the full cost of the drug). Our intent was for the reduction in price to be applied to the price of the drug upon which any beneficiary cost sharing is calculated. The issues related to AMP, ASP, and Best Price, and linking reductions in price to formulary placement are addressed elsewhere in this preamble.

Comment: Certain commenters cited to fundamental rules of fairness or generally urged OIG to acknowledge that the principles set out in the Proposed Rule are a change in law and would apply only prospectively. A commenter noted that OIG states in the Proposed Rule that many financial arrangements would ''no longer'' meet the discount safe harbor and that OIG has well-documented its awareness of rebates paid to PBMs. Another commenter stated that the Proposed Rule is an abrupt change in our longstanding interpretation of the statutory exception.

Response: We agree with commenters and acknowledge that the revisions to the discount safe harbor are a change with respect to certain rebates that the discount safe harbor at § 1001.952(h) will no longer protect. Enforcement of these changes would be prospective. However, as explained elsewhere in this final rule, not all payments labeled ''rebates'' are (or ever were) reductions in price. We address the statutory exception in section III.B.i below.

Comment: A commenter asserted that an agency's narrowing of protected conduct, resulting in expansion of criminal conduct, is not authorized and is impermissible. To the extent there is ambiguity, the commenter noted that the Rule of Lenity should apply and resolve ambiguity in favor of a defendant. The commenter cited to a Supreme Court case that held that ''criminal laws are for courts, not for the Government, to construe.''

Response: Revisions to the discount safe harbor at § 1001.952(h) do not expand the scope of the anti-kickback statute or remove protections offered under the statutory exceptions.

Comment: A commenter suggested that the Proposed Rule requires disclosure of rebates and price information and that such disclosure and potential for the public to access the information eliminates the value of these trade secrets, thus extinguishing a property right. Therefore, compliance with the Proposed Rule without compensation would violate the Takings Clause of the Fifth Amendment. Similarly, a commenter stated that any proposal that requires even a specific portion of manufacturer rebates to be passed through at the point of sale would expose confidential information in direct violation of the Trade Secrets Act.

Response: As a threshold matter, we reiterate that safe harbors were intended to evolve with changes in the health care industry, are voluntary, and do not require any party to take any action, including any disclosure of rebate or pricing information. Therefore, no property right is being extinguished and this final rule does not implicate the Takings Clause. Moreover, even for parties seeking to comply with the point-of-sale reduction in price safe harbor, we fail to see how the Trade Secrets Act at 18 U.S.C. 1905 would be implicated. That law prohibits certain Federal officers or employees from disclosing certain types of information received through the course of their employment or official duties, except where authorized by law. Nothing about this safe harbor requires disclosure of rebates or pricing information to a Federal agency, so the law would not be implicated.

[27] 68 FR 23731 (May 5, 2003).

Comment: A commenter expressed concern that the chargeback system set forth in the Proposed Rule might incentivize manufacturers to deal only with a subset of pharmacies who agree to contract terms that are more stringent than what safe harbor compliance would require. The commenter noted that this would limit the effect of the any willing pharmacy provisions of the Part D program.

Response: Nothing about this final rule exempts any party from complying with other legal obligations, including any willing pharmacy provisions. We further note the point-of-sale reduction in price safe harbor requires that the reduction in price be completely reflected at the time the pharmacy dispenses it to the beneficiary.

Comment: Some commenters requested that we implement procedures outside of the advisory opinion process where parties can request interpretive guidance regarding the new safe harbors.

Response: We decline to implement procedures for parties to request individualized interpretive guidance related to the new safe harbors. OIG periodically issues materials (*e.g.,* special advisory bulletins, special fraud alerts) that provide guidance on compliance with Federal health care program standards to relevant stakeholders.

x. Formularies

c. Formulary Placement

Comment: We received a number of comments related in some way to the Proposed Rule's statement that ''[r]ebates paid by drug manufacturers to or through PBMs to buy formulary position are not reductions in price.'' [28] Several commenters stated that OIG's assertion that rebates negotiated in exchange for formulary position do not qualify as ''a discount or other reduction in price'' under the statutory exception conflicts with the statutory exception and is inconsistent with Federal price reporting rules and the agency's own past statements. Commenters requested clear guidance on the extent to which manufacturers and plans may consider formulary positioning and other utilization management techniques in negotiating discounts under the proposed point-of-sale reduction in price safe harbor, asserting that negotiating point-of-sale discounts that are contingent on formulary placement is an important tool for plans, or their PBMs, under the new point-of-sale reduction in price safe harbor and would provide an opportunity to lower patients' out-of-pocket expenses. A commenter further requested that OIG clarify whether a reduction in price for one drug contingent on formulary placement or other condition related to another drug would be protected under the proposed safe harbor, so long as the price reduction to patients applied at the point-of-sale is consistent with, for example, the allocation methodology used for price reporting purposes.

In contrast, other commenters recommended that OIG eliminate safe harbor protection for point-of-sale reductions in price conditioned on exclusive or preferred formulary placement when there are generic or biosimilar competitors and for multi-year formulary arrangements that preclude a plan sponsor or PBM from adding a generic or biosimilar to a formulary. In particular, commenters requested that OIG preclude point-of-sale discounts on a branded product in exchange for a plan not covering a competing generic or biosimilar product or placing the generic or biosimilar on the same or higher cost-sharing tier compared to the brand.

Response: We recognize that some statements in the Proposed Rule may have been misinterpreted, and we are taking this opportunity to clarify that reductions in price given to Part D plan sponsors or Medicaid MCOs that are conditioned on formulary placement of a particular drug can qualify for protection under the new safe harbor for point-of-sale reductions in price (and could have been protected for Part D plan sponsors under the discount safe harbor, and can continue to be protected under the discount safe harbor for Medicaid MCOs if all safe harbor conditions are met). As noted by commenters, we believe reductions in price contingent on formulary placement can foster competition among manufacturers to the ultimate benefit of beneficiaries and Federal health care programs, provided that safety and efficacy considerations are not disregarded. Accordingly, under this final rule, we confirm that point-of-sale reductions in price can be conditioned on formulary placement and nonetheless qualify for protection under the new safe harbor at § 1001.952(cc), provided that there are no required services (*e.g.,* marketing or switching), and all conditions of the safe harbor are met. Whether other arrangements would be considered a ''service'' that would not be protected, such as the scenario suggested by a commenter (conditioning a reduction in price on a formulary not covering a competing drug), would be subject to a case-by-case analysis.

Comment: Some commenters recommended prohibiting, through additional safeguards in the proposed safe harbor for PBM Service Fees or otherwise, drug manufacturers from tying any service fees or other compensation paid to PBMs to formulary placement. A commenter recommended this prohibition unless the compensation is paid by the manufacturer in exchange for services a PBM performs on a manufacturer's behalf to support the safe and effective use of medicines, for example, through risk evaluation or mitigation strategies. Another commenter recommended that OIG ensure payments for chargeback processing related to point-of-sale reductions in price are not disguised kickbacks related to formulary placement or exclusive arrangements.

Response: We agree with the commenters' concern about linking PBM service fees or point-of-sale chargeback administration fees to formulary placement. As we stated in the 2003 Compliance Program Guidance for Pharmaceutical Manufacturers (2003 CPG), ''[l]ump sum payments for inclusion in a formulary or for exclusive or restricted formulary status are problematic and should be carefully scrutinized.'' [29] We reiterate here that any type of a ''fee'' (which would include any payment retained by a PBM) is not a discount or other reduction in price and therefore will not meet the discount safe harbor at § 1001.952(h) or the new safe harbor for point-of-sale price reductions at § 1001.952(cc) if it is tied to formulary placement. Similarly, the PBM service fee safe harbor protects fees for services that PBMs provide to manufacturers; developing a formulary is a service that a PBM provides to a plan. Therefore, those fees cannot be tied to formulary placement.

d. Impact on Formulary

Comment: Several commenters raised concerns relating to narrow formularies, with a commenter noting that plans may look for ways to minimize some of the cost increases caused by the loss of rebates by moving to exclusive contracts with manufacturers where only one manufacturer will be on the formulary in exchange for keeping discount levels stable. Another commenter posited that higher-cost prescription drugs may be placed on higher tiers or removed from formularies altogether.

[28] 84 FR 2340.

[29] Office of Inspector General, OIG Compliance Program Guidance for Pharmaceutical Manufacturers, 68 FR 23726, 23731 (May 5, 2003), *available at https://oig.hhs.gov/authorities/docs/03/050503FRCPGPharmac.pdf.*

Several commenters predicted that it could take several years following the rule's implementation before formularies stabilize, while other commenters noted that the possibility of major formulary changes should be an essential aspect of any impact analysis and considered before the rule is finalized.

Response: OIG does not administer the Part D program; this responsibility lies with CMS. We are informed by CMS that they have and will diligently oversee a robust formulary review process to ensure sufficient inclusion of all necessary Part D drug categories or classes for Medicare beneficiaries. As part of this review, CMS assesses the adequacy of a Part D sponsor's formulary drug categories and classes along with the plan's formulary drug list to ensure that the formulary offers an appropriate range of Part D drugs.[30]

Comment: Another commenter asserted that the forced application of point-of-sale reductions in price to brand drugs may lead beneficiaries to use more expensive brand drugs instead of generics. The commenter indicated that not only will this increase overall program costs and disrupt efforts to promote the use of generics, but it may incentivize plans to minimize the opportunity for brand drugs to capitalize on this circumstance by developing narrower formularies with fewer brand drugs.

Response: First, we reiterate that safe harbors are voluntary and do not mandate any conduct. In particular, the new safe harbor for point-of-sale reductions in price provides a pathway to protect certain types of price reductions, but it does not require price reductions. Second, the final rule does not affect other drug utilization tools that plans have at their disposal, such as moving generics to a lower tier or moving brands to higher tiers. Furthermore, sponsors have an incentive to promote utilization of the lower net cost drug, regardless of whether the drug is a generic or brand. Reductions in price applied at the point-of-sale will remove an incentive for plan sponsors to game rebates in their bidding, as well as create an incentive for plans to include more generic drugs of equal safety and efficacy on their formularies.

Comment: A commenter indicated that under the Proposed Rule, Part D plans could further reduce or even eliminate their use of fixed copayments since simply converting all of their cost sharing to coinsurance may make it considerably easier to pass through rebates at the point of sale and ensure compliance with the changes included in the Proposed Rule. This shift, the commenter further contended, would directly expose beneficiaries to drug manufacturers' pricing and be particularly problematic for beneficiaries taking brand drugs without a rebate.

Response: We appreciate commenters' concern that there could be a transition to coinsurance for more drugs. Nothing in this final rule compels plans to discontinue their use of copayments, which many consumers prefer; further, upfront discounts on drugs subject to copayments can comply with the final point-of-sale safe harbor, so long as the discounts are reflected in the point-of-sale price the beneficiary is paying and accounted for when setting the copayment amount at the time of bidding. Comments related to CMS's administration of the Part D program are outside the scope of this rulemaking. However, CMS has indicated that actuarial equivalence requirements in the Part D program may require that plans adjust copayment amounts when setting them at the time bids are submitted to reflect discounts under the point-of-sale safe harbor. Additionally, for beneficiaries taking brand drugs with a rebate, it is possible that the coinsurance amount for some highly rebated drugs may be very close to the current copayment amount and that even patients in plans with no deductibles and paying only copayments could save as a result of this final rule. When accounting for the trends in utilization and costs by phase for Part D beneficiaries taking high-cost drugs with high rebates, these analyses also suggest it is likely that beneficiaries taking high-cost, high-rebate drugs in copayment-based plans will see a decrease in their overall out-of-pocket costs.

Comment: Another commenter discussed the impact of the Proposed Rule on those with rare diseases. Noting that manufacturers have less of an incentive to offer rebates to secure placement on a formulary for therapies for rare diseases since these treatments have fewer competing products, and that within the context of Medicare, many rare disease therapies fall within the six protected classes that must be included on a formulary, the commenter asserted that as a result, there is limited use of rebates for rare disease therapies, so any benefits expected under the Proposed Rule would be diluted for patients on these treatments.

Response: As stated in the Proposed Rule, we understand that beneficiaries using high-cost drugs in protected classes may be less likely to benefit from a reduced pharmacy purchase price, because manufacturers generally offer low or no rebates to plans for these drugs, since drugs in protected classes must be included on Part D plan formularies.[31] While we also recognize that manufacturers generally do not offer rebates on drugs where there are no competing products, the Proposed Rule was only intended to address circumstances where rebates are used. Furthermore, the Department believes that reductions in price that are completely reflected in the price of the prescription pharmaceutical product at the time the pharmacy dispenses it to the beneficiary may also benefit consumers in poorer health or with higher drug costs who are on treatments where rebates are used by decreasing their out-of-pocket spending at the pharmacy. The Department also believes that the enhanced transparency of premiums and out-of-pocket costs that the safe harbor encourages will support beneficiaries in making more actuarially sound decisions.[32] Thus, while the final rule may have a differing impact on certain patient groups, the Department believes many patients will experience benefits.

Comment: A health plan commenter requested that Medicare Advantage and Medicare Part D plan sponsors have the ability to temporarily exclude all new, high-cost medications from coverage formularies for at least six months. According to the commenter, this approach prevents pharmaceutical manufacturers from driving any utilization before appropriate price concessions are negotiated to better reflect the new drug's actual clinical value.

Response: Recommendations to change Part D program rules are beyond the scope of this rulemaking.

Comment: Various commenters recommended that following the implementation of the final rule, CMS actively monitor formulary changes and utilization management protocols in order to prevent patient discrimination and to ensure patients are able to access needed treatments. Several commenters noted that the Proposed Rule, in conjunction with previously proposed changes to allow greater utilization management for the six protected classes of drugs within Medicare Part D, could result in restrictions that would interrupt care regimens for those with certain diseases.

A commenter noted that as a requirement for formulary approval, the

[30] 79 FR 1918, 1939 (Jan. 10, 2014).

[31] 84 FR 2358 (Feb. 6, 2019).

[32] 84 FR 2355 (Feb. 6, 2019).

MMA requires that the Secretary of HHS cannot find that a plan's categorization system discourages enrollment by a group of beneficiaries. This commenter also recommended various guardrails that CMS should consider when evaluating formularies under this proposal, including tracking formularies for increases in product exclusions due to the heightened potential for adverse selection, aligning formularies to existing clinical guidelines, including a wide range of drug treatments on formularies, and monitoring formularies for significant changes from copay to coinsurance.

Response: We have coordinated with CMS, which administers the Part D program, in promulgating this rule. We agree that it is critically important that patients' access to needed treatments be protected, that patients not be discriminated against, that patients receive critical care uninterrupted, and that plans not discourage enrollment impermissibly. Plans should comply with all Part D rules and take appropriate actions to guard their enrollees against these harms. We are informed by CMS that they have and will diligently use a robust formulary review and approval process, which entails in-depth checks to ensure sufficient inclusion of all necessary Part D drug categories or classes for Medicare beneficiaries, preventing discriminatory benefit designs. As part of this review, CMS assesses the adequacy of a Part D sponsor's formulary drug categories and classes along with the plan's formulary drug list to ensure that the formulary offers an appropriate range of Part D drugs.[33] The formulary review and approval process, risk adjustment, and anti-discrimination rules each serve to mitigate the incentive for health plans and PBMs to narrow prescription benefits for vulnerable populations and to discourage enrollment among high-cost patients.

Comment: In order to prevent narrower formularies and increased cost sharing, a commenter recommended that in the next payment notice for Medicare Part D plans, CMS include discussion of cost-sharing and utilization management rules to ensure the changes included in the final rule do not lead to violations of existing protections or result in decreased access to necessary medicines.

Response: Suggestions for CMS to issue guidance in the next payment notice are outside the scope of this rulemaking.

[33] 79 FR 1918, 1939 (Jan. 10, 2014).

Comment: Other commenters discussed the influence of rebates on formulary placement. A health plan commenter indicated that while net prices factor into the overall value proposition of a drug, review of clinical evidence is the essential first step of formulary development, and a drug's clinical performance relates in this way to the potential magnitude of a rebate, if any. Another health plan commenter stated that rebates are only considered for drugs that are in competitive classes, where two or more therapeutically similar or equivalent drugs exist, and that in the overwhelming number of cases, plan determinations regarding drug formulary treatment are well-justified by the underlying drug characteristics and economics.

However, other commenters asserted our current rebate system may result in PBMs placing more expensive products in a preferred formulary position over less expensive equivalents and that eliminating rebates would correct their impact on formulary design.

Other commenters discussed the influence of rebates on the placement of biosimilars on formularies and asserted that PBMs generally give preferred formulary placement not to the product with the lowest list price, or to the product that provides the lowest cost to the patients, but to the product that will provide the PBM with the greatest rebate. These commenters stated that because of a biosimilar's lower price, it may not have preferred placement on a formulary, which can be particularly harmful to patients with chronic illnesses that rely on biosimilars. Another commenter was concerned that the absence of rebates, combined with the impacts of beneficiary cost-sharing differences and Part D subsidies/program design, may make generic or biosimilar drugs less lucrative to PBMs or plan sponsors, which could result in Part D plans giving preferential or equivalent-tier placement to higher-cost brand drugs.

Another commenter emphasized that decisions about which drugs are chosen for formulary inclusion should be based upon the drug's effectiveness, safety, and ease of administration, rather than financial arrangements like rebates. Other commenters raised concerns that PBMs lead to formulary disruptions.

Response: The Department agrees with commenters asserting that clinical factors should be paramount in formulary development and with commenters asserting that the current rebate system may result in more expensive products or products offering PBMs the largest rebates receiving preferred formulary placement, rather than products with lower list prices or lower costs to beneficiaries. This concern about inappropriate financial influence on formulary placement is an important element of the Secretary's decision to finalize the Proposed Rule. Nothing in this rule changes any Part D requirements with respect to formularies, including which types of drugs should be included in a formulary and criteria for including the drugs on the formulary. These are matters for CMS under the Part D program. However, as we clarify throughout this final rule, we agree with commenters' suggestion that formulary placement may be a factor in determining the type or extent of a reduction in price that may be available for a particular drug. As we also clarify throughout this rule, any portion of a so-called ''rebate'' that was retained by a PBM was not and is not protected under the discount safe harbor, nor will it be protected under the safe harbor for point-of-sale reductions in price; such remuneration is a payment for a service, not a reduction in price, for purposes of the discount safe harbor.

Comment: Other commenters raised concerns relating to chargeback services and formulary placement. A few commenters asked OIG to clarify that when a third-party unrelated to a PBM is being paid to perform point-of-sale chargeback administration services, PBMs cannot require pharmaceutical manufacturers to pay chargeback administration fees, chargeback adjudication fees, or similar service fees as a condition for formulary placement or position, due to the potential chilling effect on third-party chargeback administrators entering into the market.

Response: Point-of-sale chargeback administration fees or similar service fees would not be covered under the new safe harbor for point-of-sale reductions in price at § 1001.952(cc), regardless of whether such fees are fair market value; however, payment for these services might, depending on the facts and circumstances, be covered by another safe harbor. We agree with the commenter that only the party performing the point-of-sale chargeback administration should be paid for that service. As explained elsewhere in this rule, payments to PBMs for formulary placement, or any kind of payment for a service, are not covered by either the discount safe harbor or the safe harbor for point-of-sale reductions in price.

xi. Impact on List Price

Comment: Many commenters believed that removing rebates would correct distorted incentives and lower list prices. These commenters expect that

removing rebates and moving to upfront discounts will consolidate the procurement process and lead to reduced costs, which could be passed on to customers. These commenters also expected that manufacturers would respond to added competitive pressures from plan sponsors with more competitive pricing, and potentially introduce new drugs at lower price points.

Response: We agree with commenters' suggestion that removing the existing safe harbor and creating the two new safe harbors should promote a more transparent and rational pharmaceutical market that may reduce drug prices through competition.

Comment: Many commenters expressed concern that the rule would be unlikely to lower list prices for new drugs or limit price increases for existing drugs. These commenters felt that the rule would be more likely to either increase drug prices or not significantly affect list prices at all.

Response: We appreciate commenters' concern that the rule may not lower list prices. There are a wide range of potential behavioral changes from all parts of the prescription pharmaceutical product supply chain. The amendment to the discount safe harbor removes the positive incentives that come with higher list prices for manufacturers, PBMs, and payors. With these incentives removed, and with the incentive to get the drug for the lowest possible net price retained, the Department believes it is likely that list prices will decrease and price increases for existing drugs may be more limited.

Comment: Many other commenters expressed concern that the expectation that the rule would result in lower list prices is not supported by historical, economic, or competitive market analysis. These commenters noted that there was not enough support for the conclusion that rebates are the primary cause of high list prices and that drug manufacturers have given no indication that they would lower drug prices if the rule were finalized.

Response: We disagree with commenters' feedback that there is no evidence that rebates are a primary cause of high list prices. Rebate arrangements in the prescription drug supply chain have been cited as a barrier to lowering drug costs.[34] We also disagree that manufacturers have given no indication that they would lower drug prices if the rule were finalized.[35] Finally, while we acknowledge that there are a range of potential behavioral changes that could result from the rule, we do not agree with the assumption that PBMs will start paying a higher net price simply because of the transition from rebates to point-of-sale discounts. PBMs and manufacturers already know the current net prices that they have negotiated for drugs and PBMs have proven to be extremely effective negotiators over the past 15 years. Therefore, the Department expects PBMs to continue to work to get the best possible deals for their customers, with one likely result being lower list prices.

Comment: Several commenters asserted that not only would the Proposed Rule fail to lower list prices, but rebates do not contribute to high list prices nor do they prevent manufacturers from lowering prices. These commenters specifically argued that list price increases are primarily driven by drug manufacturers' revenue and profit goals and that rebates assist in keeping list prices from being even higher. These commenters noted that list prices are increasing at a faster rate for drugs with small rebates than for drugs with larger rebates.

Response: The Department believes rebates are an important driver of increased list prices. Rebates and price protection payments increase when list prices increase.[36]

Comment: Many commenters remarked that the Proposed Rule contains no mechanism to bring down list prices, and that absent additional rulemaking, the changes included in the Proposed Rule would further embolden manufacturers to keep prices high.

Response: We appreciate commenters' concern that the rule does not have a mechanism to lower list prices. As discussed above, the Department believes that rebates are a major driver of high list prices, and that, by removing the incentives of the rebate system, PBMs and payors will have a strong incentive to negotiate lower net prices and manufacturers will lower list prices. The Department agrees with the many commenters that commend the existing competitive market and praise the effectiveness of PBMs as negotiators that have carefully managed net prices. The amendment to the discount safe harbor should add transparency to an extremely competitive market, which will translate into lower list and net prices.

Comment: Several commenters suggested that high list prices and drug costs would be better addressed through increased competition among drug manufacturers. These commenters noted that most of the most expensive drugs have no competition from other manufacturers and offer no rebates. The commenters also noted that there are few meaningful legal or economic restrictions on drug manufacturers' ability to set and increase prices, arguing that drug manufacturers frequently engage in anti-competitive behavior that must be addressed for list prices to come down, such as securing longer periods of patent exclusivity and pay-for-delay settlements.

Response: We agree with commenters that high list prices and drug costs are an important issue that requires a multifaceted response. We further agree that action taken to promote competition in the prescription pharmaceutical product space has the potential to curb rising drug prices. This final rule is one of many Department initiatives that build on each other to lower list prices and reduce out of pocket costs, as outlined in the American Patients First blueprint.[37]

Comment: Several other commenters remarked that because the safe harbors and amendments included in the Proposed Rule would not apply to commercial markets, list prices are not likely to be lowered. These commenters noted that commercial markets represent a majority of the U.S. drug market, and therefore, drug manufacturers have little incentive to lower list prices where a majority of the industry would remain unchanged.

Response: We acknowledge that the commercial market is not covered by this final rule, and that there are a range of potential behavioral responses as a result of this rule. While it is possible that the market will respond by keeping rebates in the commercial market, as commenters suggest, it is also possible that the commercial market will follow the Medicare market without direct action. It may be difficult to maintain a bifurcated market between commercial and Medicare Part D, so plans may prefer to negotiate based on the same discount mechanism for efficiency. We note that some commercial plans have already begun to pass discounts on to

[34] *See, e.g.,* A perspective from our CEO: Gilead Subsidiary to Launch Authorized Generics to Treat HCV. Gilead Pharmaceuticals, *available at https://www.gilead.com/news-and-press/companystatements/authorized-generics-for-hcv.*

[35] *See* Drug Pricing in America: A Prescription for Change, Part II, Hearing Before the U.S. Senate Comm. on Finance (Feb. 26, 2019), *available at https://www.finance.senate.gov/imo/media/doc/37143.pdf.*

[36] Pharmacy manufacturer rebate negotiation strategies: A common ground for a common purpose. Milliman. Nov. 17, 2015.

[37] American Patients First: The Trump Administration Blueprint to Lower Drug Prices and Reduce Out-of-Pocket Costs, Dep't Health & Human Servs. (May 2018), *available at https://www.hhs.gov/sites/default/files/AmericanPatientsFirst.pdf.*

patients at the point of sale. While the commercial market is a larger portion of U.S. spending on prescription pharmaceutical products than Medicare, Medicare is an important part of the market and the commercial market often tracks policies implemented in the Medicare program. The Department believes it is likely that as parties change their operating practices to comply with the safe harbors with respect to Medicare Part D business, there may be a spillover effect on their practices in the commercial market, and that list prices would decline as a result.

Comment: A few commenters expressed skepticism that switching to point-of-sale reductions in price would not translate to lower list prices for various reasons, including: There is lack of meaningful competition; intellectual property and Food and Drug Administration laws empower monopolistic pricing; clinicians have a strong influence over prescribing; coverage and reimbursement laws create price floors; and the healthcare industry as a whole generally fails to assess effective lower-cost alternative drugs.

Response: We agree with the commenters that there are a number of complex factors that have led to high list prices for prescription pharmaceutical products, and that the Department will have to use a multifaceted approach that addresses many of these issues to meaningfully lower list prices and reduce out-of-pocket costs for patients. This final rule is addressing the incentives in the existing rebate framework that drive up list prices while net prices stay neutral or increase only slightly. The Department believes this is an important and foundational step for other reforms that can help to lower list prices and reduce out-of-pocket costs, as outlined in the American Patients First blueprint. The Department will continue to consider further reforms to address issues described by the commenters.

Comment: A commenter argued that the Proposed Rule seems to suggest that HHS would prefer a lower list price drug with a net higher cost over a drug with a lower net cost and that such a situation would increase costs for both beneficiaries and taxpayers.

Response: We disagree. The Department expects that the net price of prescription pharmaceutical products would largely be the same with point-of-sale discounts as it has been through the use of rebates. The Department expects that PBMs will continue to be effective negotiators in a competitive market and does not see any reason why PBMs would accept higher net prices. Instead, the Department expects that the rule will result in lower list prices and lower out-of-pocket costs for patients through point-of-sale reductions in price.

Comment: Several commenters expressed concern that because the MDRP calculates mandatory rebates using the AMP of a product (which is impacted by a product's list price), lower list prices could reduce rebates states receive under this program.

Response: The Department recognizes that the final rule has the potential to affect calculations of AMP in ways and to an extent that may be difficult to anticipate. We reiterate that the final rule does not alter obligations under the statutory provisions for Medicaid prescription drug rebates under section 1927 of the Act, including AMP.

xii. Definitions

In the Proposed Rule, we asked for comments on the definitions that are necessary to implement the new safe harbors. We received several comments that we discuss below.

General Comments on Definitions

Comment: Many commenters suggest that a number of terms introduced in the Proposed Rule, such as ''affiliate,'' ''negotiated price,'' ''pharmacy negotiated price,'' ''fair market value,'' ''chargeback administrators,'' ''administrative fees,'' and ''manufacturer reporting requirements,'' must be more fully defined by the Administration to ensure that operational changes that will be required by the Proposed Rule are reflected in the common understanding of the rules for these programs.

Response: We appreciate commenters' feedback on the terms that require a definition to implement this final rule regulation. We provide the definitions of the terms that are within the scope of this rule below. We provide additional information on terms such as ''point-of-sale chargebacks'' and ''value-based arrangements'' in other parts of this rule. We believe this rule includes the necessary definitions for affected entities to comply with the new safe harbors.

Pharmacy Benefit Manager

The Proposed Rule proposed to define ''pharmacy benefit manager'' as ''any entity that provides pharmacy benefits management on behalf of a health benefits plan that manages prescription drug coverage.'' A number of commenters provided feedback on the definition.

Comment: One commenter noted that health benefits plans may engage PBMs to provide a limited suite of pharmacy benefits management services, such as a limited authorization to provide rebate contracting services on behalf of the plan. In addition, PBMs may be engaged to provide services with regard to prescription drugs dispensed under the medical benefit, such as physician administered drugs where a POS discount could not be implemented, and thus, such engagements should continue to be covered by the existing discount safe harbor. The commenter recommended the following definition: ''For purposes of this paragraph (h), the term pharmacy benefit manager or PBM means any entity that provides pharmacy benefit management services, or a subset thereof, to a prescription benefit plan.''

Response: The definition of a PBM requires that the PBM provide ''pharmacy benefit management.'' This definition does not require that a PBM provide a full range of pharmacy benefit management services; it might provide a subset of such services. This is consistent with the definition we are finalizing, and we are not making a change to the regulatory text.

Comment: Many commenters recommended that we use a functional definition of ''PBM.'' While some of these commenters agreed that the role of a PBM may evolve over time, they suggested that if we do not use a more detailed definition, the scope of the safe harbor would be unclear and PBMs would structure their arrangements to fall within or outside of the safe harbor based on their preferences. To develop the more detailed definition, commenters recommended including a non-exhaustive list of PBMs services. Many commenters specifically referenced the definition proposed by a trade association:

''Pharmacy Benefit Manager'' means any person, business, or other entity that, pursuant to a written agreement with plan sponsors under Medicare Part D, either directly or through an intermediary, acts as a price negotiator on behalf of plan sponsors under Medicare Part D or manages the prescription drug benefits provided by plan sponsors under Medicare Part D, including but not limited to, the processing and payment of claims for prescription drugs, the performance of drug utilization review, the processing of drug prior authorization requests, the adjudication of appeals or grievances related to the prescription drug benefit, contracting with network pharmacies, controlling the cost of covered prescription drugs, or the provision of services related thereto. Under this definition, any person, business, or other entity that carries out one or more of the activities above or any entity that is owned, affiliated, or related under a common ownership structure with such a person, business, or entity is a ''pharmacy benefit

manager.'' Such entity is not a purchasing agent and therefore is not a GPO as defined in paragraph (j) of this section.

Other commenters recommended additional services (discussed below) be included in the definition. Commenters notes that the list should not include ''services'' such as ''negotiating rebate arrangements,'' that are core functions of a PBM's job for its plan customers, because the new safe harbor should protect only fees that are paid for a specific service that the manufacturer legitimately needs and that are provided to the manufacturer, independent of services a PBM provides to its plan customers.

Response: We decline to define ''pharmacy benefit manager'' with the level of specificity suggested by the commenter, *e.g.,* by defining a PBM through a list of pharmacy benefit management services, by incorporating a common ownership element, or by referencing the definition of ''GPO.'' We do not see value in including a list of services in the regulatory text, given the variety of potential services; we believe the term ''pharmacy benefit management'' is clear and commonly understood, and would include both price negotiation and management of benefits. We separately provide a non-exhaustive list of potential pharmacy benefit management services in this preamble that PBMs provide to health plans, and we are adopting some of the commenters' suggestions for the preamble list. The list may be useful to parties determining whether they are a PBM, and particularly, whether the services they provide to a manufacturer for purposes of the PBM services fee safe harbor are related to the pharmacy benefit management services that the PBM furnishes to one or more health plans, which is a requirement of that safe harbor. As commenters acknowledge, the role of PBMs may evolve over time, which could make it problematic to use a functional definition. We address common ownership elsewhere in this preamble.

Comment: One commenter recommended that the PBM definition should further distinguish between the functions of PBMs and GPOs to foreclose protection of PBM services arrangements under the GPO safe harbor.

Response: We are not prohibiting PBMs from potentially qualifying for the GPO safe harbor protection. As we explain in greater detail in section III.D.vii below, if a PBM otherwise meets the qualifications, and follows the limitations, for the GPO safe harbor, then it may be able to use that safe harbor.

Comment: Some commenters noted that the Proposed Rule may lead entities to vertically integrate. These commenters expressed concern that as PBMs continue to evolve in the market, *e.g.,* by vertical integration, merging with other entities, and/or spinning off certain business units, there could be new entities that fall outside the Proposed Rule's definition for ''PBM,'' but that influence the PBM negotiation process.

Response: This final rule relates only to safe harbor protection under the anti-kickback statute; safe harbors protect specified arrangements that implicate the anti-kickback statute. Any entity seeking protection for an arrangement must meet all conditions of a safe harbor, including any applicable definitions. If an arrangement does not fit in a safe harbor, it would be subject to case-by-case review under the anti-kickback statute. It strikes us as unlikely that this final rule itself would lead parties to favor arrangements that do not qualify for safe harbor protection.

Pharmacy Benefit Management Services

Under the Proposed Rule, the services provided to the manufacturer must relate to the ''pharmacy benefit management services'' that the PBM furnishes to one or more health plans.

The Proposed Rule proposed a non-exhaustive preamble list of examples of pharmacy benefit management services furnished to plans, such as contracting with a network of pharmacies; establishing payment levels for network pharmacies; negotiating rebate arrangements; developing and managing formularies, preferred drug lists, and prior authorization programs; performing drug utilization review; and operating disease management programs. In the Proposed Rule, we proposed that we would not create a definition for ''pharmacy benefit management services'' with the understanding that these services could evolve over time. We did not propose a definition for the term ''pharmacy benefit management services.'' In the Proposed Rule, we solicited comments on the approach of providing examples, but not providing a definition.

Comment: Many commenters recommended including the list of the pharmacy benefit management services in the definition. Services recommended for the definition in addition to those listed in the Proposed Rule include processing claims for prescription drugs, adjudication of appeals or grievances related to the prescription drug benefit, controlling the costs of covered prescription drugs, and provision of services related to the services listed. These commenters stated that ''negotiating rebate arrangements'' should not be included in the list of services, since they are prohibited by the new safe harbor.

Response: We accept, with a modification explained below, the commenters' recommendations for additions to the preamble list of potential pharmacy benefit management services that PBMs furnish to plans and to change the listed service related to negotiation of rebate arrangements to negotiation of discount arrangements. Accordingly, the following is a non-exhaustive list of pharmacy benefit management services that PBMs furnish to plans for purposes of this final rule: Contracting with a network of pharmacies; establishing payment levels for network pharmacies; negotiating rebates and discount arrangements; developing and managing formularies, preferred drug lists, and prior authorization programs; performing drug utilization review; operating disease management programs; processing and payment of claims for prescription drugs; adjudication of appeals or grievances related to the prescription drug benefit; and controlling the costs of covered prescription drugs. To be clear: This is not a list of services PBMs furnish to manufacturers, but a list of examples of pharmacy benefit management services that PBMs furnish to any type of health plan. For the purposes of this rule, we are listing ''negotiate rebate or discount arrangements'' in recognition that PBMs may negotiate both discounts and some types of rebates.

Comment: Some commenters noted that it is unclear how the PBM service fee amounts compare with the current definitions of ''Bona Fide Service Fees'' (BFSFs) under the Medicare Part D and the MDRP. One commenter noted that the definition of BFSFs includes additional conditions, meaning that it is not entirely consistent with the terms of the safe harbor, which creates questions regarding the reporting of these fees by Part D sponsors under Part D as well as by drug manufacturers in regards to their determinations of best price and AMP under the MDRP. Likewise, PBMs are required to account for BFSFs in reporting the aggregate amount of price concessions they negotiate that are attributable to patient utilization under a Part D or MA–PD plan. This commenter asked that CMS issue guidance regarding any differences between these two types of fees and the reporting and FMV implications under Part D and the MDRP.

Response: These comments are outside of the scope of this rule, which

does not address compliance with CMS requirements relating to DIR reporting for when a payment may be considered within the point-of-sale safe harbor but not a bona fide service fee for purposes of DIR reporting.

Comment: One commenter noted that PBMs do not conduct many of the services outlined in the examples for pharmacy benefit management services, listed in the Proposed Rule, on behalf of manufacturers. In fact, some of the activities attributed to PBMs involve the practice of pharmacy which is overseen by state boards of pharmacy. Specifically, the commenter noted that negotiating pharmacy networks is an activity that is typically done by PBMs on behalf of plans and for which community pharmacies pay a type of pharmacy DIR fee to participate in such a network (known as a pay-to-play fee). In the PBM-manufacturer relationship, PBMs typically receive administration fees from manufacturers for acting as a purchasing agent for the underlying plans to which PBMs provide services (and also for the provision of data). The commenter recommends revising definition of ''pharmacy benefit management services'' and narrowing any further description of PBM services to the actual services PBMs provide to manufacturers so that PBMs do not create a de facto rebate composed of new classes of fees charged to manufacturers.

Response: We clarify that term ''pharmacy benefit management services'' as used in the safe harbor at 42 CFR 1001.952(dd), and the non-exhaustive list of such services provided above, refers to services furnished to health plans, not manufacturers. We agree that we do not want to create de facto rebates composed of new classes of fees charged to manufacturers. We believe that the condition in the new safe harbor for PBM service fees that requires predetermined flat fees that are not tied to volume provides a necessary safeguard to prevent abuse of these fees.

Manufacturer

The Proposed Rule proposed to define ''manufacturer'' with the meaning ascribed to it in Social Security Act section 1927(k)(5), which defines manufacturer as any entity which is engaged in the production, preparation, propagation, compounding, conversion, or processing of prescription drug products, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, or in the packaging, repackaging, labeling, relabeling, or distribution of prescription drug products.

We did not receive any comments on the definition of manufacturer, and we are finalizing the definition of ''manufacturer'' as proposed.

Wholesaler/Distributor

The Proposed Rule proposed to define the terms ''wholesaler'' and ''distributor'' as terms that are used interchangeably and carry the same meaning as the term ''wholesaler'' as defined in Social Security Act section 1927(k)(11). Section 1927(k)(11) defines ''wholesaler'' as a drug wholesaler that is engaged in wholesale distribution of prescription drugs to retail community pharmacies, including (but not limited to) manufacturers, repackers, distributors, own-label distributors, private-label distributors, jobbers, brokers, warehouses (including manufacturer's and distributor's warehouses, chain drug warehouses, and wholesale drug warehouses) independent wholesale drug traders, and retail community pharmacies that conduct wholesale distributions.

We did not receive any comments on the definition of ''wholesaler'' and ''distributor,'' and we are finalizing the definitions of ''wholesaler'' and ''distributor'' as proposed.

Medicaid Managed Care Organization

The Proposed Rule proposed to define ''Medicaid managed care organization'' or ''Medicaid MCO'' with the same meaning ascribed to these terms in section 1903(m) of the Social Security Act. We did not receive any comments on the definition of Medicaid MCOs in the Proposed Rule. While we are moving this definition to § 1001.952(cc), we are otherwise finalizing this definition as proposed.

Prescription Pharmaceutical Product

The Proposed Rule proposed to define ''prescription pharmaceutical product'' as either a drug or a biological as those terms are defined in sections 1927(k)(2)(A), (B), and (C) of the Act.

Comment: One commenter noted that the definition of prescription pharmaceutical product states that the terms ''drug'' and ''biological'' are defined at Section 1927(k)(2) of the Social Security Act, but this is not the case. A commenter recommended that this definition be revised to read as follows: ''For purposes of this paragraph (h), a prescription pharmaceutical product means any drug, biological or insulin product that falls within the scope of Social Security Act section 1927(k)(2).''

Response: We agree that ''defined'' is inaccurate. We are updating the definition to use the word ''described'' instead of ''defined.'' In addition, because insulin is considered to be a biological product, we are not adopting the commenter's recommendation to list that term in this definition.

''Fair Market Value'' and ''Arm's-Length Transactions''

In the Proposed Rule, we stated that the new safe harbor for certain PBM service fees would be available for fees if they are consistent with ''fair market value in an arm's-length transaction.'' Many commenters provided feedback on the definition of ''fair market value'' and ''arm's-length transaction.''

Comment: Multiple commenters recommended that OIG provide guidance on certain issues related to fair market value compensation in an arm's-length transaction. At least one of these commenters recommended that OIG (i) clarify that PBMs are obligated to negotiate services arrangements in good faith based on the bona fide needs of manufacturers, (ii) clarify the scope of safe harbor protection available for arrangements in which a PBM provides services on behalf of an affiliated health plan, and (iii) clarify that individual health plans that do not provide pharmacy benefits management services to plan sponsors under Part D may not attempt to use the safe harbor to negotiate administrative fees from manufacturers.

Another commenter recommended definitions of ''fair market value'' and ''arm's-length'' that would set guardrails for purposes of negotiations between manufacturers, PBMs, Part D plans, and chargeback administrators and would provide further transparency on how HHS intends these fees to be determined. Specifically, the commenter recommended that OIG clarify that the fair market value standard is neither intended to allow free rein for third-party entities to continue to keep a disproportionate share of pricing concessions that should be used to reduce beneficiary cost-sharing nor to tie fees to the list price of a medication.

Response: We decline to provide further guidance on fair market value compensation in an arm's-length transaction. The safe harbor is an affirmative defense for criminal violations of the anti-kickback statute, so it is the entity's obligation to prove that the remuneration meets the conditions of the safe harbor based on the terms outlined in this final rule. Moreover, these terms are used in several existing safe harbors.

Comment: One commenter recommended that OIG clarify the requirement that payments be ''consistent with fair market value in an arm's-length transaction'' by providing a non-exhaustive list of examples of valuation approaches that meet this standard and specify that PBMs must negotiate in good faith based on manufacturers' bona fide needs, refraining from tactics that would be inconsistent with an arm's-length transaction. The commenter asserted that OIG should require that PBMs inform manufacturers when seeking manufacturer compensation for services also compensated by health plans. This disclosure would enable manufacturers to evaluate whether to pay for the services and what a fair market value rate might be.

Response: We decline to provide a non-exhaustive list of examples of valuation approaches. We expect that parties seeking protection under this safe harbor have experience with the fair market value standard and would use generally accepted valuation methodologies and principles in any determination of ''fair market value.'' We also decline to include a requirement that the PBM inform a manufacturer when the PBM is receiving compensation from a health plan for a service. This safe harbor protects only payment by a pharmaceutical manufacturer for services the PBM provides to the manufacturer, not payment for services a PBM provides to a health plan; because we have included additional conditions in the safe harbor aimed at clarifying that only payment for legitimate services would be protected, we do not believe this requirement is necessary.

xiii. Comments Outside the Scope of Rulemaking

Above we respond to certain comments addressing matters outside the scope of this safe harbor rulemaking. We received additional comments that are outside the scope of this rulemaking. For instance, several commenters recommended that Congress pass legislation or the Department create new regulations related to certain issues the Proposed Rule appears to address, such as lowering cost-sharing and out-of-pocket costs for consumers; promoting competition of generics and biosimilars; and ensuring beneficiaries have access to negotiated prices through point-of-sale rebates. Requests for Congress to pass legislation are outside the rulemaking authority; the other matters raised by commenters are programmatic and outside the safe harbor authority. Another suggestion involved extending safe harbor protection to the commercial market; as noted above, purely commercial arrangements generally do not implicate the Federal anti-kickback statute. Commenters requested that OIG or CMS establish certain programs or other forms of guidance, including creating a rebate index that would provide parties with data on the range of rebates currently used in the market for each drug receiving rebates under Part D. Another commenter recommended focusing on the lack of competition in the drug market and restrictions on beneficiary choice rather than trying to reform the rebate system; as noted above, this rule is part of a larger set of Department actions undertaken and under consideration with respect to lowering drug prices. Other commenters requested that OIG create a new safe harbor protecting value-based arrangements or proposed specifically including value-based arrangements in existing safe harbors. OIG has proposed safe harbors for certain value-based arrangements in separate rulemaking.[38]

B. Discount Safe Harbor Amendment

i. Statutory Exception

Comment: Several commenters stated that, under the terms of a rebate arrangement, a manufacturer offers remuneration to a Part D plan sponsor or Medicaid MCO to induce the purchase of federally reimbursable products, thus implicating the anti-kickback statute. However, commenters further asserted that, although the statutory discount exception does not explicitly refer to rebates, the language encompasses any reduction in price as long as it is properly documented, which would include rebates administered by PBMs. Because a rebate is a ''reduction in price'' obtained by Part D plan sponsor ''under a Federal health care program,'' and they are ''properly disclosed'' to CMS and ''appropriately reflected'' in costs submitted to CMS, including through statutorily required and CMS-established processes for reporting DIR, commenters assert that they are protected under the statutory discount exception. Similarly, a commenter alleged that the Proposed Rule was based on incorrect and incomplete assumptions regarding the conduct protected by the statutory discount exception.

Response: The legislative history of the statutory exception states that the exception is intended to protect discounts that are properly disclosed and appropriately reflected, and notes that providers are encouraged to ''seek discounts as a good business practice *which results in savings to [M]edicare and [M]edicaid program costs.*''[39] As explained elsewhere, as the market has evolved in recent years, we do not believe that the way many types of rebates have been used in the Part D program function as reductions in price. While we believe that the changes that we are finalizing to the safe harbors reflect statutory intent and provide a clear pathway to protection, we reiterate our longstanding guidance that safe harbors are voluntary. If a party believes in good faith that a particular arrangement does not implicate the anti-kickback statute or meets the terms of a statutory exception, there is no mandate to comply with a safe harbor.

Comment: A commenter noted that the Department has acknowledged that Congressional intent was to protect price reductions in the normal course of business and that post-point-of-sale manufacturer price reductions are precisely the type of discounting that occurs in the normal course of business. Another commenter noted that Congress did not give the Department authority to transform practices that are protected under the statutory discount exception into a crime; the Secretary's regulatory authority is limited to protecting conduct that would otherwise be illegal.

Response: We agree with the commenter that Congress gave the Department authority to protect certain practices that occur in the normal course of business. We further agree that the Department does not have authority to narrow the reach of the statutory discount exception, and that is not our intent. We note, however, that the mere fact that a certain practice is performed in the normal course of business does not make it legal. As a threshold matter, to be protected under the discount exception, an arrangement must involve a reduction in price. For example, an arrangement between a manufacturer and a plan sponsor to increase the amount of the rebate to the plan sponsor by increasing the list price of the drug would be suspect and subject to scrutiny under the statute. Given the variety of ''rebate'' arrangements that have been created over the past several years between pharmaceutical manufactures and Part D plan sponsors (directly or through PBMs), many of which are not reductions in price, the Secretary has determined that rebates to Part D plan sponsors do not pose a low

[38] 42 FR 55694 (Oct. 17, 2019).

[39] *See* H.R. Rep. No. 95–393, pt. 2, at 53 (1977) (emphasis added).

risk of fraud and abuse and should not be protected by a regulatory safe harbor. We reiterate that falling outside of a safe harbor does not make an arrangement criminal; each arrangement would need to be examined on a case-by-case basis.

Comment: A commenter stated that the Proposed Rule impermissibly infringes on protections afforded by the statutory discount exception because, taking together the changes to the discount safe harbor and the addition of the new safe harbor for point-of-sale reductions in price, the Proposed Rule effectively eliminates post-point-of-sale manufacturer price reductions, which limits the types of price reductions a Part D plan sponsor, a Medicaid MCO, or a PBM could accept from a manufacturer. The commenter stated that the new safe harbor for point-of-sale reductions in price imposes requirements beyond those in the discount exception's text.

Response: In this final rule, we are carving out a narrow class of arrangements that the Secretary believes poses a higher risk of fraud and abuse and the potential for increased costs to both beneficiaries and Federal health care programs, and we are creating a new safe harbor to protect certain reductions in price that pose lower risk. This new safe harbor has its own conditions, specific to the particular arrangements that are the subject of the safe harbor, and it is not intended to mirror the discount exception or safe harbor. As noted above, this final rule has no impact on the statutory exception.

Comment: Other commenters asserted that rebates or other payments by drug manufacturers to PBMs may be structured to fit under the GPO safe harbor, 42 CFR 1001.952(j), as well as the managed care safe harbors 42 CFR 1001.952(m),(t), and (u), and noted that these safe harbors have corollary statutory exceptions under the anti-kickback statute (the statutory GPO exception, and the statutory shared risk exception). Commenters asserted that the elimination of these statutory protections through revisions to the regulatory discount safe harbor inappropriately reads out of the anti-kickback statute the multiple protections available to MCOs under other relevant statutory exceptions.

Another commenter asked OIG to issue guidance or revise the managed care safe harbors 42 CFR 1001.952(m), (t), and (u) to ensure they do not protect reductions in price or other remuneration that is excluded under the discount safe harbor.

Response: As a threshold matter, and as we discuss in detail above, rebates from manufacturers to PBMs were not protected by the discount safe harbor. If a payment arrangement can be structured to fit within any one safe harbor, it would be protected by that safe harbor regardless of any changes to a different safe harbor. Amendments to the managed care safe harbors, 42 CFR 1001.952(m),(t), and (u), are beyond the scope of this rulemaking.

ii. Effective Dates

We received many comments on the proposed January 1, 2020 effective date for the revisions to the discount safe harbor.

Comment: Various commenters supported the proposed effective date. Some of these commenters noted that it would be challenging to make all necessary updates to systems and agreements and that significant resources would be required across the industry to meet a January 1, 2020 effective date, but that the proposed effective date is attainable. Some commenters noted that guidance from OIG and CMS and cooperation from stakeholders would be required to meet that timeline and minimize patient, pharmacy, and supply chain disruptions.

Response: Based on the comments received and further consideration of the appropriate timeframe for implementation, we have modified our proposal, and the changes to § 1001.952(h)(5) of the discount safe harbor will be effective January 1, 2022, which should provide adequate time for parties to come into compliance and to minimize any disruption.

Comment: A commenter strongly supported a January 1, 2020 effective date, but the commenter recommended that it be coupled with both a flexible 36-month transition process to facilitate implementation and guidance issued before the effective date on chargebacks and other issues. Other commenters suggested delaying the effective date and testing efforts to reform the rebate system before the Proposed Rule is implemented across Medicare Part D. Other commenters that did not support a January 1, 2020, effective date noted that the April 5, 2019 Memorandum from CMS provided some guidance, but not enough to submit an actuarially sound bid. Another commenter urged OIG to delay the effective date of the final rule until 2022 or, alternatively, to issue a statement that it will not begin to enforce the new safe harbors until after the period of the announced CMS demonstration. A commenter also noted that the demonstration program would need to be expanded, for example, to account for enhanced benefits to EGWP plans. This commenter further stated that if CMS does not expand the demonstration program, CMS would have to require plans to submit two bids (one to account for rebates, one to account for POS discounts). Another noted that this effective date would place an enormous burden on CMS to issue required guidance, which could lead to beneficiary disruption if key events leading to the open enrollment period are delayed. A commenter requested that OIG clarify whether manufacturers, PBMs, and pharmacies can leverage existing mechanisms for exchanging data to support point-of-sale reductions in price, noting that the January 1, 2020 effective date is more feasible if extensive systems changes are not necessary.

Response: Based on the comments received and further consideration of the appropriate time frame for implementation, we are finalizing our proposal for the changes to § 1001.952(h)(5) of the discount safe harbor to be effective January 1, 2022. The CMS demonstration referenced by the commenter was contingent on a change in the safe harbor rules effective in 2020; because our changes to § 1001.952(h)(5) of the discount safe harbor will be effective January 1, 2022, requests for modifications to that demonstration are no longer applicable.[40] Additionally, we confirm that the safe harbor does not mandate any particular system or process for implementing point-of-sale reductions in price.

Comment: Several commenters noted that the proposed January 1, 2020 effective date is particularly problematic for Medicaid MCOs because many states' contracts are not renewed annually and often work on a July 1-June 30 fiscal year. A January 1 change could require mid-year rate adjustments to ensure that capitated payments to managed care plans are actuarially sound. Other commenters noted that the proposed January 1, 2020, effective date would not give states enough time to substitute directly negotiated supplemental rebates for current Medicaid MCO rebates. Additionally, a state health department commenter indicated that a January 1, 2020, effective date would make it challenging to prospectively set Medicaid Managed Care capitation rates that appropriately account for anticipated price reductions for prescription pharmaceutical

[40] Letter from Seema Verma, Administrator, CMS, to Part D Plan Sponsors (Apr. 5, 2019), *available at https://www.cms.gov/Research-Statistics-Data-and-Systems/Computer-Data-and-Systems/HPMS/Downloads/HPMS-Memos/Weekly/SysHPMS-Memo-2019-Apr-5th.pdf.*

products, while another commenter stated that the proposed January 1, 2020, effective date would significantly disrupt current arrangements among manufacturers, PBMs, Medicaid MCOs, and pharmacies.

Response: Based on the feedback we have received from commenters and further consideration of the appropriate timeframe for implementation, we are finalizing the modifications to § 1001.952(h)(5) of the discount safe harbor to be effective on January 1, 2022. Additionally, we are not finalizing our proposal with respect to Medicaid MCOs, which we believe addresses the commenters' concerns.

Comment: Various commenters stated that the effective date should be delayed for some period of time (*e.g.,* at least until 2022) to give plan sponsors time to understand the impact of the rule. A commenter noted that the changes set forth in the Proposed Rule would occur simultaneously with many other changes being proposed to or implemented in the Part D benefit, including new indication-based formularies. The commenter stated that other pending rules would impact Part D protected classes, pharmacy DIR changes, shifting drugs from Part B to Part D, and others, all of which would make a January 1, 2020, effective date more challenging. Commenters noted that, depending on what is finalized, plans may need to adjust bids, renegotiate contracts, and make systems changes. Another commenter noted that both PBMs and plans will have to contract with vendors, who will have to develop, test, sell, and have operational products, which the commenter asserts cannot happen by 2020. Another commenter indicated that the safe harbor changes proposed in the Proposed Rule would require fundamental changes to the way drugs are negotiated, reimbursed, and adjudicated at the point of sale, which would include new NCPDP electronic health care transaction codes for pharmacy claims.

Commenters suggested that both the proposed January 1, 2020, effective date and alternative effective date of January 1, 2021, were unreasonable, indicating additional time would be needed to implement the point-of-sale reduction in price structure, and that the chargeback system referenced in the Proposed Rule would be far more complex and require more coordination than what currently exists. Others suggested that the same changes would take one year and recommended an implementation date of 2021, with a commenter noting that an additional year would help protect patients from the negative consequences of market disruption and allow more time to educate beneficiaries on any finalized changes. Another commenter asserted that the proposed effective date of January 1, 2020 should be delayed to allow the market to have an opportunity to respond to the new rule. A health plan commenter also recommended delaying the effective date of the rule beyond January 1, 2020, noting that even with CMS's risk corridor assurances, there is still too much uncertainty, which will lead to disparities in 2020 bid pricing.

Response: The final rule is one of many complementary initiatives targeted around lowering list prices and reducing out-of-pocket costs, as outlined in the American Patients First blueprint. These initiatives are meant to build on each other to create a more rational and competitive prescription pharmaceutical product market. Based on the comments received and further consideration of the appropriate timeframe for implementation, we are finalizing the changes to § 1001.952(h)(5) of the discount safe harbor to be effective January 1, 2022.

Comment: Several commenters objected to the proposed effective date because of the statutory Part D bid deadline. Commenters stated that plans expected all final guidance for the upcoming year to be released by CMS in early April 2019 because Part D bid submissions for calendar year 2020 were due by June 3, 2019. If a final rule were released without sufficient lead time, the commenter cautioned that there will be large financial losses for plans and for CMS (who would have to make substantial payments when plans enter the risk corridor). A commenter expressed concern about the ability to submit an actuarially sound bid by the bid deadline.

An effective date of January 1, 2020, does not provide a reasonable amount of time after issuing a final rule for re-negotiating agreements involving pharmaceutical manufacturers, pharmacies, health plans, and PBMs. Several commenters raised concerns that a January 1, 2020, effective date would make it difficult for the online Medicare Plan Finder tool to reflect accurate information about premiums, deductibles, and cost-sharing and requested that CMS prioritize updates to the Medicare Plan Finder and other notices to patients. Some commenters also noted that a January 1, 2020, effective date could cause significant disruptions in coverage or benefits and confusion for beneficiaries. This confusion, a commenter argued, may make it difficult for patients to understand and utilize their prescription drug benefits or could cause patients to search for new plans.

Other commenters noted that formularies for Medicare Part D plans must be complete by early May for the June bid submission, and that given the timing of the rule, an effective date of January 1, 2020, would make it extremely challenging to meet the bid requirements.

Response: Comments related to CMS's administration of the Part D program are outside the scope of this rulemaking. We are finalizing the changes to § 1001.952(h)(5) of the discount safe harbor to be effective January 1, 2022.

Comment: A commenter stated that a 2020 effective date would harm beneficiaries enrolled in MA–PD plans, especially if the rule is finalized after bids are submitted on June 3, 2019. The commenter suggested that, in order to mitigate losses from the change in rebates after premiums and bids have been set, MA–PD plans would have to reduce costs in other areas. The commenter stated that it would take years for plan sponsors to recover from these losses, threatening improvements in quality performance, Star measures, and the benefits of care coordination over an extended period.

Response: We appreciate commenters' feedback and note that we are now finalizing an effective date of January 1, 2022, for the amendments to § 1001.952(h)(5) of the discount safe harbor, which should avoid the disruptions and potential harm described by the commenters. Under the final rule, parties are not being asked to change their practices after bids and premiums have been set for the 2022 plan year.

Comment: A health plan commenter indicated that if OIG requires point-of-sale reductions in price, health plans will have to determine benefit configuration, and there will likely be several formulary configuration changes. A PBM commenter indicated that significant system development and testing would be required, including system modifications to apply formulary exceptions, and that PBMs would need to make dramatic formulary changes just prior to the 2020 plan year which, according to the commenter, may result in member disruption and dissatisfaction.

Response: We thank the commenter for sharing this concern and note that the effective date of the modifications to § 1001.952(h)(5) of the discount safe harbor will be January 1, 2022, providing additional time for stakeholders to address these and other potential implementation concerns.

Comment: A commenter noted that employers, including state employers, would not receive any benefits from the changes we proposed, and they would face additional costs if premiums increase. The commenter indicated that this is particularly unfair for public employers such as state governments that rely upon taxpayers to help fund public employee and retiree health benefit coverage. The commenter requested either an exemption from the proposed rule for governmental employee benefit plans, which are not subject to ERISA, or if an exemption is not granted, then a delay in the effective date specifically for non-ERISA plans to January 1, 2021.

Response: We thank the commenter for sharing this concern and note that the finalized effective date of January 1, 2022 for modifications to § 1001.952(h)(5) of the discount safe harbor should provide sufficient time to address these and other implementation concerns. We do, however, disagree with the commenter's suggestion to remove employee benefit plans from the final rule. The Department believes that the transition from rebates to point-of-sale reductions in price can happen based on existing infrastructure, and these plans will benefit from the lower list prices that may result from the final rule.

iii. Expand to Other Federal Health Care Programs

The Proposed Rule stated that the changes proposed were intended to exclude from discount safe harbor protection rebates from manufacturers to plan sponsors under Medicare Part D and Medicaid MCOs, whether negotiated by the plan or by a PBM or paid through a PBM to the plan or Medicaid MCO. The Proposed Rule clarified that the Department intended for the discount safe harbor to continue to protect discounts on prescription pharmaceutical products offered to other entities, including, but not limited to, wholesalers, hospitals, physicians, pharmacies, and third-party payers in other Federal health care programs. Commenters provided feedback about whether payments for prescription pharmaceuticals paid for by other Federal health care programs should be excluded from the safe harbor.

Comment: Some commenters noted that if Medicaid MCOs, but not Medicaid fee-for-service, are excluded from the existing safe harbor, the Department would be treating these programs differently and would potentially put Medicaid MCOs at a disadvantage. Most of these commenters recommended removing Medicaid MCOs from the proposed exclusion of the existing safe harbor. A few commenters were indifferent on whether or not Medicaid MCOs were excluded from the existing safe harbor or not, but they recommended that Medicaid MCOs and Medicaid fee for service be treated the same way.

Response: As discussed above, the final rule removes Medicaid MCOs from the exclusion of the existing safe harbor, which addresses these comments.

Comment: Several commenters agreed with our proposal that the amendment to the discount safe harbor should not apply to prescription pharmaceutical products payable under Medicare Part B. These commenters noted that Part B drugs are reimbursed under Medicare fee-for-service based on the average sales price (ASP), which already accounts for rebates and other price concessions. There were no comments recommending that payment for drugs billed by Part B fee-for-service providers be excluded from existing safe harbors.

Response: We are finalizing our proposal that the amendment to the discount safe harbor should not apply to prescription pharmaceutical products payable under Medicare Part B for the reason noted by the commenters.

Comment: A commenter recommended that OIG remove the safe harbor protection for rebates paid to Medicare Advantage plans with respect to their coverage of Part B drugs because an increasing number of Medicare beneficiaries are covered by Medicare Advantage plans, and these plans can use rebates, similar to Part D plans, to manage Part B drug costs. Additionally, according to the commenter, many of the most expensive, high-spend drugs are physician-administered biologics.

Another commenter noted that Medicare Advantage generally pays for Part B drugs as part of the medical benefit, and because of underlying Medicare rules, these drugs are generally not subject to the same type of formulary placement negotiations and patient cost-sharing patterns as in the Part D prescription drug benefit.

Finally, additional commenters stated that there are differing levels of cost-sharing in Medicare Advantage for Part B drugs and that it is likely not necessary to extend the proposed changes to Part B drugs. However, they recommend that OIG evaluate how Medicare Advantage plans are reflecting potential savings on Part B covered medicines in beneficiary cost-sharing.

Response: We thank the commenters for their recommendations. We are finalizing our proposal that the amendment to the discount safe harbor should not apply to prescription pharmaceutical products payable under Medicare Part B for the reasons noted by the commenters.

Comment: One commenter noted that the Department of Veterans Affairs (VA) could use this rule as an opportunity to assert a self-serving interpretation of the definition of the non-Federal average manufacturer price (non-FAMP). The commenter would like OIG to clarify that any transactions governed by the final rule would constitute ''Federal'' prices and should thus be excluded from the determination of a ''non-Federal'' average manufacture price. For the VA to determine that these are not ''Federal'' sales would be inconsistent with the Veterans Health Care Act.

Response: In the Proposed Rule, we noted that the VA, Department of Defense, Coast Guard, and the Public Health Service (including the Indian Health Service) are eligible to purchase drugs under the Federal Ceiling Price (FCP) Program. The FCP is calculated as a percentage of non-FAMP. Eligible programs can purchase drugs using the lesser of the Federal Supply Schedule (FSS) Price and FCP. Although it is difficult to determine the operation of the Proposed Rule on FSS users or entities entitled to FCPs, if the overall effect of lowering list pricing is achieved and that results in lower prices to commercial customers (and wholesalers) or pricing components of non-FAMP, it is possible the VA may realize some additional savings. This final rule does not change the requirements of the FCP and whether Federal programs, such as the VA, count transactions governed by this final rule as ''Federal'' prices is outside the scope of this rulemaking.

iv. Scope of Amendment

Comment: A commenter asserted that, as written, the proposed amendment to the discount safe harbor would apply not only to rebates on prescription drugs dispensed by a community pharmacy but also to physician-administered drugs covered in the Medicaid program. According to the commenter, Medicaid MCOs would no longer be able to collect rebates on these drugs as there is no avenue to pass the rebate on at the point of sale. The commenter explained that the change could lead to ''white-bagging'' (*i.e.,* where providers purchase a pharmaceutical product from a specialty pharmacy in order to receive a discount), which the commenter believes raises a number of operational and program-integrity concerns. The commenter also noted this change could create an access issue for members in rural locations.

Response: As discussed in detail elsewhere in this final rule, we are not finalizing the changes to the discount safe harbor with respect to Medicaid MCOs, which we believe addresses the commenter's concerns.

Comment: A number of commenters requested clarification regarding what specific types of rebates and discounts would still be protected under the discount safe harbor. According to these commenters, the Proposed Rule, as drafted, could be read to remove protection for common purchase discounts that manufacturers provide to wholesalers or pharmacies, if those discounted products are later dispensed by the pharmacy to a Part D or Medicaid MCO enrollee. A commenter requested that the final rule clarify that discounts to wholesalers are protected.

Another commenter requested clarification that pharmacy purchase discounts received by any mail-order pharmacy, specialty pharmacy, or retail pharmacy owned by a plan sponsor under Part D, Medicaid MCO, or a PBM operating on behalf of either, regardless of whether these discounts are dependent on formulary placement, are protected, as the proposed language could be read to exclude such discounts.

Response: We note initially that we are not finalizing our proposal to amend the discount safe harbor to exclude protection for reductions in price to Medicaid MCOs, which we believe partially addresses the commenter's concerns with respect to pharmaceutical products dispensed to Medicaid enrollees as well as the comments regarding pharmacies owned by Medicaid MCOs or their PBMs.

We confirm in this final rule our statement in the Proposed Rule that we ''intend[] for the discount safe harbor to continue to protect discounts on prescription pharmaceutical products offered to other entities, including, but not limited to, wholesalers, hospitals, physicians, pharmacies, and third-party payors in other Federal health care programs.'' [41] Further, we clarify that protection is available for these discounts (including rebates) even if the prescription pharmaceutical product is ultimately dispensed to a Part D enrollee (provided all safe harbor conditions are met). We have revised the language in § 1001.952(h)(5)(viii) to state that the term excludes ''[a] reduction in price or other remuneration in connection with the sale or purchase of a prescription pharmaceutical product from a manufacturer to a plan sponsor under Medicare Part D either directly to the plan sponsor under Medicare Part D, or indirectly through a pharmacy benefit manager acting under contract with a plan sponsor under Medicare Part D, unless it is a price reduction or rebate that is required by law.'' We believe this revised language addresses commenters' concerns and reflects our intent as articulated in the Proposed Rule.

Discounts offered or given to pharmacies owned by a plan sponsor under Part D or a PBM generally could qualify under the discount safe harbor if all conditions of the safe harbor are met. However, remuneration that is labeled as a ''discount'' but that is given to pharmacies or other entities owned by or affiliated with a plan sponsor under Part D or a PBM to reward the plan or the PBM for referrals of other Federal health care program business would be suspect. These arrangements would appear to have many of the same features as problematic swapping arrangements discussed elsewhere in this rule.

Comment: A commenter requested that OIG clarify in the final rule that all rebates are still protected under the discount safe harbor, except for formulary rebates paid by pharmaceutical manufacturers to health plans or PBMs. Similarly, a commenter requested that OIG confirm that the Proposed Rule does not affect discounts offered to other entities (*e.g.,* pharmacies).

Response: As we stated in the Proposed Rule and confirm in this final rule, ''[t]he Department intends for the discount safe harbor to continue to protect discounts on prescription pharmaceutical products offered to other entities, including, but not limited to, wholesalers, hospitals, physicians, pharmacies, and third-party payors in other Federal health care programs.'' [42] As discussed above, we are finalizing our proposed revisions to the discount safe harbor with a slight modification to ensure that the regulatory text is consistent with our statement in the Proposed Rule. Specifically, the revisions to the definition of ''discount'' apply only to reductions in price or other remuneration in connection with the sale or purpose of a prescription pharmaceutical product from a manufacturer to a plan sponsor under Medicare Part D or through a PBM acting under contract with the plan sponsor under Medicare Part D, unless it is a price reduction or rebate that is required by law. In other words, the revisions apply only to reductions in price offered from manufacturers to plan sponsors under Medicare Part D or a PBM acting under contract with such entities. For reasons explained above, the revisions to the discount safe harbor in the final rule do not apply to discounts offered to Medicaid MCOs.

Comment: A commenter recommended that OIG clarify that manufacturer rebates and discounts may remain protected under other safe harbors. The language of any proposed point-of-sale reduction in price safe harbor and related amendments should specifically provide that the subject remuneration may still receive protection under other available safe harbors.

Response: If a party enters into an arrangement that fits squarely within a safe harbor—any safe harbor—the party would be protected from liability under the anti-kickback statute.

v. Impact on Volume or Prompt Pay Discounts

Comment: A commenter expressed concern that the finalizing changes that we proposed to the discount safe harbor would enable other entities to engage in the exact same practice that the Department is trying to eliminate with PBMs; specifically, it will allow other entities in the supply chain to be compensated for the provision of services based on volume and a percentage of list prices.

Response: We noted in the Proposed Rule that we intended for the discount safe harbor to continue to protect discounts on prescription pharmaceutical products offered to other entities, including, but not limited to, wholesalers, hospitals, physicians, pharmacies, and third-party payors. However, we reiterate that the discount safe harbor protects only the reduction in the amount a buyer is charged for an item or service; it does not protect payments for services.

vi. Impact on Beneficiary Access

Comment: A number of commenters were supportive of the Proposed Rule. These commenters contended that the Proposed Rule would reduce out-of-pocket costs for beneficiaries; safeguard and increase access to necessary and affordable treatments and therapies and increase patient adherence to those treatments and therapies; and lower list prices for drugs or, at least, address the increasing cost of drugs.

Other commenters contended that the Proposed Rule addresses the perverse incentives for manufacturers to provide rebates, which affects affordability of drugs; curbs PBMs' practices of preferring high-cost drugs; shifts practices so that drug choices are based

[41] 84 FR 2348.

[42] 84 FR 2348.

on what is best for patients; and addresses PBMs' role in reducing the availability of drugs, patients' access to drugs, and patients' freedom to choose certain drugs.

Response: We thank the commenters for their support. The commenters describe goals this rule is intended to achieve.

Comment: A commenter requested that the Department ensure that some form of rebates remain protected to maintain prescription drug choice and savings for their enrollees.

Response: The new safe harbor for point-of-sale reductions in price offers a clear pathway for manufacturers to offer price reductions to Part D plan sponsors and Medicaid MCOs. In addition, reductions in price to Medicaid MCOs remain eligible for safe harbor protection under the discount safe harbor.

Comment: Several commenters were concerned that finalizing the changes in the Proposed Rule could result in higher premiums. Some of these commenters were specifically concerned that an increase in premiums will decrease or deter Part D enrollment, delay enrollment by beneficiaries and, therefore, cause them to incur penalties for late enrollment, or cause beneficiaries to dis-enroll or drop Part D coverage altogether. Other commenters were concerned that uncertainty in the Part D program caused by the Proposed Rule, including risks of an older and sicker population and higher-than-projected premiums, may cause smaller plans to drop out of participation in Part D because they may be unable to handle the increased risk, which could, in turn, reduce beneficiary choice of plans. Some commenters suggested that an increase in premiums may result in a decrease in beneficiary access to medically necessary medicines. Commenters stated that an increase in premiums could result in changes to beneficiaries', including dual-eligible beneficiaries', supplemental benefits, contending that an increase in those costs may deter enrollment. A commenter suggested that an increase in costs, generally, would reduce beneficiary access to plans and plan choices.

Response: We understand commenters' concerns. The Department notes that premiums in the Part D program have historically increased at a slower rate than inflation, while the list prices of drugs and government expenditures have increased more rapidly. Additional information about impacts of this rule in areas predicted by the commenters can be found in the Regulatory Impact Statement. The Department does not believe that the risk of increased premiums or the other uncertainties raised by the commenter will lead to plans dropping out of the Part D program because Part D plans have methods for preventing premium increases, such as tougher negotiation or lower overhead, and that plans will be able to share in the savings under this final rule.

Comment: Several commenters raised concerns that, without adequate or timely updates to the Medicare Plan Finder, beneficiaries may not be able to find appropriate plans and could, potentially, dis-enroll from Part D. The same commenters, as well as another commenter, are also concerned that beneficiaries may be confused about their cost-sharing obligations and may, incorrectly and based on inaccurate or unreliable information, assume that they should benefit from lower cost-sharing amounts. Commenters requested that the Department create mechanisms for beneficiaries to be provided or have access to information about cost sharing, discounts received at the point of sale, and the amounts reimbursed to pharmacies dispensing the medicine. A commenter suggested that one way to mitigate their concerns is to, for example, update the Medicare Plan Finder or to ensure that pharmacies and prescribers have sufficient information to provide beneficiaries about their cost-sharing obligations at the point of sale. Other commenters recommended the use of electronic tools, such as Real Time Benefit Tools, that would allow prescribers to access specific information on patients' formularies and out-of-pocket costs for prescription drugs.

Response: We agree with commenters that it is important for beneficiaries to have access to information needed to make informed health care decisions. The Department believes the reduced price at the point of sale will create the appropriate amount of transparency, and that separately providing the amount of the reduction in price is not necessary for transparency to be achieved. While the creation of mechanisms for beneficiaries and prescribers that provide information about cost sharing, out-of-pocket costs, and discounts received at the point of sale would be programmatic tools that are outside the scope of this rulemaking, we point commenters to a May 2019 final rule published by CMS entitled ''Modernizing Part D and Medicare Advantage to Lower Drug Prices and Reduce Out-of-Pocket Expenses'' under which CMS requires Part D plans by 2021 to adopt Real Time Benefit Tools that provide complete, accurate, timely, clinically appropriate and patient-specific real-time formulary and benefit information to prescribers that they can discuss with their patients. CMS has also noted that Medicare beneficiaries or their representatives can search an online interactive drug plan comparison tool, the Medicare Plan Finder, to find formulary and cost-sharing information for Part D plans. Additionally, CMS has informed us that through their eMedicare initiative, which is a multi-year initiative intended to empower patients and update Medicare resources to meet beneficiaries' expectation of a more personalized customer experience, the Medicare Plan Finder will continue to be improved over time to enhance access to information.[43]

CMS has also advised us that it will ensure that beneficiaries receive adequate and timely information about cost-sharing obligations under Medicare plans, and that the Medicare Plan Finder will reflect any necessary updates before the final rule's implementation.

Comment: A commenter is specifically concerned that the increased transparency that results from a final rule may pressure PBMs to reduce overall costs in ways that may disadvantage beneficiary access. The commenter is concerned that health plans and PBMs may narrow prescription benefits for, *e.g.,* vulnerable populations, or discourage high-cost patients from enrolling altogether. Other commenters also raised concerns relating to narrow prescription benefit design and increased cost sharing, indicating that if the amended and new safe harbors are finalized, plans and PBMs will have increased pressure to reduce costs, which may result in some plans and PBMs significantly narrowing formularies, using utilization management tools to a greater extent, and/or increasing cost-sharing on brand-name drug tiers in order to prevent enrollment by beneficiaries who have costly conditions or take certain medications. Other commenters asserted that mandatory point-of-sale reductions in price could lead to adverse risk selection, where beneficiaries with a specific condition select the one plan with the lowest upfront discounted price for their specialty drug, which the commenters asserted could result in significant formulary and coverage changes.

[43] Centers for Medicare & Medicaid Services (CMS), CMS announces new streamlined user experience for Medicare beneficiaries, (Oct. 1, 2018), *available at https://www.cms.gov/newsroom/press-releases/cms-announces-new-streamlined-user-experience-medicare-beneficiaries-0.*

Expressing similar concerns, another commenter stated that CMS should enhance its review of Part D benefit design to ensure the patient protections of Part D are not undermined and that plans are not restricting access to medicines in a manner that would violate the non-discrimination protections in Part D. Another commenter suggested that having safeguards in place to protect patients who are currently stable on a medication will be important and requested that OIG or the Department provide certain additional safeguards.

Response: We appreciate and share commenters' concerns that beneficiaries be protected from discriminatory practices, including improper restrictions on access to drugs. As stated elsewhere in this rule, CMS is responsible for administering the Part D program. We are informed by CMS that it has a robust formulary review and approval process, which entails in-depth checks to ensure sufficient inclusion of all necessary Part D drug categories or classes for Medicare beneficiaries, preventing discriminatory benefit designs. As part of this review, CMS assesses the adequacy of a Part D sponsor's formulary drug categories and classes along with the plan's formulary drug list to ensure that the formulary offers an appropriate range of Part D drugs.[44] This formulary review process also includes a review of utilization management tools to ensure plans do not restrict beneficiary access to necessary medication. The Secretary cannot approve a prescription drug plan if the plan's design and its benefits, including any formulary and tiered formulary structure, are likely to substantially discourage enrollment by certain Part D eligible individuals under the plan.[45]

CMS also employs risk adjustment where Medicare plan sponsors receive higher payments for beneficiaries who are higher risk (as determined by health status). Risk adjustment is intended to minimize the incentive for Medicare Part D plan sponsors to engage in practices that would result in the enrollment and retention of beneficiaries with expected cost below the average, although individual plan experience may differ based on the plan's mix of beneficiaries relative to the national average and the specific costs that they face relative to the national average. CMS believes that the formulary review and approval process, risk adjustment, and anti-discrimination rules each serve to mitigate the incentive for health plans and PBMs to narrow prescription benefits for vulnerable populations and to discourage enrollment among high cost patients.

Comment: A commenter stated that the changes included in the Proposed Rule could prevent Part D plan sponsors and PBMs from penalizing manufacturers for lowering list prices by removing drugs from formularies or imposing significant utilization management requirements.

Response: We agree with the commenter that it is inappropriate to penalize lower prices; a key goal of this rulemaking is to encourage lower drug prices.

Comment: Several commenters recommended that, before implementing the final rule, the Department or OIG conduct certain demonstrations, pilot programs, focus groups, or other assessments or evaluations to determine whether and how beneficiaries will benefit from, or be adversely affected by, the proposed changes.

Response: While we appreciate the commenters' suggestions, we are not conducting any particular pilot programs or assessments prior to finalizing the rule. We analyzed anticipated impacts to beneficiaries in the regulatory impact analysis and refer readers to that section for further information.

vii. Additional Safeguards

Comment: Several commenters recommended OIG, CMS, or HHS monitor, or implement mechanisms to monitor, the effect of the final rule on beneficiaries, PBMs, drug manufacturers, plans, plan sponsors, dispensing pharmacies, and other stakeholders in the drug supply chain. Some of these commenters recommended that data be gathered on the effect of the final rule, specifically related to drug prices, beneficiaries' costs, utilization management, access to drugs, chargeback amounts, the contracts PBMs enter into with drug manufacturers and plans and the terms of those contracts, and formulary changes. A commenter specifically recommended a mechanism for stakeholders in the drug supply chain to report non-compliance with any of the proposed safe harbors. Another commenter specifically requested that the data gathered by OIG, CMS, or HHS through its monitoring mechanisms be publicly available. Finally, a commenter recommended that OIG require pharmaceutical manufacturers to confidentially disclose their drug rebates before the Proposed Rule's changes are finalized so policymakers can compare net costs for drugs before and after the proposed changes go into effect.

Response: The Department recognizes that, due to the complexity of the drug supply chain, the final rule has the potential to affect stakeholders in ways and to an extent that may be difficult to anticipate. The Department declines the commenter's request to require manufacturers to disclose rebate amounts prior to issuance of the final rule. The Department intends to monitor the effects of this rule. As an independent, objective oversight entity, OIG regularly reviews the Part D and other HHS program and has identified ensuring that HHS prescription drug programs work as intended as a priority area. OIG's reports are routinely made public and available on our website at *https://oig.hhs.gov/reports-and-publications/index.asp.* With respect to a mechanism for reporting non-compliance with the requirements of a safe harbor, the OIG website provides detailed instructions for reporting violations of law, including violations of the anti-kickback statute, at *https://oig.hhs.gov/fraud/report-fraud/.* We note, however, that an individual or entity's failure to comply with the requirements of a safe harbor does not per se constitute a violation of the anti-kickback statute. The conduct in question must otherwise meet the elements of a violation of that law.

Comment: Some commenters requested OIG include safeguards in the amendment to the discount safe harbor. For example, a commenter requested OIG ensure that the only price concessions available to health plans, PBMs, or the affiliates in their vertically integrated business in Part D are those point-of-sale reductions in price under the new safe harbor for point-of-sale reductions in price.

Response: Arrangements are protected from liability under the anti-kickback statute if they meet all the requirements of a safe harbor. Parties are free to enter any arrangements that do not violate the anti-kickback statute or other federal or state law.

viii. Alternative Recommendations

Comment: A commenter recommended that, in lieu of removing rebates to Part D plans and Medicaid MCOs from the discount safe harbor, OIG should modify the existing safe harbor by allowing rebates only when a minimum percentage, for example 50 percent, is reflected at the pharmacy point-of-sale, while the remaining savings continue to be spread across

[44] 79 FR 1918, 1939 (Jan. 10, 2014).

[45] Social Security Act section 1860D–11(e)(2)(D)(1).

monthly premiums for all consumers served by the health plan.

Response: We thank the commenter for this proposal, but we decline to adopt this revision. We did not propose this approach, we do not believe it would be practical to implement, and we do not believe it would achieve the goals of this rulemaking.

Comment: A commenter recommended that OIG expand the proposed amendment to the discount safe harbor to permit manufacturers to offer copayment and coinsurance assistance to Part D beneficiaries for single-source drugs where the patient has no other choice and thus cannot be induced to select one drug over another, while still allowing plan sponsors to decide whether to cover drugs under existing rules and effectively manage utilization for appropriate patient care and while allowing patients who need innovative therapies and cannot afford the copayment due to the circumstances of Part D's benefit design to be able to access manufacturer copayment support. By contrast, a commenter recommended that OIG narrow the existing discount safe harbor to prohibit rebate arrangements as a percentage of list price while still allowing for price concessions in the form of rebates that are beneficial for the healthcare system, including those that would yield a fixed net price for a drug over time and those that reimburse plans when a drug does not work as promised.

Response: We decline to adopt the changes proposed by commenters. First, we did not propose or solicit comments on including any protection for cost-sharing supplements from manufacturers to beneficiaries, and we have longstanding concerns with such assistance. With respect to the second suggestion, we believe that some value-based arrangements involving prescription pharmaceutical products might qualify for protection under the new point-of-sale safe harbor but also could qualify under other safe harbors (*e.g.,* the personal services and management contracts safe harbor, warranties safe harbor). We decline to continue protection under the discount safe harbor for rebate arrangements between pharmaceutical manufacturers and Part D plans (directly or through their PBMs) that might yield a fixed price over time. It is unclear how we could separately protect such rebates, and beneficiaries would not be able to share in the benefit of the lower cost. We note other rebates may be permitted under the discount safe harbor, and certain price concessions are permitted under the new point-of-sale reduction in price safe harbor at 42 CFR 1001.952(cc).

Comment: Some commenters recommended that CMS monitor formulary changes by plan sponsors, and one of those commenters recommended specifically monitoring for the potential emergence of ''discount walls.'' A commenter recommended that CMS monitor medical exceptions (which, according to the commenter, are ways for beneficiaries to access new innovator products that are blocked from formulary access (*i.e.,* non-contracted) by rebate walls) to ensure plan sponsors do not tighten controls for or restrict access to these medical exceptions as a way to manage costs in the absence of rebates. The same commenter recommended that CMS ensure that the final rule does not affect ''non-medical switching'' (which, according to the commenter, involves switching between branded products and across therapeutic classes in a medically stable patient solely for cost savings and potentially without the patient's or provider's consent) so that formulary changes made by plan sponsors do not affect patients undergoing therapy.

Response: We have coordinated with CMS in promulgating this rule. As described above, CMS has informed us that it has and will use a robust formulary review and approval process.

C. Safe Harbor for Certain Price Reductions on Prescription Pharmaceutical Products

Comment: We received a comment that expressed concern about the new safe harbor for point-of-sale reductions in price taking effect 60 days after the rule is finalized. The commenter stated that 60 days is not enough to adjust bids and amend contracts for compliance.

Response: The new safe harbor for point-of-sale reductions in price does not require any party to take any action within a particular timeframe. The safe harbor may be used starting 60 days after the final rule is published, but it is just another option for protecting discounts.

i. Point-of-Sale Chargebacks

Comment: Several commenters requested that OIG revise the definition of ''chargeback'' proposed in the Proposed Rule. A commenter requested that OIG amend the definition to prohibit entities that control Part D or Medicaid MCO formularies from processing chargebacks. Another commenter recommended that different chargeback amounts should not be negotiated for chain pharmacies, community pharmacies, and specialty pharmacies.

With respect to the term ''chargeback,'' a commenter suggested defining it as ''a payment made directly or indirectly to the dispensing pharmacy that is equal to the price reduction negotiated between the manufacturer and the plan or PBM.'' A commenter representing pharmaceutical manufacturers recommended that OIG specify that the total payment to the dispensing pharmacy be equal to: (1) The payment to the pharmacy from the plan or PBM; (2) the point-of-sale chargeback due from the manufacturer; and (3) the beneficiary cost-sharing amount. The commenter recommending these changes expressed concern that OIG's proposed definition could result in gaming by other entities that would result in pharmacies dispensing medicines at a financial loss. Several commenters requested that we change the term to ''point-of-sale chargeback'' to avoid confusion with how that term is used elsewhere in the distribution channel.

While a commenter asked for the definition of ''chargeback'' to include a payment agreed upon by the pharmacy, and not just Part D issuers and/or PBMs, another commenter expressed support for chargeback to be defined as proposed in the rule but requested clarification on whether a chargeback is to be based on the pharmacy actual acquisition cost or on Wholesale Acquisition Cost (WAC). Another commenter proposed amending the definition of ''chargeback'' to confirm that chargebacks are separate and apart from the agreed upon reimbursement to the pharmacy.

Response: We appreciate the range of suggestions received in response to our request for comment on the proposed definition. As we noted in the Proposed Rule, ''the use of chargebacks [makes] pharmacies whole for the difference between acquisition cost, plan payment, and beneficiary out-of-pocket payment . . . .'' [46] Further, we are mindful of concerns about pharmacies dispensing prescription pharmaceutical products at a loss. We agree with the commenter above who recommended clarifying that a chargeback is equal to the amount of the discount negotiated by the Plan Sponsor under Part D, the Medicaid MCO, or a PBM acting under contract with either, and the manufacturer of the prescription pharmaceutical product. We are revising the definition to eliminate any confusion on this point. The revised definition is consistent with our goal expressed in the Proposed Rule

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to protect point-of-sale price reduction arrangements in which consumers share the full benefit. Any point-of-sale chargeback, as defined in this rule, is part of the total reimbursement to the pharmacy for the prescription pharmaceutical product.

With respect to the request that OIG confirm that different types of pharmacies must receive the same chargeback amount, as described above, the chargeback amount due to the pharmacy must be equal to the reduction in price negotiated by a plan (or PBM operating on its behalf) and the manufacturer of the prescription pharmaceutical product. If a manufacturer and a plan (or a PBM acting on its behalf) have negotiated a point-of-sale reduction in price for a prescription pharmaceutical product that complies with the safe harbor, we would expect the chargeback to the pharmacy to be the same, regardless of the type of pharmacy.

Finally, we agree with those commenters who recommended that we revise the term from ''chargeback'' to ''point-of-sale chargeback'' to differentiate this process from other transactions in the pharmaceutical supply chain with the same name. We have revised the term in the final regulations at § 1001.952(cc).

Comment: A number of commenters raised concerns about the need for CMS to promulgate or revise regulations and to issue technical guidance applicable to the chargeback administration process if the new rule is finalized. Several of these commenters requested that OIG consult with CMS because of its oversight and administration of the Part D program. For example, a commenter requested that CMS issue guidance regarding how to incorporate chargebacks into the Medicare Plan Finder files. Another commenter provided an extensive list of Part D regulations that it believes would need to be revised and topics for sub-regulatory guidance that it believes would need to be published in order to implement the chargeback construct.

Several commenters also posited that significant involvement by CMS would be required because there is currently no regulatory structure or oversight mechanism in Part D for these chargebacks, for example, there is no structure for invoicing, reconciliation, or auditing and recovery functions. As one example, a commenter expressed concern that there are no requirements for pharmacies to disclose chargeback amounts to CMS and there is no requirement for pharmacies to provide evidence that the point-of-sale reduction in price benefited the beneficiary. A commenter recommended that there be regulatory oversight of the chargeback process by relevant agencies. Furthermore, according to commenters, under Part D there is no existing regulatory authority over or oversight of wholesalers or other entities that could be facilitating the chargeback administration process.

In addition, several commenters requested guidance from CMS on error adjudication or dispute resolution processes. A commenter indicated the error adjudication process would be used in those instances where a manufacturer erroneously remits a chargeback to a pharmacy or where there are errors in the amount that a beneficiary pays. Other commenters suggested that pharmacies should not be required to reverse and rebill original claims if a price reduction is applied in error because it could result in a beneficiary's cost-sharing obligation increasing, and a commenter requested guidance from the Department explaining that plan sponsors and PBMs are not required to collect additional cost-sharing from beneficiaries under these circumstances. A number of commenters raised concerns or questions about the impact that changes included in the Proposed Rule would have on pharmacies. For example, a commenter requested guidance on dealing with non-collectible rebates (*e.g.,* if a beneficiary is given a discount at the point of sale, which the manufacturer later does not honor, must the pharmacy attempt to collect the disallowed amount from the beneficiary?).

Similarly, a commenter requested clarification on the role of pharmacies in dispute resolutions involving point-of-sale reductions in price and asked that there not be any retroactive adjustments for chargebacks paid to pharmacies. Another commenter requested guidance on administering chargebacks to pharmacies where the value of the chargeback exceeds the ingredient cost.

Response: This rule provides flexibility for parties seeking safe harbor protection to structure back-end, point-of-sale chargeback processes that result in fully passed-through point-of-sale discounts. Moreover, were we to include detailed technical requirements, we would make it more difficult for parties to use and comply with the safe harbor for its intended purposes. While we have consulted with CMS in this rulemaking, any requests for CMS to issue guidance related to the chargeback administration process (*e.g.,* guidance related to dispute resolution processes) and questions about CMS authority to do so are outside the scope of this rulemaking, as are CMS requirements related to PDE reporting and correcting known discrepancies in cost-sharing charged to beneficiaries in the event of a mistake or error in the calculation of the point-of-sale price.

With respect to the comments regarding the circumstances under which a pharmacy extends a price reduction to a beneficiary that is not honored by the manufacturer, we note that if an entity made a practice of undercharging beneficiaries for cost sharing, under the guise of passing through manufacturer reductions in price, with knowledge that the reductions in price would not be paid by manufacturers (thus providing remuneration to the beneficiaries), and did so with the intent to induce beneficiaries to purchase items paid for in part by a Federal health care program, the entity could be subject to liability under the anti-kickback statute. Moreover, while occasional errors in calculations (*e.g.,* a miscalculation of a beneficiary's cost-sharing obligation) would not implicate the anti-kickback statute, a pattern of errors could eliminate the protection of the safe harbor (*e.g.,* if a manufacturer regularly miscalculates the full value of the reduction in price owed to the pharmacy that is required to be provided for safe harbor protection) and would be subject to scrutiny for intent.

We also clarify that there should be no situation in which the price at the pharmacy counter is less than zero. A situation in which a beneficiary or a Part D plan sponsor theoretically would be owed money would not be a reduction in price; that would be a payment to a referral source and would not be protected by a safe harbor.

Comment: A commenter requested additional safeguards related to chargebacks for small business community pharmacies, including but not limited to the right to: Appeal chargeback decisions, inquire about missing chargeback payments, utilize audit processes, and engage in dispute resolution. A commenter recommended that, if other parties violate the requirements under the Proposed Rule and the anti-kickback statute, then community pharmacies should be held harmless from such conduct. This commenter stated that independent community pharmacies should have the opportunity to do business with any trading partner in the supply, billing, or reconciliation chain.

Response: Nothing in this rule restricts the ability of pharmacies to do business with other parties in the supply, billing, or reconciliation chain.

While we appreciate the commenter's concerns, we decline to provide additional safeguards in the safe harbor that are specific to community pharmacies; the articulated concerns are not unique to any particular type of pharmacy, and we believe the safe harbor contains the right combination of conditions to protect programs and patients from abusive kickback schemes. We note that many of the commenter's requests, *e.g.,* the right to appeal chargeback decisions, are outside the scope of this rulemaking, which addresses the conditions necessary for protection under the anti-kickback statute. Nothing in this rule limits pharmacies' ability to inquire about missing chargeback payments or to enter into contracts that provide for appealing chargeback decisions, utilizing audit processes, and engaging in dispute resolution. We further note that community pharmacies would not necessarily be liable under the anti-kickback statute if other parties violate the anti-kickback statute. Whether a party is subject to liability under the anti-kickback statute depends upon the actions and intent of that party and not solely upon the actions and intent of other parties to an arrangement.

Comment: Several commenters requested that the Department facilitate the exchange of information for purposes of implementing the chargeback process. For example, a commenter requested that CMS allow for the electronic sharing of data so that pharmacies will know patients' cost-sharing obligations and create a mechanism for pharmacies to receive point-of-sale chargebacks. Another commenter asked that OIG require as a safe harbor condition that plans, PBMs, and other entities involved in the chargeback administration process exchange information and cooperate as necessary to ensure transparency.

Several commenters raised concerns or questions related to the claims-level data needed for chargeback administration. For instance, some commenters asked that the Department develop processes and claims-level data elements to allow manufacturers to administer chargebacks to pharmacies. A commenter requested that HHS implement updates to existing data and communications file formats to assist with the chargeback verification and correction process.

Other commenters commented on the need for pharmacies to have visibility into various claims-level data. For example, a commenter explained that pharmacies should have full visibility into the total and final reimbursement due the pharmacy and any final amounts due as chargebacks so that they can predict their cash flow. A commenter indicated that while other parties in the drug supply chain may argue that these chargeback amounts are proprietary, access to this information is vital to a pharmacy's ability to operationalize its business and support the Proposed Rule. Another commenter noted that transparent, timely, and plan-validated communication of claims-level chargeback amounts due to the pharmacy will enable wholesalers to effectively adjudicate the chargeback payment to pharmacies. A commenter recommended that the chargeback administrator be required to furnish electronic remittance advices with all chargeback amounts detailed at the claim level so as to allow pharmacies to substantiate the total and final reimbursement. Other commenters had various requests for pharmacies to have full visibility into plan-adjudicated claims, for example, to allow the pharmacies to extract chargeback data or to track price reductions made by an entity who will be paying the pharmacies (if the entity making payment is not a plan sponsor under Part D or a PBM).

Response: We do not intend for this rule to stipulate the data that must be shared among the parties administering the point-of-sale chargebacks. As we stated above, this rule provides flexibility for the industry to develop and implement arrangements for the administration of chargebacks as necessary to meet the conditions of the safe harbor.

While we encourage such flexibility, we note that point-of-sale chargebacks are defined as a payment made directly or indirectly by a manufacturer to a dispensing pharmacy. To the extent the chargeback process is used, we expect the manufacturer and the plan sponsor under Part D, Medicaid MCO, or PBM to have a writing that sets forth the reduction in price negotiated between the parties, which would be equal to the chargeback due to the pharmacy.

Similarly, we would expect a manufacturer to have sufficient documentation to prove that the chargeback actually was administered to the pharmacy and that the amount of the chargeback was equal to the point-of-sale reduction in price agreed upon in writing between the plan sponsor under Part D, the Medicaid MCO, or a PBM acting under contract with either, and the manufacturer. While we are not specifying the form of this documentation, it would be prudent for manufacturers to maintain appropriate documentation to show that the condition in (cc)(1)(ii) has been met, if applicable.

We decline to adopt the commenter's request to create a condition in the safe harbor related to the exchange of information and cooperation among the parties. While increased transparency is an important goal of this final rule, we believe such a condition in the safe harbor would be vague and would result in significant stakeholder confusion.

Comment: Several commenters noted that NCPDP would need to be consulted in order to implement new minimum transaction standards related to chargebacks. A commenter posited that a new version of the standard transaction is not required but expedited code values would be required. Several commenters suggested that every approved pharmacy claim (adjudicated through the standard transactions developed by NCPDP) should include an itemized chargeback amount due to the pharmacy. One of these commenters explained that a number of sources (*e.g.,* a manufacturer, a health plan, a pharmacy switch) could potentially provide the claims-level chargeback data. Another commenter raised concerns, however, that manufacturers and wholesalers do not currently have access to the final adjudicated claim or to other enrollee-level data, which the commenter believes would be necessary to implement the chargeback processing system.

A commenter that is a not-for-profit standards development organization provided guidance on three possible options for chargebacks to be administered in accordance with the HIPAA standards for electronic healthcare transactions. In two methods, a PBM would administer the chargeback process and in the third method a non-PBM entity would serve as the chargeback administrator. According to the commenter, two of the possible methods for administering chargebacks (one involving a PBM and one involving a non-PBM entity) would require near-term modifications to the standard transaction through additional expedited code values added to the existing HIPAA standard. The commenter stated that ten-to-twelve months from the date of a final rule would be necessary for the standards development process, with additional time needed for modification of industry operations. The commenter requested that OIG and the Department provide guidance as to which of these methods would support the definition of a ''chargeback.''

Response: We appreciate the commenters highlighting changes to the

HIPAA standard transactions that might be required for certain parties to administer point-of-sale chargebacks, although we will note that the Department is agnostic as to which entities may choose to implement the point-of-sale chargeback process. We thank the commenter for the estimate that ten to twelve months would be necessary for standards development and implementation. While we do not endorse that estimate, we do believe the revised effective date of January 1, 2022 for the amendments to § 1001.952(h)(5) of the discount safe harbor will provide adequate time for the standards development process and for implementation of industry operations to provide the chargeback function.

Comment: A few commenters requested that OIG provide flexibility as to the entities that may administer the chargebacks described in the point-of-sale reductions in price safe harbor, with various commenters highlighting that existing systems used by PBMs, pharmacy switch models, and wholesale distributors, among others, could be leveraged to operationalize this process. A commenter requested that OIG allow market forces to determine the most efficient revenue streams under this new system. Another commenter requested that OIG clarify those entities that can have a role in the chargeback administration process, and whether entities that have formulary decision-making responsibility (directly or indirectly) could serve as chargeback administrators. A commenter highlighted, however, that the safe harbor only protects reductions in the price charged by a manufacturer, which the commenter noted could unintentionally limit the chargeback process to wholesalers because manufacturers typically only ''charge'' these entities.

Several commenters supported the use of wholesalers to effectuate chargebacks to pharmacies. For example, a trade association representing pharmaceutical distributors explained that existing distributor systems could be leveraged to process point-of-sale reductions in price and to route chargebacks to pharmacies. More specifically, some commenters posited that wholesalers are best-positioned in the distribution channel to facilitate point-of-sale discounts because of their existing capabilities and infrastructure, and their prior experience with chargeback transactions. According to these commenters, the wholesaler system would create a ''cash-less'' discount model and would move the industry towards net prices for patients, would enhance transparency, and would minimize payment delays to pharmacies. A wholesaler commenter noted that the use of wholesalers to effectuate chargebacks would increase transparency and would ensure wholesaler accountability because pharmacies have the discretion to choose a different wholesaler with which to do business. However, the commenter emphasized that there is a need for additional accountability principles to be set, such as requirements to relay accurate information and credits throughout the channel promptly so as not to impede manufacturers, wholesalers, or other entities from the proper administration of chargebacks. Another wholesaler commenter stated that a new remittance transaction would need to be established for the payment of the chargeback by the wholesaler to the pharmacy once it is authorized by the manufacturer.

A PBM commenter raised a number of concerns with wholesalers serving as chargeback administrators. For example, the commenter expressed concern that using a wholesaler-led system could lead to pricing collusion. Another commenter raised its concerns that wholesalers that administer chargebacks may be incentivized to ignore utilization management requirements and pay discounts because, unlike plans or PBMs, they are paid per unit sold. A commenter also cautioned against unintended consequences of using wholesalers to facilitate chargebacks; specifically, the commenter stated that using these entities would decrease the AMP and, as a result, would lower the amount that states and the Federal government receive under the MDRP.

Other commenters requested that PBMs be designated to administer chargebacks because they are able to use existing infrastructure and relationships with manufacturers, plan sponsors, and pharmacies. However, a trade association representing community pharmacists supported a model in which PBMs would not participate in the chargeback administration process. According to the commenter, interactions between pharmacies and PBMs have led to a non-transparent environment that may hinder patient care. Another commenter cautioned against making pharmacies the chargeback administrator, as it would require the pharmacy to be privy to a significant amount of new information, such as information about the beneficiary's plan, benefit structure, position in the benefit parameters, and costs, as well as information about the discount negotiated. The commenter also cautioned that such responsibilities would significantly change the role of a pharmacy.

Response: The Department recognizes that stakeholders in the pharmaceutical industry are best positioned to determine what entity or entities should be responsible for the point-of-sale chargeback administration process. In addition, the Department wants to encourage current and future innovation and seeks a level playing field so that a variety of entities may engage in the chargeback administration process. For these reasons, and so as not to be overly prescriptive, the final rule does not require a specific category or categories of entities to serve as chargeback administrators.

We did not intend for the use of the word ''charged'' in the safe harbor to imply that only wholesalers may effectuate the chargeback process, and that term has been changed in the regulatory text. So long as all conditions of the safe harbor are met, any entity may administer the chargeback process for purposes of compliance with the safe harbor.

Comment: Many commenters raised concerns about the costs, coordination, and development that would be required for all Part D stakeholders (*e.g.,* manufacturers, wholesalers, and pharmacies) to create and implement new systems to operationalize chargebacks. For example, several commenters noted that pharmacies would be required to develop mechanisms to track payments at negotiated discount rates and to operationalize chargebacks. To address these concerns, a commenter requested that OIG minimize burden and financial risk for pharmacies and suggested that the responsibility for calculating the total payment due to the pharmacy rest with the plan sponsor. On a similar note, a commenter raised concerns about the burden on pharmacies to determine beneficiary out-of-pocket cost-sharing amounts.

Commenters noted that entities would incur significant financial costs through, by way of the commenters' examples, upfront investments in IT; development of systems for invoicing, reconciliation, and recovery; and new systems (specific to pharmacies) to collect reimbursement from the PBM and chargeback administrator. Such system modifications also would be required across the entire drug supply chain to incorporate and analyze utilization information at the beneficiary level. In addition, some commenters noted that the existing wholesaler chargeback systems in place are much simpler and very different than what would be

required in the retail pharmacy context and would need to be modified for this context, potentially requiring significant infrastructure changes and material investments.

Commenters also noted that all parties involved would have to renegotiate existing contracts or enter into new contracts to operationalize this system, which they posited would be a time-consuming and resource-intensive process. A commenter also requested confirmation from CMS that the renegotiation of the terms and conditions of contracts between pharmacies and plans (or PBMs) implicates the any willing pharmacy provisions of the Act.

Commenters highlighted that the new chargeback infrastructure would need to undergo rigorous testing to avoid adverse impacts, and a commenter noted that the proposed deadline does not provide sufficient time for stakeholders to develop, test, and deploy these new chargeback systems. According to a commenter, requiring pharmacies to implement these new processes increases administrative costs for, and requires significant upfront investment by, these entities, with no added benefit. Several commenters noted that these burdens, challenges, and risks would be worse for independent community pharmacies and specialty pharmacies.

Response: While we recognize that some system changes may be required in order to administer point-of-sale chargebacks, we note that nothing in the point-of-sale reduction in price safe harbor requires parties to utilize this process. While the Department encourages rapid adoption of point-of-sale price reductions, we note that we are finalizing a later effective date than originally proposed for the amendments to § 1001.952(h)(5) of the discount safe harbor, which should help address commenters' concerns about implementation timelines. As we set forth in § 1001.952(cc)(1)(ii), the reduction in price must not involve a rebate unless the full value of the reduction in price is provided to the dispensing pharmacy by the manufacturer, directly or indirectly, through a point-of-sale chargeback or series of point-of-sale chargebacks, or is required by law. We view this criterion of the safe harbor as applying only if a rebate is involved (in the form of a point-of-sale chargeback). If the pharmacy receives the full value of the reduction in price at the time of sale of the prescription pharmaceutical product to the beneficiary, then a chargeback (and the requirements for chargebacks under this safe harbor) would not be needed.

We are not providing specific guidance and rules around reimbursement methodologies or processes in the safe harbor to allow flexibility, as further explained below. If the chargeback process is used, then in order to receive protection under the safe harbor the payment must be made from the manufacturer (directly or indirectly) to the pharmacy, and the amount of the payment must be equal to the reduction in price negotiated between the plan sponsor and the manufacturer. Moreover, we agree that the new safe harbor should not restrict patient access to drugs because of delays in reimbursement at the pharmacy.

Comment: A commenter raised concerns that the chargeback system may allow manufacturers to access pharmacy systems for auditing purposes, which the commenter believes raises privacy issues.

Response: Nothing in this final rule would alter in any aspect existing obligations of Covered Entities under the HIPAA privacy and security rules. We would expect such entities to structure their interactions in full compliance with applicable laws.

Comment: A commenter asked if payments to pharmacies will be subject to prompt payment rules, particularly with regard to chargeback payments where, according to the commenter, CMS has no regulatory authority over wholesalers. The commenter noted that if the chargeback system fails to timely compensate pharmacies at the point of sale, pharmacies may refuse to participate in Part D plans or networks that rely on chargebacks rather than existing PBM-facilitated transaction systems, decreasing beneficiary access to medicines at pharmacies.

Commenters also noted that there could be a significant delay between a pharmacy's dispensing of a product and receipt of a chargeback, which the commenters believe will create significant financial burdens, substantial operational challenges, and increased financial risk for pharmacies. A commenter asked for clarification as to what entity holds the financial risk in the period between when the price reduction is applied at the point of sale and when pharmacies are made whole. According to the commenters, this lag also could jeopardize patient access to needed medications.

Commenters suggested solutions to this issue such as tracking systems to account for each specific discount, applying chargebacks as credits due from the wholesaler to the pharmacy, immediate communication of the discount at the time of invoicing, or daily adjudication for rebate payments. Several commenters posited that pharmacies may choose not to participate in the Part D program if they are not compensated in sufficient time or are required to implement these new operations.

Some commenters recommended that CMS amend its regulations to apply the Part D prompt-payment requirements to point-of-sale reductions in price, while another commenter opposed application of these regulations to chargeback payments. At least one commenter requested that the safe harbor require as a condition of protection that any chargeback process be consistent with prompt payment laws. Similarly, a commenter requested that pharmacies be permitted to charge interest for delayed payment of chargebacks in addition to being paid in full for the total and final reimbursement.

Response: We thank commenters for highlighting these issues. As a threshold matter, the Proposed Rule did not propose prompt payment as a condition of meeting the safe harbor condition regarding chargebacks. We did not propose this condition, and, in any event, it would add unnecessary technical detail to the safe harbor to stipulate the specifics related to the timing of any payments made via the chargeback process or which party assumes the financial risk during the process. In large part, these comments concern questions that must be resolved through arrangements negotiated by the relevant parties. The Part D program is a private sector-based program in which the participating entities negotiate with their partners to make what they believe are the most effective arrangements to participate in the Part D market. Entities have been and continue to be required to establish these arrangements in compliance with programmatic requirements as well as the anti-kickback statute.

We expect terms related to chargebacks to be in the agreements between the relevant parties, but we note that, to the extent the chargeback process is used, the chargeback must be made from the manufacturer to the pharmacy, directly or indirectly, in order for the safe harbor to protect the reduction in price.

Comment: A trade association representing pharmacy benefit managers stated that the rule, if finalized, would require parties to create a new system to handle chargeback transactions unless rebates can be transferred through a PBM. In lieu of the Proposed Rule, the commenter provided a detailed description of an alternative in which

PBMs would be responsible for administering price concessions at the point of sale.

Response: The Department does not intend for this rule to prescribe those individuals or entities that may serve as chargeback administrators, and we see no compelling reason to do so. The Department believes that PBMs as well as other individuals or entities (including entities that currently or may in the future participate in the pharmaceutical supply chain) would be able to develop the means and infrastructure necessary to effectuate the chargeback process. By remaining agnostic in this safe harbor, the Department believes that innovation and competition will be encouraged in the marketplace.

Comment: A commenter requested that HHS modify Medicare and Medicaid policy to ensure point-of-sale chargebacks will continue to be treated as plan discounts because they are established through manufacturer-plan relationships, rather than being treated as pharmacy discounts because this may affect pharmacy reimbursement.

Response: We have consulted with CMS as part of this rulemaking and are informed that point-of-sale chargebacks should be treated as plan discounts.

Comment: A commenter noted that key portions of the Proposed Rule related to the chargeback process are vague and ambiguous, which heightens enforcement concerns for these parties under the anti-kickback statute. The commenter requested that OIG re-propose the rule with additional clarifications.

Response: While we appreciate the commenter's concerns, we respectfully disagree that the portion of the proposal related to the chargeback process is vague and ambiguous. By design, the proposed safe harbor is not overly prescriptive with respect to the chargeback process to allow for private sector flexibility, competition, and innovation, and to avoid creating technical barriers to the safe harbor's utility. We intend for this safe harbor to provide flexibility in terms of the parties responsible for chargeback administration as well as how that process is operationalized.

Comment: Several commenters requested that OIG revise the safe harbor for point-of-sale reductions in price to add disclosure requirements for chargeback administrators that mirror the disclosure requirements in the PBM service fees safe harbor.

Response: We decline to accept the commenter's suggestion. As we explained in the Proposed Rule, the ''transparency requirement is important to ensure that PBM's arrangements with pharmaceutical manufacturers are not in tension with the services that the PBM provides to the health plans for which it is acting as an agent.'' We believe the transparency requirement is important for purposes of the PBM service fee safe harbor because of the agency relationship and functions in that safe harbor, because of the potential for a wide variety of services and compensation structures and amounts, and because there are defined parties (*i.e.,* the pharmaceutical manufacturer, the PBM, and the health plans to which the PBM provides pharmacy benefit management services). Because the point-of-sale reductions in price safe harbor specifically requires the point-of-sale chargeback (if used) to be equal to the discount negotiated between the manufacturer and plan and is agnostic as to the entity that serves as chargeback administrator, and because a range of individuals and entities could potentially be involved in this process, we believe the same disclosure requirements are not appropriate or necessary for purposes of this safe harbor.

Comment: Commenters who commented on the chargeback process raised a number of questions about fees that may be charged to administer chargebacks. For instance, a commenter recommended that pharmacies not be responsible for any chargeback administration fees, and another commenter recommended that pharmacies be held harmless for these processing fees. Commenters also asked that the compensation and disclosure requirements set forth in the new PBM service fees safe harbor apply with respect to fees for chargeback administration services. A commenter recommended that OIG establish a form for a chargeback administration fee (*e.g.,* specify that the fee must be on a per-chargeback basis), and recommended that OIG mandate that chargeback administration fees not vary substantially by manufacturer or by drug.

Response: We did not propose, and are not finalizing in this rule, requirements regarding chargeback administration arrangements. We note, however, that chargeback fee arrangements should not be used to reward the generation of Federal health care program business and would need to comply with the anti-kickback statute. Other existing safe harbors (*e.g.,* the personal services and management contracts safe harbor) could be used to protect such arrangements. We note that chargeback administration fees based on the cost of the drug, or that vary substantially by drug, would share many of the same problematic features of those rebate arrangements that are no longer protected under the discount safe harbor and would be suspect.

ii. Reverse Engineering

Comment: Various commenters expressed concerns that the proposed point-of-sale reduction in price safe harbor would provide sufficient data to reverse engineer the manufacturer's or the PBM's discount structure, with certain commenters asserting that point-of-sale reductions in price would not likely be incentivized because disclosure of sensitive price and bargaining information inhibits competition. However, another commenter noted that this reverse engineering may allow stakeholders to have a better understanding of drug discounts and pricing and may result in increased competition and lower prices.

Response: We appreciate commenters' concerns about price transparency and agree that providing the market with additional information could have unintended effects in certain, limited circumstances. However, the Department is not persuaded, on net, that this would increase overall program costs or reduce competition. Price transparency lowers a key barrier to entry and increases competition in most competitive markets. Additionally, as commenters suggest and program performance indicates, PBMs have been extremely effective negotiators in the Medicare Part D program, and the Department does not anticipate that additional price transparency would weaken their negotiating leverage and ability to obtain price concessions. PBMs are aware of the rebates they currently receive, and, in the Department's view, they are unlikely to accept higher net prices going forward as they compete to attract Medicare beneficiaries.

Comment: Numerous commenters were concerned that requiring the disclosure of discounts would, for example, lead to collusion among manufacturers; higher prices; and lower, unvaried discounts because, in part, negotiation leverage diminishes, manufacturers will be able to determine the contract terms offered by their competitors to each plan, and manufacturers will lose the incentive to negotiate the lowest possible discounts, in order to protect market share. In support of these assertions, several commenters cited statements from the FTC indicating that, if pharmaceutical manufacturers learn the exact amount of rebates offered by their competitors,

tacit collusion among manufacturers is more feasible.[47]

Several commenters recommended that OIG consider implementing commercial best practices and safeguards that maintain the confidentiality of proprietary contract data and ensure point-of-sale discounts that manufacturers negotiate with plans and their PBMs are not made public. A commenter also requested that CMS not display the value of rebates on Medicare Plan Finder but only require display of the final discounted drug prices, net of any pharmaceutical manufacturer discounts.

By contrast, a commenter asserted that, while some stakeholders fear full price transparency will undermine the negotiating power of payers and increase the potential for collusion, the disclosure of price concessions represents the best way of assuring plan sponsors that formulary development is not being influenced by rebates.

Response: We appreciate commenters' concerns that manufacturers may raise their prices or engage in tacit collusion as a result of this final rule. However, the Department has seen very limited evidence that this will occur.

Additionally, although we recognize that the pharmaceutical market is different than other markets in some respects, in most consumer markets where prices are known, transparency increases competition, rather than harms it. In the Department's experience, a hallmark of the prescription drug market is that manufacturers are less concerned about other manufacturers knowing the level of discounts they offer. Indeed, manufacturers can generally estimate the discount their competitors are offering, based on negotiations they have won or lost. Manufacturers are more concerned about each PBM knowing the discount the other PBMs have received, because that will enable PBMs to seek the lowest discount offered by a manufacturer for a particular product. This places downward pressure on net prices, rather than enabling collusion.

Echoing a sentiment of many commenters, the Department recognizes that PBMs are extremely effective negotiators. Nothing in this final rule takes away a PBM's ability to negotiate lower drug prices in exchange for better formulary access, and the Department expects that PBMs will continue to be effective negotiators.

iii. Common Ownership

Comment: Various commenters raised concerns regarding changes proposed in the Proposed Rule and common ownership between PBMs, pharmacies, and health plans. Commenters noted that many of the largest PBMs have vertically integrated business lines, such as health plans or pharmacies. Some commenters asserted that OIG's proposed definition of ''PBM'' might allow vertically integrated organizations to circumvent the proposed requirements, with a commenter noting that this potential loophole could give PBM-affiliated pharmacies improper competitive advantages over non-PBM-affiliated pharmacies. Another commenter highlighted the potential anti-competitive behavior of PBMs, including requesting that drug manufacturers provide higher discounts for drugs sold through PBMs' own pharmacy operations.

To address this issue, commenters recommended that OIG adopt a functional definition of PBM that includes any person, business, or other entity that carries out specified PBM services to a manufacturer, where directly or through an owned, affiliated, or other related entity under a common ownership structure with a PBM, with a commenter recommending that PBM- and plan-affiliated pharmacies be able to access non-abusive purchase discounts, such as those on generics. A commenter suggested that PBMs be required to provide the same conditions and same reimbursement to independent, non-vertically integrated pharmacies as are provided to PBM-owned pharmacies, while another commenter recommended that all discounts and rebates from any source and PBM service fees be disclosed at the point of sale and PBM service fees paid by the pharmaceutical industry be disclosed and separated from any discounts and rebates provided to PBM-owned pharmacy operations.

However, another commenter noted that only extending the revisions proposed in the Proposed Rule to PBM-owned pharmacies could raise anti-competitive issues with non-PBM-owned competitors. This commenter recommended expanding the scope of the amendment to include all intermediaries involved in drug distribution and payment transactions, whether or not they take possession of the drugs. Another commenter specifically noted that the provisions in 42 CFR 1001.952(dd)(2)(iii) for PBM services must also include language to prohibit the PBM's activity between the manufacturer and another business entity in which the PBM has operational control or an ownership interest.

Another commenter suggested that the changes we proposed could result in unfair competition because they would exclude from safe harbor protection all purchase discounts received by any mail-order pharmacy, specialty pharmacy, or retail pharmacy owned by a PBM or a plan sponsor, regardless of whether the purchase discounts (offered to the buyer in its capacity of a dispensing pharmacy, not in the capacity of a formulary manager) are dependent on formulary placement of the manufacturer's pharmaceutical product. The same commenter is concerned that, if purchase discounts are not offered to PBM-owned and plan sponsor-owned pharmacies because of the safe harbor exclusion, class-of-trade pricing could prevent manufacturers from offering purchase discounts to any mail-order pharmacy, specialty pharmacy, or retail pharmacy.

Response: We appreciate the comments on any potential issues that ownership interests might create under our proposed revisions to the discount safe harbor and suggestions on how best to address these issues. However, we intend for the discount safe harbor to continue to protect discounts on prescription pharmaceutical products offered to entities other than plan sponsors under Medicare Part D (directly or through a PBM), including, but not limited to, wholesalers, hospitals, physicians, and pharmacies. As explained previously, we are not expanding the amendment to include entities other than plan sponsors under Medicare Part D, such as PBM-affiliated pharmacies. We note, however, that arrangements in which PBMs funnel discounts through affiliated or commonly owned entities, or arrangements where it appears that a PBM is channeling kickbacks through a commonly owned entity or otherwise in order to evade this rule, are highly suspect. The anti-kickback statute prohibits remuneration offered, paid, solicited, or received, *directly or indirectly,* to induce or reward referrals of, or the purchase (or arranging for the purchase) of, an item or service paid for in whole or in part by Federal health care programs. If a discount offered to a pharmacy is for the purpose of inducing a commonly owned entity, *e.g.,* a PBM, to arrange for the purchase of a drug paid for by Federal health care programs, through formulary placement or otherwise, then the discount would not be protected by the discount safe harbor.

[47] U.S. FTC, Letter to Assembly Member Greg Aghazarian, 2004, *available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-comment-hon.greg-aghazarian-concerning-ca.b.1960-requiring-pharmacy-benefit-managers-make-disclosures-purchasers-and-prospective-purchasers/v040027.pdf.*

Finally, while we appreciate the commenter's suggestion to require disclosure of all discounts and rebates from any sources and PBM service fees paid by the pharmaceutical industry, we note that this safe harbor is limited to reductions in price by manufacturers for prescription pharmaceutical products payable by a plan sponsor under Medicare Part D or a Medicaid MCO. The safe harbor does not protect discounts or rebates offered to or from other sources and it does protect any service fees. Given this limited scope of this safe harbor, we decline to adopt the commenter's suggestion for broader disclosure requirements.

Comment: Other commenters recommended that OIG monitor for inappropriate business practices involving PBMs and PBM-affiliated entities, with several pharmaceutical company commenters pointing to price concessions from manufacturers to specialty pharmacies that are owned by or affiliated with PBMs and may be used to subvert the requirements set out in the Proposed Rule. A commenter also encouraged OIG to assert in the preamble to the final rule that these types of price concession arrangements will be viewed as highly suspect if certain facts are present.

Response: We acknowledge the issues that common ownership interests between PBMs and other entities may cause and understand that this may be a potential area of risk following the implementation of the final rule. We reaffirm that this rule is intended to explicitly exclude from the discount safe harbor certain reductions in price and other remuneration offered by manufacturers of prescription pharmaceutical products to Part D plan sponsors that may pose a risk to certain Federal health care programs and beneficiaries. As discussed above, pricing arrangements that enable PBMs to retain these types of discounts through an affiliated or commonly owned entity, instead of flowing to Part D plans, are excluded from the discount safe harbor and would not qualify for protection under the new point-of-sale reductions in price safe harbor. The determination as to whether a particular pricing arrangement would receive safe harbor protection would be dependent upon the facts of that particular case.

Comment: Some commenters recommended that DOJ monitor and increase its scrutiny related to vertical and horizontal mergers, especially given that three PBMs appear to control a majority of the market, allowing the PBMs to leverage their market power to the detriment of plan sponsors (government and commercial), providers, and consumers.

Response: We appreciate the commenters' feedback. This issue is outside the scope of this rule.

Comment: A commenter stated that pharmaceutical companies should provide to all pharmacies in the same circumstances, irrespective of their ownership, access to the same drug product's actual acquisition cost and discounts.

Response: The amendment to the discount safe harbor and the two new safe harbors promulgated in this final rule do not address discounts or other pricing arrangements between manufacturers and wholesalers, pharmacies, or other entities.[48]

iv. Incentives for Point-of-Sale Reduction in Price

Comment: Several commenters were uncertain how manufacturers, health plans, and PBMs would react to the new safe harbor for point-of-sale reductions in price for and how those reactions would affect the prescription drug marketplace. These commenters were generally unsure whether the new safe harbor would incentivize point-of-sale reductions in price and requested that HHS further analyze how manufacturers may alter pricing strategies, particularly longer-term impacts, before enacting a final rule.

Response: We appreciate commenters' concerns regarding uncertainty. The Department intends to monitor the effects of this final rule. However, we note that the new safe harbor for point-of-sale reductions in price is designed to offer more flexibility for manufacturer discounts and several manufacturers commented that they would be incentivized to offer point-of-sale reductions in price, noting their support for lowering out-of-pocket costs for beneficiaries.

Comment: A few commenters questioned whether manufacturers would provide point-of-sale reductions in price to fully offset the rebates that would be prohibited if the amendment to the discount safe harbor were finalized, especially because point-of-sale reductions in price have been offered by PBMs for some time in the commercial market, and there has not been widespread adoption.

Response: We appreciate commenters' observations about the dynamics of the commercial market. As we discuss elsewhere in this rule, we are aware that some commercial plans may be operationalizing point-of-sale benefit designs and believe that at least some industry stakeholders have the capabilities to operationalize point-of-sale reductions in price that would be protected under the new safe harbor.

Comment: A commenter requested clarification on how PBMs will negotiate for discounts without using rebates. For example, the commenter requested clarification on what compensation would be available to PBMs, how PBMs would be incentivized to negotiate lower prices for patients, and how drug manufacturers would negotiate for formulary placement, all in the absence of rebates.

Response: This rule does not require any particular method of negotiation of discounts, and parties are free to pursue all lawful forms of negotiation. With respect to negotiations between PBMs and manufacturers, PBMs are supposed to be acting as an agent of health plans and, in this role, we would expect them to negotiate with manufacturers on behalf of plan sponsors under Part D for point-of-sale reductions in price. We leave it to the applicable parties to determine how negotiations of point-of-sale reductions in price will evolve and how financial arrangements will be structured between these parties to comply with the anti-kickback statute.

Comment: A few commenters expressed concern that errors or delays in the implementation of point-of-sale reductions are likely, which could leave beneficiaries without prescriptions at all or with prescriptions at higher costs. Commenters questioned whether a pharmacy would be liable for such errors via retroactive reconciliation. Without clarity on these issues, commenters believed manufacturers were not likely to be incentivized to offer point-of-sale reductions in price.

Response: Questions regarding billing errors are outside the scope of this rulemaking. However, we note that while all conditions of a safe harbor must be met to ensure protection, falling outside a safe harbor does not necessarily result in liability under the statute. Moreover, mere errors do not create liability under the anti-kickback statute.

Comment: A couple of commenters questioned whether point-of-sale reductions in price were viable as constructed under the Proposed Rule as they would require significant operational changes, ultimately discouraging point-of-sale reductions in price from being offered. These commenters recommended that the Department should require Part D plans to provide a point-of-sale rebate plan as one of their plan offerings instead.

[48] *See* 84 FR 2348.

Response: We appreciate the commenters' concerns regarding the viability of point-of-sale reductions. The Department believes that industry stakeholders have or can develop the capabilities to operationalize point-of-sale reductions in price that would be protected under the new safe harbor. Regarding commenters' recommendation that the Department require Part D plans to provide a rebate plan, we note that changes to Part D rules related to required plan offerings are outside the scope of this rulemaking.

Comment: A few commenters expressed concern that manufacturers would not likely be incentivized to offer point-of-sale reductions in price unless HHS clarified whether discount safe harbor protection will continue to be available for formulary and utilization management arrangements.

Response: As we explain above, reductions in price to a plan sponsor or Medicaid MCO that are conditioned on formulary placement and utilization management tools can qualify for protection under the new safe harbor for point-of-sale reductions in price.

Comment: A few other commenters expressed concern that manufacturers were not likely be incentivized to enter into arrangements to offer point-of-sale reductions in price unless the Department clarified whether manufacturers have an option to provide these discounts via plans, directly to each pharmacy, or through another mechanism.

Response: We thank commenters for their concern. We note that the discount safe harbor continues to protect discounts on prescription pharmaceutical products offered to other entities, including, but not limited to, wholesalers, hospitals, physicians, pharmacies, and third-party payors in other Federal health care programs. We clarify, however, that under the new safe harbor at § 1001.952(cc), the reduction in price must be set in advance with a plan sponsor under Medicare Part D, a Medicaid MCO, or a PBM acting under contract with either. While a chargeback may be paid directly to the pharmacy, the Medicaid MCO or Part D plan is the anticipated recipient of the reduction in price.

Comment: A few other commenters expressed concern that manufacturers were not likely be incentivized to enter into arrangements for point-of-sale reductions in price unless HHS clarified whether point-of-sale discounts are required to be uniform across all stages of the benefit design.

Response: We appreciate the commenters' concern. We clarify that because the reduction in price must be set in advance with a plan sponsor under Medicare Part D, a Medicaid MCO, or a PBM acting under contract with either, we would expect the point-of-sale reduction in price to be uniform across all stages of the benefit design, and would not expect the reduction in price to be negotiated on a beneficiary-by-beneficiary basis. Any such arrangement would be difficult to know at the point of sale and thus could not be applied accurately to the point-of-sale price, creating risk of violating the requirements of the new safe harbor for point-of-sale reductions in price.

Comment: Another commenter expressed concern that manufacturers would not likely be incentivized to provide point-of-sale reductions in price, or only provide limited reductions at the point of sale, because manufacturers would more likely set single discount levels across all payers due to the increased transparency requirements.

Response: As we discuss in more detail in the Regulatory Impact Statement, we acknowledge that there may be a wide range of behavioral changes throughout the prescription pharmaceutical product supply chain. However, PBMs will continue to have access to important negotiation tools, such as formulary placement. Additionally, PBMs know the net prices that plans paid before the revisions to the safe harbors. Accordingly, the Department believes it is unlikely that parties will dramatically change the prices they negotiate due to transitioning from rebates to point-of-sale reductions in price.

Comment: A few commenters noted that since drugs are not typical consumer products, offering point-of-sale reductions in price would not likely impact demand; therefore, manufacturers would not likely be incentivized to offer them. However, another commenter expected that the new safe harbor would increase competition and create a strong behavioral response among plans and manufacturers. Another commenter believed that some manufacturers would be highly incentivized to offer point-of-sale reductions in price if the drug was already in a highly competitive market.

Response: We thank commenters for their insights into the dynamics of drug markets. We agree that manufacturers are more likely to be incentivized to offer point-of-sale reductions in highly competitive drug markets and less likely to be incentivized in drug markets with less competition, as was the case with rebates. However, as explained elsewhere in this final rule, we believe there is a decreased risk of fraud and abuse when the reductions in price are offered at the point of sale rather than as rebates.

v. During 100 Percent Cost Sharing

Comment: A commenter noted that the Proposed Rule did not address how point-of-sale discounts would apply to beneficiaries with 100 percent cost sharing. Other commenters provided examples of how they interpreted the point-of-sale discount to apply during phases with 100 percent cost sharing, *e.g.,* the deductible phase. A commenter suggested that such beneficiaries should pay 100 percent of the discounted net cost. The commenter provided the following example: If a drug's list price is $200 and a beneficiary's plan sponsor under Part D has negotiated a point-of-sale reduction in price of 10 percent, then the price of the drug is $180. According to the commenter, during a period of 100 percent cost sharing, the beneficiary would pay $180.

Response: We agree with the example offered by the commenter. Specifically, if a drug's list price is $200 and a plan sponsor under Part D has negotiated a point-of-sale discount of 10 percent, the price of the drug for enrollees of that plan is $180. If a beneficiary is in the deductible phase, the beneficiary would pay the full discounted price of the drug (*i.e.,* $180) at the pharmacy counter.

vi. Additional Safeguards

Comment: A commenter recommended OIG require entities to ''refrain from doing anything that would impede'' their contracting counter-party from meeting its own obligations under the safe harbor. The commenter noted that this is a condition of the discount safe harbor.

Response: The proposed safe harbor for point-of-sale reductions in price for prescription pharmaceutical products differs from the discount safe harbor at 42 CFR 1001.952(h), in that the latter has separate sets of requirements for buyers and sellers or offerors of discounts. Because the ability of the buyer to meet its obligations under the discount safe harbor depends in part on cooperation of the seller or offeror, the safe harbor includes requirements that the seller or offeror refrain from impeding the buyer from meeting the buyer's own obligations. Because the proposed safe harbor for point-of-sale reductions in price does not include conditions that similarly require the cooperation of other parties to the transaction, we did not propose to include this safeguard, and we decline to include it in the final rule.

Comment: A commenter recommended that the point-of-sale reductions in price not be contingent upon agreement between the manufacturer and the PBM as to PBM service fees.

Response: We did not propose, and therefore are not finalizing in this rule, a condition of the point-of-sale reduction in price safe harbor that would prohibit a reduction in price being contingent upon agreement between the manufacturer and the PBM on PBM service fees. We note, however, that the point-of-sale reduction in price safe harbor protects only the reduction in price; it does not protect a demand or request for concession with regard to a PBM service fee arrangement. Such a demand or request itself could constitute a solicitation for remuneration (the remuneration being the service fee agreement, or a concession on the terms of the service fee agreement) prohibited by the anti-kickback statute that would not be protected by any safe harbor.

Comment: Some commenters recommended revising the proposed safe harbor for point-of-sale price reductions to require any individual or entity administering point-of-sale chargebacks to meet the same compensation requirements set forth in the proposed PBM service fees safe harbor.

Response: We did not propose, and therefore are not finalizing in this rule any requirements for payments related to chargeback administration. We note, however, that the point-of-sale reduction in price safe harbor protects only a reduction in price by a manufacturer for a prescription pharmaceutical product that is payable, in whole or in part, by a plan sponsor under Medicare Part D or a Medicaid MCO; it does not protect any payment arrangements that parties may enter into for services such as chargeback administration.

Comment: Several commenters requested that OIG require certain transparency requirements, for example: Plans or PBMs should be required to exchange information to enable manufacturers to validate that the full value of the reduction in price is provided to the dispensing pharmacy; data from plans and PBMs should be available to manufacturers to confirm that patients receive point-of-sale reductions in price; information from plans or PBMs be available to patients and pharmacies at the point-of-sale; and information from plans or PBMs, including chargeback amounts due and paid, be available to pharmacies in real time. By contrast, some commenters opposed general transparency requirements and requested that OIG ensure that point-of-sale reductions in price remain confidential by explicitly stating that transparency is not required for this proposed safe harbor. For example, pharmacies are not parties to the agreements between plans, PBMs, and manufacturers and, thus, should not be allowed to know their terms.

Response: We appreciate the commenters' suggestions for and concerns about certain transparency requirements for the proposed point-of-sale reductions in price safe harbor. As explained elsewhere in this final rule, we believe that creating a new safe harbor for point-of-sale reductions in price will increase transparency, including transparency to plans and beneficiaries, and improve alignment of incentives among parties that could result in lower list prices and out-of-pocket costs. However, as explained earlier in this rule, we decline to adopt the commenter's request to create a condition in the safe harbor related to the exchange of information and cooperation among the parties, such as the suggested disclosures to manufacturers.

Comment: Some commenters recommended that OIG ensure that pharmacies are further protected by, for example, ensuring that a reduction in revenue for PBMs is not compensated by reduction in payment to pharmacies not affiliated with the PBM, or ensuring that the chargeback accounts for costs incurred by the pharmacy or that pharmacies are reimbursed for medication costs and costs to acquire, handle, and dispense medications.

Response: We are not specifying the reimbursement terms of an agreement between a PBM or plan and a pharmacy for prescription pharmaceutical products in the final safe harbor. To the extent point-of-sale chargebacks are used, the payment from the manufacturer to the pharmacy must be equal to the reduction in price negotiated between the manufacturer and the plan or PBM. As we stated in the Proposed Rule, we intend for the point-of-sale chargeback to make ''pharmacies whole for the difference between acquisition cost, plan payment, and beneficiary out-of-pocket payment.''

Comment: A commenter requested that OIG clarify the meaning of ''completely applied'' as set forth in paragraph (cc)(1)(iii). Another commenter requested OIG revise paragraph (cc)(1)(iii) to indicate that the reduction in price must be completely applied to the price upon which the patient's out-of-pocket spending at the point-of-sale is based. Another commenter recommended revising paragraph (cc)(1)(iii) to ensure that the rule does not inadvertently permit point-of-sale reductions in price to operate like a branded drug manufacturer coupon program for Medicare and Medicaid beneficiaries.

Response: We agree with the commenter's interpretation of ''completely applied'' as it was set forth in paragraph (cc)(1)(iii) of the Proposed Rule and confirm that a protected reduction in price cannot operate like a coupon program. We have revised the language for clarity in this final rule. The reduction in price is from the manufacturer to the plan sponsor under Medicare Part D or a Medicaid MCO, but the reduction in price negotiated by a Part D plan sponsor or Medicaid MCO (or a PBM on the plan sponsor's or Medicaid MCO's behalf) must be reflected at the pharmacy counter. The amount paid by a beneficiary at the pharmacy counter will depend on the benefit design of a particular plan, the phase of the benefit year in which the prescription is filled, and the price negotiated by the plan sponsor or PBM for the prescription pharmaceutical product that may include, *e.g.,* reductions in price negotiated with the pharmaceutical manufacturer or dispensing fees negotiated with the pharmacy. For example, if a pharmaceutical product has a list price of $120 and the manufacturer gives a reduction in price of $20, then that entire $20 would need to be reflected completely in the price upon which the beneficiary's cost-sharing obligation is based. We are informed by CMS that their guidance allows for this reflection of the entire discount at the point of sale.[49] For purposes of safe harbor protection, the reduction in price must be completely reflected at the point of sale.

If a Part D beneficiary has a 20 percent coinsurance obligation, the beneficiary typically would pay 20 percent of $100, or $20, at the pharmacy counter (plus any portion required by the benefit design for, *e.g.,* dispensing fees). If the beneficiary were in the deductible phase at the time the prescription was filled, the beneficiary would pay $100 at the pharmacy counter (plus any portion required by the benefit design for, *e.g.,* dispensing fees). If, however, the beneficiary's plan used copayments instead of coinsurance, then the beneficiary would pay the copayment amount according to Part D rules. Part

[49] CMS, Medicare Prescription Drug Benefit Manual, ch. 5, section 20.6 (describing that Part D plan sponsors must provide enrollees with access to negotiated prices for covered Part D drugs as part of their qualified prescription drug coverage).

D plan sponsors must meet actuarial equivalence standards when designing plans and benefit structures during the Part D bidding process. The reduction in price must be reported in accordance with existing rules and regulations governing the reporting of discounts and other reductions in price under the Part D program. We reiterate that if a PBM operating on behalf of a Part D plan sponsor or Medicaid MCO retains any portion of the reduction in price, the remuneration retained by the PBM would not be protected under this new point-of-sale safe harbor.

To provide additional clarity for stakeholders, we include the following example from the Proposed Rule regarding the current rebate framework and then explain how a reduction in price would be reflected at the point of sale consistent with the new safe harbor. Consider a branded prescription drug dispensed at a retail pharmacy that has a WAC/list price of $100. A manufacturer sells the drug to a wholesaler at a 2 percent discount from the WAC. Thus, the drug is sold to the wholesaler at $98. The wholesaler in this example sells the drug to a pharmacy for $100. A PBM negotiates on behalf of a plan both a negotiated reimbursement rate with a pharmacy that dispenses the drug and a rebate from the manufacturer for including the drug on the plan's formulary, tier placement within the formulary, etc. Under its contract with the PBM, the pharmacy agrees to be paid a negotiated rate such as, by way of example only, 1.20 × WAC/list price minus 15 percent plus a $2 dispensing fee.

When a patient has a prescription for the medication, the pharmacy files a claim on behalf of the patient to the patient's prescription insurance. This claim is processed by the plan and/or the PBM on the plan's behalf. The PBM determines what they pay the pharmacy and the amount remaining for the patient to pay the pharmacy. In this instance, the pharmacy is paid $104 for the drug. After the transaction, the plan and/or PBM may also receive rebates from the manufacturer, and in some cases, pay the pharmacy less than the original amount.

In this example, the PBM has negotiated a rebate with the manufacturer, of 30 percent of the WAC/list price ($30), which is passed on entirely to the plan sponsor. This rebate does not reduce the price charged at the pharmacy counter or the beneficiary's out-of-pocket cost, and the beneficiary's $26 coinsurance is actually 35 percent of the net cost of the drug ($104-$30), compared to the 25 percent coinsurance described in the benefits summary (which is based on negotiated pharmacy reimbursement and not net price). Thus, in this example, the plan receives back $30 in rebates, reducing the net cost for the drug to $74 (*i.e.,* $104-$30). This process is reflected in the following chart, which has been revised slightly with technical edits:

Transaction	Brand	Notes
List Price	$100	(A).
Pharmacy Reimbursement/POS Price	$104	(P).
Manufacturer Rebate to Plan	$30	(B) = 30% of (A).
Net Drug Cost	$74	(C) = (P) − (B).[50]
Patient Coinsurance	($26)	(D) = 25% * (P).
Net Cost to Plan	$48	(E) = (C) − (D).
Patient's Share of POS Price	25%	(H) = (D)/(P).
Patient's Share of Net Cost	35%	(I) = (D)/(C).

The difference in the patient's cost sharing relative to that of the plan is even more acute when the beneficiary is in the deductible phase and is fully responsible for the total pharmacy reimbursement. In this case, the beneficiary pays the full $104, more than 40 percent higher than what the plan negotiated, but never paid any fraction of it. In fact, the plan netted $30 when the beneficiary picked up the prescription.

Transaction	Brand	Notes
List Price	$100	(A).
Pharmacy Reimbursement/POS Price	$104	(P).
Manufacturer Rebate to Plan	$30	(B) = 30% of (A).
Net Drug Cost	$74	(C) = (P) − (B).
Patient Coinsurance	($104)	(D) = 100% of (P).
Net Cost to Plan	($30)	(E) = (C) − (D).
Patient's Share of POS Price	100%	(H) = (D)/(P).
Patient's Share of Net Cost	140%	(I) = (D)/(C).

As we stated in the Proposed Rule, this example reflects the Department's concern that, under the current rebate-based system, beneficiaries may not receive the benefits of reduced prices and costs that other parties do. The Department recognizes that parties to prescription drug sales are frequently paid based on a percentage of the WAC/list price and therefore, as the list price increases, so does the revenue to these parties. For example, in the context of branded prescription drugs, the absolute net revenue to the PBM and manufacturer generally may increase as the WAC increases. The net revenue to the pharmacy also may increase, but that would be contingent on the pharmacy's contract with the PBM. While the insurer's costs will increase as the WAC increases, under the current system, PBMs often offset the increase for insurers via a higher rebate from the manufacturer. In contrast, when a beneficiary is in the deductible phase, their out-of-pocket spending is more closely related to the WAC price than the net price. The rebate from the manufacturer is not utilized to offset beneficiary's out-of-pocket costs. Similarly, the beneficiary's coinsurance, which is often partly a percentage of WAC, will often increase as list price

[50] The Federal government shares in the rebates received by PBMs and Part D plan sponsors. *See also https://www.cms.gov/newsroom/fact-sheets/medicare-part-d-direct-and-indirect-remuneration-dir.*

increases. Under the current system, rebates are often not applied at the point of sale to offset the beneficiary's deductible or coinsurance or otherwise reduce the price paid at the pharmacy counter.

Under this final rule, beneficiaries would be able to share—at the pharmacy counter—in the discounts that plans and PBMs negotiate with manufacturers. Using the examples above, if the rebate were fully reflected in the point-of-sale price, the beneficiary's cost-sharing obligations would drop from $104 to $74 if the beneficiary were still in the deductible phase, and from $26 to $18.50 if she had a coinsurance obligation of 25 percent. The plan's share of the discount would be proportional to the coinsurance: The plan would get no share of the discount if the beneficiary were to pay full cost, but it would get 75 percent of the discount if the beneficiary had 25 percent coinsurance. The following provides an illustration of this point:

Transaction	100 Percent coinsurance (deductible)	25 Percent coinsurance
List Price	$100	$100
Pharmacy Reimbursement	$104	$104
Negotiated POS Discount	($30)	($30)
Net Drug Cost/POS Price	$74	$74
Patient Coinsurance	$74	$18.5
Net Cost to Plan	$0	$55.5
Patient's Share of POS Price	100%	25%
Patient's Share of Net Cost	100%	25%

Comment: A commenter recommended that OIG restrict, through a revision to the proposed safe harbor, the provision of identifying patient and prescriber information the drug manufacturer can receive from a Medicaid MCO or PBM acting on behalf of a Medicaid MCO in exchange for providing a price reduction. Specifically, the commenter recommended that a new paragraph (cc)(1)(iv) be added: (iv) The reduction in price does not involve the provision of identifying patient or prescriber information to the pharmaceutical manufacturer by a Medicaid MCO, or the PBM acting under contract with it.

Response: Nothing in this final rule affects obligations under existing privacy and security rules. We do not expect manufacturers to need patient- or provider-specific information. The plan sponsor under Part D, Medicaid MCO, or PBM must have a writing with the manufacturer that sets in advance the reduced price for a prescription pharmaceutical product. The plan sponsor under Part D, Medicaid MCO, or PBM is best positioned to ensure that the reduction in price is completely reflected in the price of the prescription pharmaceutical product at the time the pharmacy dispenses it to the beneficiary, and we would expect these parties to maintain documentation showing that these reductions in price were completely reflected at the time of dispensing.

Comment: A commenter requested that OIG clarify that under the point-of-sale safe harbor, point-of-sale reductions in price can be made contingent on bundled sales arrangements. Such arrangements can provide additional value to patients by expanding the types of discount arrangements available to manufacturers and payors. Another commenter recommended that any point-of-sale reductions in price that are contingent on bundled sales arrangements are passed along to consumers in a non-allocated, disaggregated fashion. This commenter further stated that if a method for allocating bundles at the point-of-sale is needed, OIG should look to CMS's definition of ''bundled sale'' at 42 CFR 447.502 and that OIG should encourage manufacturers and PBMs to agree upon a written method for estimating and allocating, in advance, effective rates for products subject to a bundle and that these effective rates are provided to the dispensing pharmacy. This commenter also recommended that price protection payments are passed along as point-of-sale chargebacks.

Response: The conditions of the new safe harbor for point-of-sale reductions in price do not limit the types of negotiation methods the parties may use, as long as the reduction in price can be completely reflected at the point of sale. Elsewhere in this final rule, we make clear that a reduction in price must be simply a reduction in price and not payment for a service. Therefore, making a reduction on price contingent on a bundled sale arrangement (*e.g.,* by providing for a reduction in price for one drug contingent on formulary placement of another drug) is not prohibited. However, we caution that to be protected under the safe harbor, the reduction in price must be reflected in the price of the product at the point of sale and a reduction in price that is not known at the time of sale (and therefore cannot be reflected at the time of sale) would not meet this condition of the safe harbor. For example, we could see a bundled arrangement based on formulary placement (such as in the example above) to be feasible; the parties will know at the time of sale, what the reduction in price would be. However, some types of bundling arrangements (*e.g.,* an arrangement that might be contingent on volume of sales of different items in a bundle) would make it difficult to reflect the final price at the time of sale, and therefore would not be consistent with the requirements of the safe harbor. We also clarify that there should be no situation in which the price at the pharmacy counter is less than zero. A situation in which a beneficiary or a Part D plan sponsor theoretically would be owed money would not be a reduction in price; that would be a payment to a referral source and would not be protected by a safe harbor.

Comment: A commenter suggested that OIG coordinate with the FTC to identify and address anti-competitive rebate schemes, such as rebate walls (which, according to the commenter, block competition by coupling volume-based discounts across multiple indications with retaliatory measures, such as the clawback of rebates by a market leader), when they run afoul of antitrust law.

Response: We appreciate the commenter's feedback. We work closely with our Government partners, including the FTC, as appropriate.

Comment: A commenter proposed an alternative model relating to point-of-sale reductions on drugs covered under Federal health care programs—namely, safe harbor protections for manufacturer cost-sharing assistance programs that provide point-of-sale reductions on prescription drugs covered under Federal health care programs when

there is no less expensive and equally effective generic available, such as for biologics.

Response: We did not propose to protect manufacturer cost-sharing assistance programs and have long-standing concerns with these types of arrangements; for these reasons, we decline to adopt the commenter's suggestion in this final rule.

Comment: Some commenters requested that OIG clarify how the point-of-sale discounts should be structured. For example, a commenter requested that OIG clarify whether manufacturers would be required to or have the option to provide the point-of-sale discounts by plans directly to the pharmacies, individually, or through another mechanism.

Response: If safe harbor protection is desired, point-of-sale reductions in price can be structured in any way that complies with the requirements of this safe harbor and any other applicable law. We note, however, that the safe harbor protects the price reduction from the manufacturer to the plan (directly or through a PBM). Discounts to pharmacies are not included in this safe harbor, but they are eligible for protection under the discount safe harbor if all safe harbor conditions are met. We have made minor changes to the regulatory text at § 1001.952(cc)(1) to clarify this point.

Comment: Some commenters recommended that patients with higher cost sharing be provided preferential treatment. A commenter requested that OIG provide manufacturers with the ability to pass through differential discounts to patients with, for example, copayments or higher cost sharing. Another commenter requested that patients with copayments, specifically, pay the lesser of the negotiated price of the drug, after it is reduced to reflect the point-of-sale discounts, or a reduced copayment reflecting a reduction that must, at a minimum, be proportional to the point-of-sale discount.

Response: We have clarified above the treatment of copayments under this final rule. We are not providing specifically for differential discounts under the safe harbor. We note, however, that this safe harbor protects reductions in price that manufacturers offer to plan sponsors under Part D and to Medicaid MCOs; the amount that gets passed through to beneficiaries is part of a plan's design and would not be determined by the manufacturer.

Comment: Several commenters identified that there is no mechanism in the proposed safe harbor to influence or even monitor drug manufacturer behavior, particularly related to lowering drug prices. Some commenters recommended that OIG require manufacturers to lower drug prices, while another commenter recommended that drug manufacturers be required to ''price drugs fairly'' as a condition for receiving government-funded research monies. A commenter recommended that OIG enforce penalties for ''egregious price increases'' that have the effect of increasing costs for plans, Federal health care programs, or patients. Another commenter recommended that OIG require not just manufacturers, but also PBMs and payors to lower drug prices. Another commenter recommended that CMS leverage the condition of participation standards by implementing new conditions on drug manufacturers that (1) would limit price increases for existing drugs to a measure of healthcare cost inflation and (2) allow managed care companies the option to exclude new drugs from their formularies if their price is higher than existing, peer drugs, but the differences in their clinical effectiveness relative to existing, peer drugs are not statistically different. A commenter recommended that the Department establish requirements on drug manufacturers that are similar to the medical loss ratio, for example, drug manufacturers should be held to standards based upon a ratio of expenditures on research and development and required to provide detailed reports of their expenses with penalties or other consequences for non-compliance. A commenter recommended that OIG require not only manufacturers, but also PBMs and payors, to lower drug prices.

Response: OIG does not have the authority to require that manufacturers or others lower drug prices, and comments recommending CMS take certain actions are outside the scope of this rulemaking. This final rule is limited to the issue of safe harbor protection under the anti-kickback statute for certain arrangements that implicate the prohibition on referral payments but pose an acceptably low risk of fraud or abuse. To that end, we have revised the discount safe harbor and added two new safe harbors. We have not required any particular level of discounts or price reductions.

Comment: Several commenters were concerned that the changes included in the Proposed Rule would not influence manufacturers' behavior and would not impose requirements on manufacturers to engage in good faith negotiations with all entities of the supply chain.

Response: As we stated in the Proposed Rule, it is difficult to predict any particular manufacturer's behavior. We are finalizing a safe harbor that permits manufacturers to offer reductions in price that meet certain conditions, including that the reduction be completely reflected in the price of the prescription pharmaceutical product at the time the pharmacy dispenses the drug to the beneficiary. Like all safe harbors, this safe harbor is optional and does not require manufacturers to offer discounts.

Comment: A commenter identified that the Proposed Rule does not provide a mechanism by which manufacturers can monitor or validate whether the reductions in price from manufacturers are passed through at the point of sale. Thus, the commenter recommended that OIG allow for manufacturers to be insulated from liability if certain discounts are not passed through at the point of sale, until OIG can establish a mechanism for monitoring and validating the pass through actually occurs.

Response: We decline to adopt this suggestion. Under the anti-kickback statute, parties are always required to comply with the law regardless of whether the OIG monitors for compliance with it. With that said, we recognize that each party has certain responsibilities for complying with the safe harbor. Whether a party has complied with the law is a fact-specific inquiry, including with respect to the intent of the parties.

Comment: Some commenters recommended that OIG require all participants or intermediaries in the drug supply chain be regulated and subject to the proposed safe harbor.

Response: For reasons explained elsewhere, we are not expanding the scope of the safe harbor beyond what we proposed. The commenters' suggestion would be impractical. Further, a safe harbor offers protection under the Federal anti-kickback statute for the remuneration described in the safe harbor; it does not generally regulate parties in the industry.

D. Safe Harbor for Certain PBM Service Fees

The Proposed Rule proposed a safe harbor to protect remuneration in the form of flat, fixed fees that manufacturers pay to PBMs for services the PBM provides to a manufacturer.

Comment: Many commenters who commented on the proposed safe harbor for PBM service fees were generally supportive of the safe harbor and its requirements. According to a commenter, the conditions limit the potential for PBMs to perform services with the incentive to increase costs for beneficiaries and programs. Another

commenter supporting the proposal stated that it will allow parties to receive appropriate payment for the value of their services, rather than the volume or value of the pharmaceutical products.

Response: We appreciate the commenters' support for this safe harbor.

Comment: Some commenters raised concerns about or opposed the proposed safe harbor for PBM service fees. For example, according to a commenter, the proposed safe harbor does not address what the commenter believes to be a conflict of interest when a PBM provides services to plan sponsors and patients while profiting from their relationships with manufacturers. The same commenter also said that manufacturers and PBMs can mislead parties by how they classify rebate payments and service fees in their financial arrangements.

Another commenter said that the safe harbor will not lower the surplus that PBMs with market power receive because, according to the commenter, such PBMs can demand a flat fee as easily as they can negotiate for percentage-based fees under the current rebate system. According to this commenter, payments from manufacturers to PBMs should first flow to the payor before being split between the payor and the PBM.

Response: We appreciate the commenters' responses. While we agree that PBMs can negotiate for flat fees just as they can negotiate for percentage-based fees, this safe harbor includes safeguards to reduce the risks associated with remuneration that may be tied to referrals. For example, the fees must be consistent with fair market value in an arm's-length transaction and cannot be determined in a manner that takes into account the volume or value of referrals or business otherwise generated between the parties, or between the manufacturer and the PBM's health plans that is payable, in whole or in part, by a Federal health care program. In addition, protected fees would be only for services that the PBM provides to the manufacturer, not for services provided to health plans. Fees for services furnished to health plans may be structured to comply with the personal services and management contracts safe harbor at § 1001.952(d).

Comment: Several commenters requested that OIG clarify the meaning of ''services the PBM provides to the pharmaceutical manufacturer related to the pharmacy benefit management services that the PBM furnishes to one or more health plans,'' and requested that OIG specify the types of services protected by the proposed safe harbor. A commenter recommended OIG narrow the list of ''pharmacy benefit management services'' listed in the preamble to the Proposed Rule so that, for example, PBMs do not create rebates composed of new classes of fees, or otherwise disguise rebates as fees, charged to and paid by manufacturers. Another commenter recommended OIG restrict PBM services to adjudicating claims only. Other commenters suggested that OIG issue guidance on the types of PBM services that OIG views as appropriately compensated by plans instead of by manufacturers, with a commenter pointing to claims adjudication and utilization management as examples of services performed for plans, and member aggregation as an example of a service appropriately provided to manufacturers.

Response: We are not specifying the services to be protected under the PBM service fees safe harbor because we do not want to set a static list of services that will be protected. Moreover, the types of services a PBM might provide to a health plan are not necessarily the same types of services that a PBM might provide to a manufacturer. Using the commenter's example, adjudicating claims is a service that a PBM performs for a health plan, but not for a manufacturer; further, while member aggregation might be one type of service provided by PBMs to manufacturers, to the extent that any compensation for such services is determined based on the volume or value of Federal health care program business, the compensation would not be protected by this safe harbor. We decline to specify a list of services that the PBM provides for plans as opposed to manufacturers. We believe it should be clear to the contracting parties whether the PBM is providing a service for a manufacturer or a plan.

i. Scope of Protected Fees

The Proposed Rule proposed a new safe harbor to protect certain PBM service fees that were flat service fees manufacturers make to PBMs for services the PBMs provide to the pharmaceutical manufacturers, for the manufacturers' benefit, when those services relate in some way to the PBMs' arrangements to provide pharmacy benefit management services to health plans. This safe harbor would protect only a pharmaceutical manufacturer's payment for those services that a PBM furnishes to the pharmaceutical manufacturer, and not for any services that the PBM may be providing to a health plan. The compensation paid to the PBM must be consistent with fair market value in an arm's-length transaction, be a fixed payment, not based on a percentage of sales, and not be determined in a manner that takes into account the volume or value of any referrals or business otherwise generated between the parties, or between the manufacturer and the PBM's health plans, for which payment may be made in whole or in part under Medicare, Medicaid, or other Federal health care programs. The Proposed Rule provided a non-exhaustive list of ''pharmacy benefit management services,'' but proposed not to create a definition because the role of the PBM may evolve over time. We address the definition of pharmacy benefit management services in the definition section. This section discusses the scope of the protected fees.

Comment: Some commenters suggested clarifying that the services must be performed ''on behalf of'' the manufacturer instead of ''to the manufacturer'' or ''for the manufacturer's benefit.'' Commenters also recommend that the safe harbor be limited to fees for services ''that the manufacturer would otherwise perform (or contract for) in the absence of the service arrangement.''

Response: For purposes of this safe harbor, and in this context, we believe that ''to the manufacturer'' is sufficiently clear. The PBM would be providing a service to a manufacturer (which also might be on behalf of the manufacturer). While we are not incorporating the particular language suggested regarding the services that the manufacturer would otherwise perform (or contract for), we agree that the safe harbor protects payment only for legitimate services.

Comment: Several commenters recommended broadening the proposed safe harbor related to PBM Service Fees to all fees, especially all PBM arrangements with manufacturers. These commenters wanted to ensure that the ''related to'' language does not unduly limit the scope of the safe harbor or risk noncompliance if manufacturers contract with PBMs for services that may not clearly ''relate to'' the PBM services that they typically provide to health plans.

Response: We thank the commenter for this suggestion but decline to accept it. If a service does not relate to pharmacy benefit management services that the PBM provides to a health plan, then it is unclear how the PBM could meet the condition that requires certain annual disclosures to health plans. As we note elsewhere, other services that PBMs provide could be protected by

other safe harbors, including the GPO and personal services safe harbors.

Comment: One commenter recommended that OIG clarify the PBM services covered by the safe harbor by removing the requirement that the services must ''relate to'' services the PBM furnishes to health plans and clarify the types of PBM services that might be provided for the benefit of the manufacturer.

Response: We decline to remove the requirement in the new safe harbor for PBM service fees that the fees for which safe harbor protection is sought ''relate to'' pharmacy benefit management services that the PBM furnishes to health plans. This proposed condition fosters transparency for health plans. As we stated in the Proposed Rule, the Department believes that PBMs are agents of the health plans with which they contract and that transparency is important to ensure that a PBM's arrangements with pharmaceutical manufacturers are not in tension with the services it provides to the health plans for which it is acting as an agent. Disclosures of specific services will allow a plan to see what services a PBM is contracting with a manufacturer that relate to the health plan. Thus, we proposed to protect only those fixed fee arrangements between manufacturers and PBMs where plans could have visibility into the arrangements, in other words, arrangements related to services the PBM was providing the plans. We solicited comments on limiting the safe harbor to fees that pharmaceutical manufacturers pay to the PBMs that relate to the PBM's arrangements to provide pharmacy benefit management services to health plans.

The language of the final rule clarifies that the fees for which safe harbor protection is available are fees for services provided for the benefit of the manufacturer who is paying for them. As noted in the Proposed Rule, such services might include services rendered to a manufacturer that depend on or use data gathered from PBMS from their health plan customers (whether claims or other types of data), subject to all applicable privacy and security rules. PBMs also might provide services for manufacturers to prevent duplicate discounts on 340B claims. Nothing in this rule preempts any contractual terms that a PBM has with health plans that limit uses of health plans or enrollees' data.[51]

Comment: As noted in the definition section, many commenters recommended that the PBM services and their related fees be tied to bona fide services. Additionally, these commenters recommended that the services be itemized to clearly show that the fees are paid for specific services at a market value. These commenters recommended that this guidance clarify that these services cannot be negotiated as a fixed suite of services or services that are applied on an ''all or nothing basis.''

Response: As we explain above, we have included additional conditions aimed at clarifying that only payment for legitimate services would be protected. We did not propose, and are not finalizing, a specified format for disclosure of the services to health plans, nor would PBMs be required to disclose the fees to health plans. However, PBMs would be required to disclose both the services and associated fees to the Secretary upon request. Therefore, it would be a best practice to maintain documentation that could demonstrate how each element of the safe harbor (*e.g.,* fair market value, fixed fees) is met.

Comment: One commenter recommended that the safe harbor fees be narrowed to protect only service fees paid for the purposes of administering point-of-sale reductions in price and related chargebacks.

Response: We decline to adopt this suggestion. The safe harbor for point-of-sale reductions in price protects a different stream of remuneration (*i.e.,* the reduction in price from a manufacturer to a plan sponsor under Part D or a Medicaid MCO). This safe harbor for PBM service fees is not related to the safe harbor for point-of-sale reductions in price and therefore should not be limited to arrangements protected under it.

Comment: A commenter requested that OIG protect only fees paid to PBMs independent of services a PBM already provides to plans.

Response: The PBM service fees safe harbor protects payments ''for services the PBM provides to the pharmaceutical manufacturer.'' Services provided to plans are not services provided to manufacturers, and therefore payments for services to plans are not protected by the safe harbor.

ii. Fair Market Value

Comment: A commenter recommended that the fair market value of the payment to PBMs reflect the value of the services, not the value of the products involved.

Response: By its terms, the proposed safe harbor for PBM service fees protects compensation paid for services performed by a PBM for a pharmaceutical manufacturer. The safe harbor provides that the compensation must (1) be consistent with fair market value in an arm's-length transaction; (2) be a fixed payment, not based on a percentage of sales; and (3) not be determined in a manner that takes into account the volume or value of Federal health care program business. We believe it is clear from this context that the compensation must reflect the fair market value of the service rendered, and not the value of the products involved.

Comment: Several commenters requested that OIG clarify the meaning of ''fair market value.'' A commenter asked OIG to provide examples of valuation approaches to meet the standard. Other commenters requested that OIG either adopt CMS's statements regarding fair market value in the context of CMS's *bona fide* service fees guidance for the MDRP or clarify the ''fair market value'' standard is consistent with CMS's statements. Another commenter asserted that in order to establish fair market value, PBMs and manufacturers should provide specific disclosures and demonstrate that the performed services are of real value to manufacturers, instead of simply showing that many manufacturers are willing to pay PBMs comparable amounts of money for general, nondescript services.

Response: The requirement that compensation paid for PBM service fees be ''consistent with fair market value in an arm's-length transaction'' is nearly identical to a requirement of the safe harbor for personal services and management contracts, 42 CFR 1001.952(d), which has been in effect since 1991. 56 FR 35952 (July 29, 1991). In addition, both the personal services and management contracts safe harbor and the proposed PBM service fees safe harbor include a requirement that the compensation not be determined in a manner that takes into account the volume or value of any Federal health care program business. (Because of this requirement, a fair market value determination cannot be made through comparison to transactions where compensation may have taken the value of referrals into account.)[52] The

[51] 84 FR 2349–50.

[52] *See, e.g.,* Letter from D. McCarty Thornton, Associate General Counsel, Inspector General Division, to T. J. Sullivan, Office of the Associate Chief Counsel, Internal Revenue Service, Dec. 22, 1992 (''When considering the question of fair market value, we would note that the traditional or common methods of economic valuation do not comport with the prescriptions of the anti-kickback statute. Items ordinarily considered in determining the fair market value may be expressly barred by the anti-kickback statute's prohibition against payments for referrals. Merely because another

Continued

proposed PBM service fees safe harbor also specifically excludes from protection compensation based on a percentage of sales. In addition, as we explain elsewhere, we include certain additional requirements similar to the personal services and management contracts safe harbor at 42 CFR 1001.952(d).

We decline to provide further guidance on the setting of compensation for PBM service fees, nor do we adopt the guidance provided by CMS in a different context.[53]

iii. Take Into Account Volume or Value

Comment: Commenters suggested that, if OIG does not believe that all fees based on volume or value would generate a significant risk, OIG should adopt clear guidance excepting lower risk arrangements from the volume or value requirement. More specifically, several commenters recommended that OIG exempt any arrangement that involves varying numbers of transactions, provided that the fee for each individual transaction is fixed in advance and consistent with fair market value in an arms-length transaction, as it presents a low risk of fraud. This would facilitate practical service fee arrangements between manufacturers and PBMs. Alternatively, commenters suggested that the rule could clarify that the reference to volume or value of business ''otherwise generated'' between parties means that payment terms under the PBM service fee arrangement in question should not take into account other arrangements outside of the contract, but would not preclude per-unit fees based on volume or value of the services furnished under the service fee agreement itself. According to commenters, these types of arrangements present a low risk of fraud or abuse if certain safeguards are incorporated into the safe harbor. Specifically, a few commenters recommended including the factors identified in OIG's Advisory Opinions 10–14 and 11–18[54] to deem certain fair market value, arms-length, per-unit fees as not taking into account the volume or value of referrals or other business generated between the parties. A commenter requested that the safe harbor protect fees where PBMs are paid less per claim as the number of claims increases in light of certain fixed costs.

Response: We agree with the general premise of the commenters' concerns, that compensation for services may be determined on a per-unit of work basis and thus vary with the volume of work performed. This particular safe harbor condition excludes compensation that takes into account the volume or value of referrals or other business that are payable in whole or in part under a Federal health care program. For example, if a per-unit-of-work fee is fixed in advance at fair market value for services actually provided to the manufacturer and is not based on volume or value of Federal health care business, then that arrangement could be protected, so long as the unit-based compensation does not vary during the course of the compensation arrangement in any manner that takes into account referrals or other Federal business generated. On the other hand, the safe harbor would not protect per unit compensation that varies with either increases or decreases in volume (*e.g.,* X amount per unit for the first 1,000 units, X + 1 per unit for additional units), as we believe that compensation determined in this manner is not low risk. In addition, we emphasize that this safe harbor would not protect any per-unit-of-work fee that is based on or otherwise connected with drug prices.

Comment: According to a commenter, the Proposed Rule would allow all entities (other than PBMs) in the drug supply chain that supply services to manufacturers to be compensated for the provision of services based on volume and a percentage of list price. The commenter recommended requiring all payments by manufacturers for services provided by third parties to be applied equally and to be set in advance, fixed, and based on fair market value.

Response: In the Proposed Rule, we proposed a new safe harbor specifically to protect fees paid from manufacturers to PBMs for services rendered to the manufacturers, if all the conditions of the safe harbor are met. This safe harbor does not ''allow'' payments to other entities that do not meet these conditions; it simply does not protect them, whether they meet the conditions or not. Manufacturer payments to entities other than PBMs may be protected by other safe harbors, such as the safe harbor for personal services and management contracts, 42 CFR 1001.952(d). (This safe harbor also requires that compensation be set in advance, consistent with fair market value in arm's-length transactions, and not determined in a manner that takes into account volume and value of Federal health care program business.) However, compliance with the terms of each safe harbor is voluntary. If parties choose not to comply with such requirements with regard to particular arrangements, it may be that they do not believe that these arrangements implicate the anti-kickback Statute or that they otherwise comply with the law.

iv. Fixed Fees

Comment: Several commenters were supportive of the condition in the safe harbor requiring that the compensation paid to a PBM be a fixed payment rather than a payment based on a percentage of sales. A commenter noted that this proposal may increase the placement of less expensive drugs on preferred formulary tiers and could reduce out-of-pocket costs for certain patients. Some commenters noted that a flat-fee system aligns fees with the value of the services provided.

Response: We appreciate the commenters' support for this condition of the safe harbor. Based on the comments received, we are finalizing this condition, as proposed.

Comment: Several commenters suggested changes to the scope of fees that can be protected under the PBM service fees safe harbor. For instance, several commenters recommended that the safe harbor apply to fees for any service a PBM provides to or on behalf of a manufacturer. Many commenters either requested that the safe harbor protect fees for all *bona fide* services provided by PBMs to manufacturers or asked that we incorporate (or consider incorporating) the standards from the *bona fide* service fee definition under the MDRP (42 CFR 447.502). According

buyer may be willing to pay a particular price is not sufficient to render the price paid to be fair market value. The fact that a buyer in a position to benefit from referrals is willing to pay a particular price may only be a reflection of the value of the referral stream that is likely to result from the purchase.''), *available at https://oig.hhs.gov/fraud/docs/safeharborregulations/acquisition122292.htm.*

[53] A commenter on the Proposed Rule cited CMS's response when asked to provide guidance on the meaning of ''fair market value'' as used in its definition of ''bona fide service fees.'' 81 FR 5170, 5179–5180 (Feb. 1, 2016). Among the comments cited in that rulemaking was one that ''encouraged CMS to acknowledge that many or most fee arrangements common in the industry tend to be percentage based agreements and that manufacturers can establish a fair market value rationale for a percentage based fee through industry benchmarking by comparing types of specific services outlined in an agreement with ranges of payments observed throughout the industry.'' 81 FR 5179. While CMS did not respond to this particular comment and declined to further define fair market value for purposes of the bona fide service fee definition, it stated its belief that manufacturers should retain flexibility in determining whether service fees are paid at fair market value. We are not adopting CMS' terminology nor its definition of ''bona fide services fees,'' for purposes of this final rule. To the extent that CMS's guidance on the topic of service fees leaves room for percentage-based arrangements, it should be noted that percentage-based arrangements are expressly excluded from protection under the PBM service fees safe harbor.

[54] Advisory Opinion 11–18 was terminated on April 1, 2014.

to at least one commenter, if we do not limit the scope of the safe harbor to *bona fide* services, PBMs may seek to convert costs and lost revenue to service fees.

Response: We are finalizing a modification to the new safe harbor to protect payments by a pharmaceutical manufacturer to a PBM for legitimate services the PBM provides to the pharmaceutical manufacturer related to the pharmacy benefit management services that the PBM furnishes to one or more health plans with certain conditions. We share commenter's concerns about the use of this safe harbor to convert costs and lost revenue to service fees. Therefore, we are clarifying in the regulatory text that the safe harbor applies only to ''legitimate'' services; thus, this safe harbor does not protect arrangements between manufacturers and PBMs for services that are not necessary, are worthless, or are duplicative. Because we are not adopting or incorporating by reference the term ''bona fide service fee,'' as CMS may use that term, we wanted to use a different term to convey a similar concept.

Comment: A commenter requested clarification as to how fixed fees would be structured to comply with this safe harbor. In particular, the commenter raised concerns that a fixed-fee model could lead PBMs to pass down higher administrative costs to Medicaid MCOs that could, in turn, increase costs for states and the Federal Government. Another commenter raised concerns that flat fees will be used by manufacturers as another way to encourage utilization of their products. According to these commenters, the fixed fees are a mechanism for entities to offset rebate losses.

Response: We appreciate the commenter's concerns about how a fixed-fee model could affect costs for states and the Federal government, and we do not intend for this safe harbor to protect fixed fees that serve only as a mechanism for entities to offset rebate losses. As discussed above, we are finalizing a modification to the new safe harbor to protect payments by a pharmaceutical manufacturer to a PBM for legitimate services the PBM provides to the pharmaceutical manufacturer related to the pharmacy benefit management services that the PBM furnishes to one or more health plans with certain conditions. If the fee arrangement does not meet all safe harbor conditions, then it would not be protected.

Comment: A commenter sought clarification from OIG that the PBM service fees protected under the safe harbor would replace the existing administrative fees received by PBMs that are based on a percentage of WAC. Additionally, the commenter requested that OIG not protect any administrative fees based on a percentage of WAC that are paid to PBMs or any other intermediaries.

Response: We proposed to add, and are finalizing, a new safe harbor specifically designed to protect certain fixed fees pharmaceutical manufacturers pay to PBMs for services rendered to the manufacturers that relate to PBMs' arrangements to provide pharmacy benefit management services to health plans. With respect to the commenter's second request, we note that nothing in this final rule is intended to affect any existing protections that may be available under other safe harbors for the types of administrative fee arrangements the commenter described.

Comment: A commenter disputed OIG's assertion that a PBM service fee becomes a kickback because the basis for setting it is a percentage of list price, especially since this is typically the best measure of fair market value. To address this concern, the commenter recommended a prohibition on any manufacturer requirement that the service fees be dependent on formulary placement. This would permit specifying that service fees tied to a fixed percentage of sales may qualify as a permitted fixed fee under the rule.

Response: Our Proposed Rule stated that service fees tied to a product's price ''could function as a disguised kickback.'' Whether a service fee based on a percentage of list price rises to the level of an unlawful kickback under the anti-kickback statute would depend on the facts and circumstances. As we noted in the Proposed Rule, we proposed a safe harbor that would protect flat fees because they ''pose lower risk of abuse and conflicts of interest.'' Because of these concerns, we decline to adopt the commenter's suggestion to protect service fees tied to a fixed percentage of sales.

v. Disclosure Requirement

Comment: Many commenters expressed general support for PBM disclosures arguing that plans should have full information about PBM relationships with manufacturers, including fees that manufacturers pay to PBMs.

Response: We appreciate the commenters' support. To promote transparency, we are finalizing our proposals that information about both the services and the associated fees be disclosed to the Secretary upon request. In the Proposed Rule we said we were considering and solicited comments on requiring additional information about the fee arrangements, including information about valuation, valuation methodologies, compliance with the ''volume or value'' criterion, and other characteristics. For purposes of compliance with the final safe harbor, we are not requiring disclosure of each of these additional elements. However, maintaining documentation of these elements would be prudent to demonstrate safe harbor compliance.

Comment: Many commenters recommended additional disclosure requirements, including: Requiring PBMs to disclose service fee arrangements with plans to manufacturers; requiring PBMs to disclose all arrangements with manufacturers and wholesalers that are related to health plans; requiring PBMs to disclose all information related to the fees PBMs are paid for the services protected under the safe harbor; requiring PBMs to disclose to manufacturers when they seek manufacturer compensation for services also compensated by a plan; requiring PBMs to annually disclose to the Department information that explains their valuation methodology and demonstrates their fee arrangements meet the volume and value criteria; and requiring PBMs to disclose service fees that are separated from any discounts or rebates. A commenter requested clarification regarding the specific information that must be included in the disclosures under the new safe harbor, particularly as it related to the ''additional information about fee arrangements'' that PBMs would be required to disclose to the Secretary.'' *See* 84 FR 2350. Another commenter requested that PBMs' written agreements with pharmaceutical manufacturers be made publicly available on both the manufacturer's and PBM's websites and that CMS should also compile and display these agreements on the agency's website.

Response: Although we appreciate commenters' suggestions, we did not propose transparency requirements for agreements between PBMs and health plans or wholesalers and, therefore, could not finalize such requirements here. Moreover, the additional disclosure requirements suggested by the commenters exceed what we believe should be necessary for safe harbor compliance, given the overall structure of the safe harbor, and to protect against abusive fee arrangements between manufacturers and PBMs. Additionally, we see no need to require the public disclosure of this type of private agreement between two parties as a

requirement under the safe harbor. However, we note that under the final rule, PBMs would disclose to the Secretary upon request the services provided and fees paid for the services. Of course, to the extent a PBM was subject to an enforcement action and asserting the safe harbor as a defense, the PBM would have to show that it met each element of the safe harbor. Therefore, as a best practice, the PBM should have documentation of how it met each element (*e.g.,* a fair market value analysis for the fees).

Comment: A commenter proposed that beneficiaries should have similar access as health plans to information regarding PBM contracts and another commenter requested clarification as to whether the PBM disclosures would be required to the pharmacy or beneficiary.

Response: We did not propose and are not finalizing any requirement for PBMs to make disclosures to pharmacies or beneficiaries. We believe the safe harbor conditions we are finalizing provide the appropriate protections against abusive kickback schemes.

Comment: Another commenter proposed that disclosures of contracts and service fees should be made at the time of agreement rather than annually, because obtaining the information earlier would aid plans in contemporaneously addressing possible conflicts in PBMs' recommendations. The same commenter recommended adding a new subsection to prohibit Medicaid-identifying patient or prescriber information from being provided to the manufacturer.

Response: We appreciate the commenter's suggestion, but we decline to delete the requirement for PBMs to report on arrangements with manufacturers annually. We believe that this information can change over time and should be updated. Medicaid-identifying patient or prescriber information is not part of the disclosure requirement and its disclosure may be governed by other laws.

Comment: A commenter supported general disclosure of the types of services that PBMs may provide to manufacturers but objected to disclosures of specific services provided to manufacturers on the grounds that such disclosure would be unwieldy and provide no additional transparency. Another commenter objected to the disclosure requirements, because PBMs and their clients already engage in arm's-length negotiations, including what is disclosed and not disclosed, and called any additional disclosure requirements unnecessary, burdensome, and invasive.

Response: Although we appreciate the commenters' concerns, we respectfully disagree. The transparency requirement is important to ensure that a PBM's arrangements with pharmaceutical manufacturers are not in tension with the services it provides to the health plans for which it is acting as an agent. Disclosures of specific services will allow a plan to see what services a PBM is contracting with a manufacturer for on its behalf.

Comment: A commenter requested clarification regarding the scope of ''associated costs'' and ''associated compensation'' for services rendered to pharmaceutical manufacturers that are to be disclosed under the new PBM service fees safe harbor. The commenter objected to the disclosure to plan sponsors of fees paid by manufacturers to PBMs, stating that the disclosure of fees to plan sponsors would not provide any additional transparency and would negatively affect competition due to widespread dissemination of the fees paid by each manufacturer to each PBM.

Response: We appreciate the commenter's concern. The terms ''costs'' and ''compensation'' as used in the Proposed Rule were meant to be synonymous. We further note that while we considered and solicited comments on whether PBMs should be required to disclose fee arrangements to health plans, we are not finalizing this requirement. We are, however, finalizing the proposal that PBMs are required to disclose fee arrangements to the Secretary upon request.

Comment: Regarding ''additional information about fee arrangements'' to be disclosed to the Secretary upon request, a commenter recommended that PBMs disclose information to the Department that demonstrates fee arrangements do not duplicate other arrangements for which the PBM might receive payments. Conversely, other commenters cautioned that duplicative services may not always constitute ''double dipping'' and that duplicative services may not necessarily indicate that an arrangement is fraudulent or abusive. As an example, these commenters noted that ''PBMs may provide the same data to more than one entity, and such data could represent value to each recipient, even if the data is also received by others.''

Response: In the Proposed Rule, we said we were considering and solicited comments on a range of additional information we might require be disclosed to the Secretary, upon request, including information related to duplicative payments and double-dipping. However, we are not requiring that the PBM proactively disclose information that specifically demonstrates a lack of duplicate services. The safe harbor requires that a PBM disclose to the Secretary upon request the services it rendered to each pharmaceutical manufacturer related to the PBM's arrangements to furnish pharmacy benefit management services to the health plan and the fees paid for such services. We believe this disclosure requirement will provide sufficient transparency and that additional disclosure requirements are not necessary to achieve the goals of the safe harbor. The requirement to provide information about services and the fees paid for those services to the Secretary on request does not constitute a determination that any particular arrangement is abusive. We recognize that particular fees and services cannot be examined in a vacuum, and we would look at the totality of facts and circumstances in reviewing an arrangement.

Comment: A commenter argued that, as proposed, the definition of pharmacy benefit manager services eligible for protection under the proposed safe harbor meets the definition of a *bona fide* service fee and urged HHS to specify that if administrative service fees meet the bona fide services fee definition they would no longer be treated as reportable price concessions.

Response: Determinations of what services are or are not reported as price concessions are the purview of CMS, which administers the Part D program.

vi. Scope of Agreement

We solicited comments regarding whether the safe harbor for pharmacy benefit manager fees should specify the format of any such agreement (*e.g.,* whether it would be sufficient for a PBM to have one agreement with a manufacturer that covers all of the services the PBM provides to that manufacturer, or whether separate agreements for services that relate to each health plan would be necessary).

Comment: A commenter recommended that the rule should not dictate the format of a PBM agreement, which could vary based on the services to be provided and the preferences and standards desired by the parties. The commenter suggested that requiring separate agreements for each of a PBM's plan sponsor clients would impose tremendous costs on the parties while providing no benefit or protection to Federal health care programs. The commenter also pointed out that PBMs may need separate agreements for Federal and commercial business.

Response: The final rule does not specify the format of a PBM service fee

agreement and does not mandate that the PBM have separate agreements with each health plan with which it contracts.

vii. Statutory Exception and Safe Harbor for Group Purchasing Organizations

Comment: Various commenters asked OIG to affirmatively rescind statements from its 2003 CPG that indicate rebates or other payments to PBMs may be structured to fit under the GPO safe harbor at 42 CFR 1001.952(j) [55] and to indicate in revised guidance that these statements have been superseded and replaced by the point-of-sale reductions in price and PBM service fees safe harbors, as of the effective date of the final rule. Another pharmaceutical manufacturer commenter asserted that allowing PBMs to rely on the GPO safe harbor would create a loophole to the new safe harbors and reduce uptake of point-of-sale discount arrangements and service fees based on flat, fair market value payments.

Commenters also asked for clarification as to whether OIG still recognizes the GPO safe harbor as a possible source of protection for rebates or other payments by manufacturers to PBMs. Similarly, other commenters recommended that OIG clarify or revise the 2003 CPG in light of the final rule because of the potential for confusion by stakeholders on the status of rebates or other payments paid by manufacturers to PBMs.

Conversely, a PBM commenter indicated that it intends to continue to utilize the GPO safe harbor, 42 CFR 1001.952(j), to protect the receipt of administrative fees from manufacturers. Another commenter stated the GPO safe harbor also has a corollary statutory exception that would protect these payments.

Response: To qualify for protection under the GPO safe harbor, certain requirements must be met. First, the safe harbor protects only payment by a vendor to a GPO as part of an agreement to furnish goods or services to an entity. Second, the GPO must have a written agreement with each individual or entity for which items or services are furnished that specifies either that the fee the GPO receives will be three percent or less of the purchase price of the goods or services provided by that vendor or specifies the amount (or if not known, the maximum amount) the GPO will be paid by each vendor (where such amount may be a fixed sum or a fixed percentage of the value of purchases made from the vendor by the members of the group under the contract between the vendor and the GPO). Third, if the entity that receives the goods or service from the vendor is a health care provider of services, the GPO must disclose in writing to the entity at least annually, and to the Secretary upon request, the amount received from each vendor with respect to purchases made by or on behalf of the entity. In addition to meeting the requirements above, a PBM, as a threshold matter, would have to meet the definition of a GPO: An entity authorized to act as a purchasing agent for a group of individuals or entities who are furnishing services for which payment may be made in whole or in part under Medicare, Medicaid or other Federal health care programs, and who are neither wholly-owned by the GPO nor subsidiaries of a parent corporation that wholly owns the GPO (either directly or through another wholly-owned entity).[56]

Thus, for a PBM to qualify as a GPO acting as a purchasing agent on behalf of its members, the PBM could not wholly own the members, nor could the members be wholly owned by the same parent corporation as the PBM. This may limit the utility of the safe harbor for many PBMs. The propriety of any particular arrangement and whether it can fit under a safe harbor is highly dependent upon the facts and circumstances of each particular case. Any statements in this final rule should be not construed as approval of an individual arrangement. PBMs and manufacturers wishing to use the GPO safe harbor should closely scrutinize their arrangements for full compliance with all safe harbor conditions and definitions, including all requirements relating to written agreements and disclosures.

Requests for amendments to the regulatory safe harbor for GPOs are beyond the scope of this rulemaking. In addition, as we state above, fees to PBMs are not protected by the discount or point-of-sale reduction in price safe harbors, so nothing in this rule would suggest those amendments would replace or supersede a PBM's ability to have fees protected by a different safe harbor. The new PBM service fee safe harbor is an additional avenue for protection for arrangements between pharmaceutical manufacturers and PBMs that meet the conditions of that safe harbor. As with any safe harbor, only offers or payment of remuneration that meet all safe harbor conditions, including any applicable definitions and disclosure requirements, would be protected.

Comment: Another commenter encouraged OIG to clarify and distinguish the GPO safe harbor term ''purchasing agent'' from PBM in the final rule or future rulemaking. The commenter asserted that the term ''purchasing agent'' is used but not defined in both the GPO statutory exception and safe harbor. The commenter requested that OIG define the term ''purchasing agent'' narrowly, *e.g.,* as an entity that is distinct from a PBM and represents members that take title and possession of purchased products, which, the commenter asserted, would better ensure the objectives of the Proposed Rule. Similarly, another commenter encouraged OIG to clearly distinguish PBMs from GPOs based on the types of entities that they represent and services they perform for those entities.

Response: Defining the term ''purchasing agent'' and distinguishing between GPOs and PBMS as those terms are used in the GPO statutory exception and safe harbor is outside the scope of this rulemaking, which does not address the GPO safe harbor.

viii. Additional Recommendations

Comment: Several commenters requested that OIG clarify, expand, or restrict the definition of PBM for purposes of the proposed safe harbor for various reasons. For example, some commenters recommended a definition that is based on an entity's function or incorporates the types of services an entity provides, rather than the label of its name. A commenter recommended that a definition of ''PBM'' not include ''negotiating rebate arrangements'' because it could create the impression of protecting PBM services provided to manufacturers that are not legitimate and/or necessary. Some commenters recommended OIG include in the definition all PBM-owned and PBM-affiliated entities, including PBM-owned pharmacies.

Response: We thank the commenters for their suggestions. We decline to expand or limit the definition of ''PBM'' that we included in the Proposed Rule. We included only the core function of a PBM in the definition because we recognize that one PBM may perform more or fewer services than another

[55] Specifically, several commenters requested OIG rescind the following statements from the ''Payments to PBMs'' section in 68 FR 23736: ''Any rebates or other payments by drug manufacturers to PBMs that are based on, or otherwise related to, the PBM's customers' purchases *potentially* implicate the anti-kickback statute. Protection is available by structuring such arrangements to fit in the GPO safe harbor at 42 CFR 1001.952(j). That safe harbor requires, among other things, that the payments be authorized in advance by the PBM's customer and that all amounts actually paid to the PBM on account of the customer's purchases be disclosed in writing at least annually to the customer.

[56] 42 CFR 1001.952(j)(2).

PBM, and we do not want a defined term to dictate a business model for purposes of safe harbor protection. We also decline to include all PBM-owned or PBM-affiliated entities in the definition. Other safe harbors (such as the personal services safe harbor) might be available to protect services performed by other types of entities.

Comment: Some commenters requested that OIG clarify or remove altogether the ''related to'' aspect of the proposed safe harbor so that the safe harbor protection could be more broadly available to, for example, all PBM services arrangements with manufacturers.

Response: We are not adopting this suggestion. The conditions in this safe harbor are designed to ensure that protection is offered only for service fees if the services are related or (*i.e.,* connected in some way) to pharmacy benefit management services that the PBM provides to health plans. If there is no connection to health plan services, certain conditions in the safe harbor would be inapplicable (*e.g.,* the requirement to make certain disclosures to health plans). We note, however, that other safe harbors, such as the personal services and management contracts safe harbor at § 1001.952(d) may be available to protect other types of service arrangements between PBMs and manufacturers.

Comment: Some commenters recommended that OIG incorporate certain requirements of the personal services and management contracts safe harbor to the PBM service fees proposed safe harbor. Specifically, the commenters recommended requiring that (1) the agreement for the service be signed by the parties; (2) the services performed under the agreement do not involve the counselling or promotion of a business arrangement or other activity that violates any State or Federal law, and (3) the aggregate services contracted for do not exceed those that are reasonably necessary to accomplish the commercially reasonable business purpose of the services.

Response: The proposed safe harbor for PBM service fees includes certain safeguards adapted from the personal services and management contracts safe harbor, including a requirement that compensation be fair market value for services rendered.

With regard to the suggestion that the safe harbor include a requirement that the agreement for PBM services be signed by the parties, we believe that such a requirement is implicit in the requirement that the agreement be in writing in order to establish and memorialize the agreement of the parties. However, we acknowledge that the personal services and management contracts safe harbor includes an explicit requirement of signatures. For the sake of consistency, and to avoid any implication that an inconsistency on this point means no signatures are required for compliance with the PBM service fees safe harbor, we are adding this explicit requirement to the final rule.

As noted by commenters, the personal services and management contracts safe harbor also includes a requirement that the services performed under the agreement do not involve the counselling or promotion of a business arrangement or other activity that violates any State or Federal law. While the proposed PBM service fees safe harbor did not include such a requirement in regulatory text, we think it is obvious that the proposed safe harbor was not intended to protect payments for the counselling or promotion of illegal activities. For the sake of clarity, we are adding this explicit requirement to the final rule.

The commenters also noted that the personal service and management contracts safe harbor requires that ''the aggregate services contracted for do not exceed those that are reasonably necessary to accomplish the commercially reasonable business purpose of the services.'' While we are not including this specific condition in the final rule, we note that considering whether services are commercially reasonable would likely be useful in meeting the condition that payments protected by the safe harbor be ''for services the PBM provides to the pharmaceutical manufacturer related to the pharmacy benefit management services that the PBM furnishes to . . . health plans'' and not for favorable treatment of the manufacturers' products.

Comment: A commenter recommended that OIG provide guidance stating that companies will be held accountable for their own compliance, noting that the discount safe harbor requires entities to ''refrain from doing anything that would impede'' their contracting counter-party from meeting their own obligations under the safe harbor. The contractor further noted that the 1999 preamble to the discount safe harbor states that, if a seller meets its obligations under the safe harbor in good faith, while the buyer fails to meet its obligations, the seller would be protected by the safe harbor. 64 FR 63518, 63527 (Nov. 19, 1999).

Response: The safe harbor for PBM service fees differs from the discount safe harbor at 42 CFR 1001.952(h), in that the latter has separate sets of requirements for buyers and sellers. The PBM service fee safe harbor has only one condition that is the responsibility of only one party: The PBM is responsible for certain disclosures, which we believe it is able to make without the assistance of any other party to the agreement. We confirm that, provided that all other requirements of the safe harbor are met, and provided that the manufacturer party to an agreement with a PBM has taken no steps to discourage or impede the PBM from meeting the disclosure requirements, the PBM's failure to meet the disclosure requirement will not, by itself, cause the manufacturer to lose the protection of the safe harbor. We note, however, that if the manufacturer were aware of a failure to disclose and took no steps to remedy it, liability might attach to the manufacturer through various legal theories, depending on all the facts of the arrangement and the conduct of the parties.

Comment: A commenter explained that *bona fide* payments for services performed by PBM intermediaries should be converted to fee-for-service arrangements that are tied to the fair market value of the services performed rather than a percentage of WAC. The commenter requested that OIG provide similar protections for pharmacies, wholesalers, and outpatient providers.

Response: The commenter did not explain how the referenced service arrangements with pharmacies, wholesalers and outpatient providers implicate the anti-kickback statute while posing low risk of abuse, and therefore are suitable for protection by a safe harbor. If the arrangements do not fit in a safe harbor, they would be analyzed on a case-by-case basis for compliance with the statute.

Comment: Some commenters requested that pharmacies' reimbursement not be affected by the negotiated rate between plans or PBMs and manufacturers and that pharmacies not be expected to pay any of the service fees owed by manufacturers to PBMs.

Response: There is no expectation under the final rule that pharmacies pay any of the service fees owed by manufacturers to PBMs. Pharmacy reimbursement from plan sponsors and the relationships between pharmacies and manufacturers are beyond the scope of this rulemaking. However, we note that the PBM service fee safe harbor protects only payments to PBMs by manufacturers, provided all conditions of the safe harbor are met. Payments that are made by pharmacies, even indirectly through reimbursements to

manufacturers, are not protected by the safe harbor.

Comment: Some commenters requested that OIG clarify what ''arm's-length transaction'' means. In particular, a commenter specifically requested that OIG clarify: (1) That PBMs are obligated to negotiate services arrangements in good faith based on the bona fide needs of manufacturers; (2) the scope of safe harbor protection available for arrangements in which a PBM provides services on behalf of an affiliated plan; and (3) that individual health plans that do not provide pharmacy benefits management services to plan sponsors under Part D may not attempt to use the safe harbor to negotiate administrative fees from manufacturers.

Response: The term ''arm's-length transaction'' has appeared in safe harbor regulations since 1999 [57] and has been subject to interpretation in advisory opinions and other OIG guidance,[58] as well as court cases,[59] since that time. We decline to provide further interpretation here.

Comment: A commenter suggested that alternative, transparent, flat-fee based pharmacy benefits models that reduce costs already exist (and were not considered by OIG or HHS) that generate savings, which are used by health plans in a variety of ways, including (1) reducing plan spending and/or providing member savings, such as offsetting premium costs; or (2) lowering copayments for enrollees and not charging an enrollee more than the cost of the drugs themselves.

Response: The Proposed Rule does not prohibit the use of other models but only provides protection from liability for PBM service fees, in certain circumstances, because they implicate the anti-kickback statute and are considered to be low-risk.

Comment: A commenter urged OIG to clarify that, if an arrangement fell under the protection of other safe harbors, including discount, personal services and management contracts, managed care, and GPO administrative fee, those arrangements can only now be protected under the proposed PBM service fees safe harbor.

Response: An arrangement that satisfies all conditions of any safe harbor can be protected without satisfying conditions of other potentially applicable safe harbors. Thus an arrangement between a PBM and a manufacturer that does not satisfy the conditions of the safe harbor for PBM service fees could be protected by a different safe harbor, if the arrangement met all the conditions of that other safe harbor.

E. Technical Comments

We received several comments requesting that we make technical revisions to certain provisions in the regulatory text. We summarize the comments received below.

Comment: Commenters requested that we revise ''reduced price'' to ''reduction in price'' in § 1001.952(cc)(1)(i) to ensure consistency with the term used in § 1001.952(cc).

Response: We agree with the commenters and have made the technical correction.

Comment: Commenters noted that we use the term ''health benefits plan'' in the proposed definition of ''pharmacy benefit manager'' but use the term ''health plan'' throughout the rest of the Proposed Rule. The commenters requested that we avoid introducing inconsistency and use the term ''health plan'' in this definition.

Response: We agree with the commenters and have made the technical correction.

IV. Provisions of the Final Regulation

This final rule incorporates, in large part, the amendments to the discount safe harbor and the new safe harbors we proposed in the Proposed Rule, but with some changes to the regulatory text.

A. Revision to the Discount Safe Harbor

We are finalizing, with certain revisions, our amendments to the discount safe harbor (42 CFR 1001.952(h)). In the Proposed Rule, we proposed to exclude from safe harbor protection a reduction in price or other remuneration from a manufacturer in connection with the sale or purchase of a prescription pharmaceutical product to a plan sponsor under Medicare Part D or to a Medicaid MCO. In response to comments, we are not finalizing our proposal to exclude from protection those reductions in price from pharmaceutical manufacturers to Medicaid MCOs.

B. New Safe Harbors

We are finalizing, with certain revisions, a new safe harbor in § 1001.952(cc) to protect point-of-sale reductions in price by a manufacturer for a prescription pharmaceutical product that is payable, in whole or in part, by a plan sponsor under Medicare Part D or a Medicaid Managed Care Organization. In addition, we are finalizing, with minor revisions, a new safe harbor that protects payment by a pharmaceutical manufacturer to a PBM for services the PBM provides to the pharmaceutical manufacturer related to the pharmacy benefit management services that the PBM furnishes to one or more health plans.

C. Technical Corrections

We are correcting a numbering error in the new safe harbor in § 1001.952(dd). Specifically, we inadvertently failed to include a (1) before the opening language for § 1001.952(dd). In this final rule, we have inserted the (1) and renumbered the subsequent paragraphs accordingly to correct this oversight.

V. Regulatory Impact Statement

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis must be prepared for major rules with economically significant effects of $100 million or more in any one year.

Executive Order 13771 (January 30, 2017) requires that the costs associated with significant new regulations ''to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.'' The Department believes that this rule is a significant regulatory action as defined by Executive Order 12866 that imposes costs, and therefore is considered a regulatory action under Executive Order 13771. The Department estimates that this rule generates $78.0 million in annualized costs at a 7 percent discount rate, discounted relative to 2016, over a perpetual time horizon.

The Regulatory Flexibility Act (RFA) and the Small Business Regulatory Enforcement and Fairness Act of 1996, which amended the RFA, require agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, non-profit organizations, and government agencies. Based on subsequent analysis, the Secretary does not believe that this rule will have significant impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to

[57] *See, e.g.,* 64 FR 63518 (Nov. 19, 1999).

[58] *See, e.g.,* 2003 CPG, Special Advisory Bulletin: Contractual Joint Ventures (April 23, 2003, *available at https://oig.hhs.gov/fraud/docs/alertsandbulletins/042303SABJointVentures.pdf.*

[59] *See, e.g., U.S. ex rel. Gale* v. *Omnicare, Inc.,* 2013 WL 3822152 (N.D. Ohio, July 23, 2013).

section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside a Metropolitan Statistical Area for Medicare payment regulations and has fewer than 100 beds. The Secretary has determined that this rule would not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any one year of $100 million in 1995 dollars, updated annually for inflation. In 2020, that threshold is approximately $156 million. The rule may have effects on states through its effects on the MDRP, under which rebates are shared between the Federal Government and the states based on the Federal Medical Assistance Percentage (FMAP) for each state.

The rule does not alter obligations under the statutory provisions for Medicaid prescription drug rebates under Section 1927 of the Act that are calculated as percentages of AMP plus the difference between the rate of increase in AMP and the increase in the consumer price index for all urban consumers (CPI–U). It also does not alter Section 1927's provisions for Medicaid rebates based on the Best Price available to other payers for innovator drugs or for supplemental rebates negotiated between states and manufacturers, nor does the rule alter the regulations and guidance to implement Section 1927 provisions.

Although it is difficult to anticipate the final rule's potential effects on AMP, if the rule reduces AMP, it will also reduce Medicaid prescription drug rebates calculated as percentages of AMP plus the difference between the rate of increase in AMP and the increase in the CPI–U. The Milliman analysis includes an extended example demonstrating that the loss of revenue from these rebates can exceed the savings from lower list prices.[60]

The VA, Department of Defense, Coast Guard, and the Public Health Service (including the Indian Health Service) are eligible to purchase drugs under the FCP Program. The FCP is calculated as a percentage of non-FAMP. Eligible programs can purchase drugs using the lesser of the FSS Price and FCP. Although it is difficult to determine the effects of the final rule on FSS users or entities entitled to FCPs, if the overall effect of lowering list pricing is achieved and that results in lower prices to commercial customers (and wholesalers) or pricing components of non-FAMP, it is possible the VA may realize some additional savings.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications. Since this regulation does not impose any direct costs on State or local governments, preempt State law, or otherwise have federalism implications, the requirements of Executive Order 13132 are not applicable.

Comment: One commenter suggested that the Proposed Rule did not comply with the requirements under E.O. 13771 to offset costs of significant rules by eliminating costs from at least two prior final rules and suggested the E.O. 13771 cost estimate was calculated incorrectly.

Response: We appreciate the comments but disagree. The Proposed Rule complied with the requirements under E.O. 13771, as described in more detail in OMB guidance.[61]

A. Need for Regulation

As described above, manufacturers paying rebates to PBMs may be a factor in list prices rising faster than inflation. This phenomenon may also be causing PBMs to favor higher-cost drugs with higher rebates over drugs with lower costs and discouraging the adoption of lower-cost brand drugs and biosimilars. As a result, rebates may increase costs for consumers, because their out-of-pocket costs during the deductible, coinsurance, and coverage gap phases of their benefits are based on the retail price derived from pharmacy acquisition costs with negotiated additional markups and dispensing fees. Rebates may also increase costs for the government, which pays a portion of the premium, cost-sharing, and reinsurance payments associated with the use of highly rebated drugs instead of less-costly alternatives.

Prescription drug spending can be measured based on WAC price (also referred to as list price or invoice price) and the so-called ''net price'' (which accounts for all price concessions).[62] According to the IQVIA Institute for Human Data Science (a private research organization affiliated with the human data science and consulting firm IQVIA that uses proprietary data from IQVIA), the difference between total U.S. invoice spending (the amount paid by distributors) and net spending (which accounts for all price concessions) across all distribution channels has increased from approximately $38 billion in 2009 to $135 billion in 2018 for retail drugs.[63]

Department analysis shows that within Medicare there has been a similar trend of growing differences between list and net prices. Manufacturer rebates grew from about 10 percent of gross prescription drug costs in 2008 to about 20 percent in 2016 and are projected to reach 28 percent in 2027 under current policy (Figure 1). Reinsurance spending and gross drug costs, after rising in tandem with premiums in the early years of the Part D benefit, are now growing much faster than premiums.

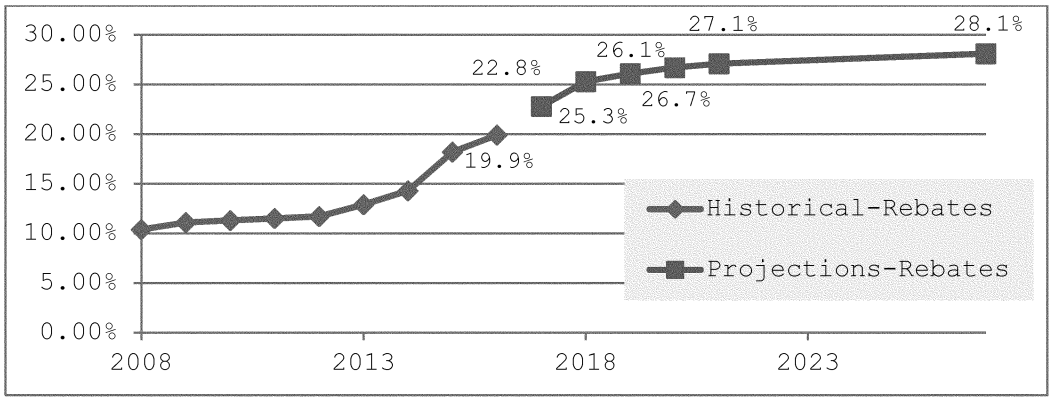
[60] Milliman, Inc., Impact of Potential Changes to the Treatment of Manufacturer Rebates (Jan. 31, 2019). This citation is corrected from the Proposed Rule and reflects the document that was posted as supplementary material in the docket for this rule at *regulations.gov* in February 2019.

[61] For general guidance, see *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf.* For guidance on accounting methods, see *https://www.reginfo.gov/public/pdf/eo13771/EO13771_accounting_methods.pdf.*

[62] ''Net price'' is industry jargon. Each PBM or plan sponsor may treat payments and price concessions differently. Thus the ''net price'' of a drug is more difficult to define than the Wholesale Acquisition Cost set by the manufacturer.

[63] IQVIA Institute for Human Data Science, *Medicine Use and Spending in the U.S.: A Review of 2018 and Outlook to 2023,* May 2019, p. 20.

FIGURE 1: MANUFACTURER REBATES AS A PERCENT OF GROSS DRUG COSTS, 2008 TO 2027 (PROJECTED)



Source: 2018 Medicare Trustees Report, Table IV.B8

Comment: One commenter suggested that the Proposed Rule does not adequately justify the need for regulation, does not adequately describe and assess the impacts of alternatives, and does not carefully weigh effects on stakeholders.

Response: We appreciate the commenter's feedback and additional information but disagree with the conclusion. One of the purposes of the Proposed Rule was to get feedback and information from the public that we could not otherwise access. We have updated the regulatory impact analysis and the rule based on the comments, and the regulatory impact analysis represents our best thinking in these areas with consideration of these comments. We note that while we only had qualitative evidence on benefits in the Proposed Rule, the Department now quantifies some of these benefits, and these benefits exceed the rule's cost estimates.

B. Background on Costs, Benefits, and Transfers

This rule eliminates safe harbor protection for rebates received by plan sponsors, or PBMs under contract with them, from manufacturers in connection with Medicare Part D prescription pharmaceutical products and offers new safe harbor protection for certain price reductions offered at the point of sale. As a result, manufacturers will have an incentive to lower list prices, PBMs will have greater incentive to negotiate larger discounts from manufacturers, and beneficiaries will benefit from more transparency enabling them to better choose a plan that meets their needs. The goal of this policy is to lower out-of-pocket costs for consumers, reduce government drug spending in Federal health care programs, and create transparency that increases choice, competition, and program integrity.

The full magnitude of these savings is difficult to quantify, and the Office of Management and Budget has specific definitions of costs, benefits, and transfers. As such, a brief summary of potential effects of this rule is provided here. More information about these effects may be found in the respective costs, benefits, and transfers sections.

Notably, the Department intends for this rule to result in manufacturers lowering their list prices and replacing rebates with point-of-sale reductions in price. One way to quantify this impact is to simply replace all manufacturer rebates paid to PBMs with point-of-sale reductions in price to consumers and estimate the effect of this transfer on stakeholders. However, this approach does not consider the range of strategic behavioral changes stakeholders may make in response to this rule, including the extent to which manufacturers lower list prices or retain a portion of current rebate spending, PBMs change benefit designs or obtain additional price concessions, and the impact on consumer utilization of lower-cost drugs. The section below describes the current system and the potential system that could result from finalizing this rule, based on current Medicare Part D spending and a range of potential behavioral changes, including the manufacturer pricing changes and PBM negotiation practices described above. In some places, the analysis in this section is premised on the proposed effective date of January 1, 2020. We recognize that impacts will not occur in 2020, but did not feel that updated analyses would significantly change the discussion of the range of potential impacts or resolve uncertainty around estimates from the proposed rule stage. Impacts will occur at a later point in time, relative to the proposed rule, due to the delayed effective date. As at the proposed rule stage, the precise timing of impacts depends on external factors, such as when regulated entities implement adjustments to their business arrangements.

Today, prescription drug manufacturers prospectively set the WAC, or list price, of the drugs they sell to wholesalers and other large purchasers. Manufacturers also retrospectively make payments to PBMs or other customers who meet certain volume-based or market-share criteria. The difference between the list price of a drug and the rebate amount is referred to in industry parlance as the ''net price.'' Since the passage of the anti-kickback statute and the establishment of the various safe harbors, the list prices of branded prescription drugs, and the rebates paid by manufacturers to PBMs, have grown substantially. The phenomenon of list prices rising faster than ''net prices'' is referred to as the ''gross to net bubble.''

Research suggests that the approval of a new drug can lead to higher list prices for existing drugs in the therapeutic class.[64] PBMs may favor drugs with higher rebates over drugs with lower costs, or otherwise discourage the adoption of lower-cost brand or generic drugs and biosimilars. As a result, rebates may increase costs for

[64] Hartung DM, et al. The cost of multiple sclerosis drugs in the US and the pharmaceutical industry: Too big to fail? Neurology 2015; 84(21):2185–92; Alliance of Community Health Plans, The Spike in Drug Costs: Rheumatoid Arthritis, *available at https://www.achp.org/wp-content/uploads/Rheumatoid-Arthritis_Final.pdf;* Alliance of Community Health Plans, The Spike in Drug Costs: Diabetes, *available at https://www.achp.org/wp-content/uploads/Diabetes_FINAL_Revised-12.7.15.pdf.*

consumers (who experience out-of-pocket costs more closely related to the list price than the rebated amount during the deductible, coinsurance, and coverage gap phases of their benefits) and the government (which pays a portion of the premium, cost-sharing, and reinsurance payments associated with the use of higher-rebated drugs instead of less-costly alternatives). This rule seeks to correct the incentives that have created the widening gaps between gross and net prescription drug costs and between gross prescription drug costs and Part D premiums.

This rule removes safe harbor protection for rebates from a manufacturer of prescription pharmaceutical products to plan sponsors under Part D (either directly or indirectly through PBMs under contract with them), and creates two new safe harbors protecting certain reductions in price at the point of sale by manufacturers and protecting certain flat fees paid by manufacturers to a PBM for services that the PBM renders to the manufacturer. To the extent that this rule results in manufacturers reducing the list price of drugs, it will impact all cash flows throughout the system.

The intent of this rule is to remove discount safe harbor protection for rebates and other reductions in price from manufacturers to plan sponsors under Part D or PBMs under contract with those sponsors and to provide a new avenue for point-of-sale reductions in price that will benefit beneficiaries at the pharmacy counter. This change will impact the price that many patients pay for prescription drugs. As part of their health insurance coverage, many consumers pay some cost-sharing for the use of health care services. For many plans, consumers first pay a deductible. This typically means that the consumer pays the full cost of services until the deductible is met. After the consumer has met the deductible, cost sharing often takes the form of coinsurance, in which consumers pay a percentage of the cost of the covered health care service or product, or copayments, in which consumers pay a fixed amount for a covered health care service or product. A recent IQVIA report found that in 2017 more than 55 percent of commercially-insured consumer spending on branded medicines was filled under coinsurance or before the deductible is met.[65] For most health care services, consumer deductibles and coinsurance are based on the prices that health insurers negotiate with their network providers. However, for prescription drugs, often the price the plan ultimately pays is based on rebates that are paid after the point of sale to the consumer, whereas the consumers' deductible and coinsurance payments are based on the list price.

With a reduced price used to adjudicate the benefit, patients with coinsurance or deductible plans will likely experience reductions in cost-sharing for rebated brand-name drugs at the point of sale. Because of actuarial equivalence requirements in the Part D program, patients with fixed co-payments may also see changes in their cost-sharing at the point of sale outside of the deductible, coverage gap, or catastrophic phases of their benefits. These effects will accrue to some beneficiaries through lower out-of-pocket costs and to all beneficiaries through more transparent pricing. If this rule closes the gap between list and net prices and leads to additional price concessions, as the Department anticipates, the benefit of lower premiums and out-of-pocket costs would accrue to all beneficiaries with individual out-of-pocket savings varying by beneficiary prescription drug utilization. If this rule closes the gap between list and net prices but leads to fewer price concessions, all beneficiaries could experience higher premiums with only some experiencing lower out-of-pocket costs. The potential impact of these distributional changes is described in the transfers section of this regulatory impact analysis.

Consumers also select health insurance plans based on their understanding of relevant plan characteristics, including premiums, cost-sharing, formulary coverage, and in-network providers. Research shows that consumers often do not understand their health insurance plans and would better understand a simpler plan.[66] Research specific to Medicare Part D suggests beneficiaries place a greater weight on premiums than out-of-pocket costs, are most likely to choose the plan with the lowest premiums.[67] Oftentimes they select the plan with the lowest premiums when plans with higher premiums and more comprehensive coverage were actuarially favorable.[68] However, consumers in poorer health or with higher drug costs are more likely to anticipate their future drug spending and choose a plan that places them at less financial risk. Also, as stated earlier, a beneficiary paying 20 percent coinsurance on a drug with a $100 WAC and 30 percent rebate effectively pays 28 percent of the plan's cost after accounting for payments made by the manufacturer to the PBM. Thus, the publication of premiums and cost-sharing amounts that more accurately reflect the discounted price of a prescription drug could help align consumer understanding of health insurance benefits with reality and help consumers to choose the health insurance plans that best meet their needs. These effects are described in the benefits section.

The Federal government pays a significant portion of the premium for every Medicare Part D beneficiary and subsidizes the cost-sharing of beneficiaries eligible for the Part D Low Income Subsidy (LIS). If this rule increases or decreases premiums, Federal spending on premium subsidies will also increase or decrease, potentially outweighing estimated Federal savings associated with this rule. These potential effects are described in the transfers section of this regulatory impact analysis.

Stakeholders involved in the manufacture, sale, distribution, and dispensing of prescription drugs, as well as those who provide prescription drug coverage, will need to review this policy and determine how it affects them. They may also need to make changes to existing business practices, update systems, or implement new documentation and recordkeeping requirements. These effects are described in the costs section of this regulatory impact analysis.

After the close of the comment period, CBO independently estimated the impact of the Proposed Rule.[69] The CBO analysis was substantially similar to the CMS Office of the Actuary (OACT) analysis of the Proposed Rule. One significant difference is that CBO expects that rather than lowering list prices, manufacturers would offer the renegotiated discounts in the form of point-of-sale chargebacks. In addition, the CBO analysis includes transfer effects related to the costs of implementation of the rule. Despite

[65] IQVIA, Patient Affordability Part One: The Implications of Changing Benefit Designs and High Cost-Sharing (May 18, 2018), *available at https://www.iqvia.com/locations/united-states/patient-affordability-part-one.*

[66] Loewenstein G et al. Consumers misunderstanding of health insurance. Journal of Health Economics. 32 (2013) 850–62.

[67] Abaluck and Gruber. Evolving Choice Inconsistencies in Choice of Prescription Drug Insurance. Am Econ Rev. 2016 Aug., 106(8): 2145–84.

[68] Heiss, Leive, McFadden and Winter. Plan Selection in Medicare Part D: Evidence from Administrative Data. J Health Econ. 2013 Dec., 32(6): 1325–44.

[69] Congressional Budget Office. ''Incorporating the Effects of the Proposed Rule on Safe Harbors for Pharmaceutical Rebates in CBO's Budget Projections—Supplemental Material for Updated Budget Projections: 2019 to 2029,'' May 2019, *https://www.cbo.gov/system/files/2019-05/55151-SupplementalMaterial.pdf.*

these differences, the transfer effects of the rule estimated by CBO are within the range of estimates presented in the Proposed Rule, and as a result, we do not provide additional substantial discussion of CBO's estimates of these transfers in the final rule.

The CBO analysis also includes additional analysis not conducted for the Proposed Rule. Part of this analysis related to guidance on Part D bids for the 2020 plan year and a CMS demonstration that was contemplated, but not finalized, in 2019. CBO analyzed the impact of the rule on Medicare Part A, B, and D utilization. On net, these changes are expected to reduce Medicare spending. According to the CBO analysis, the rule will increase prescription drug utilization, resulting in increased Part D spending. This increase in Part D spending is estimated to be offset by savings in Medicare Parts A and B. As previously described in detail in this impact analysis, the range of actuarial estimates for this rule range from $100 billion in reduced federal spending if more than 100 percent of rebates are converted into list price concessions and Part D plans exert greater formulary control, to $196 billion in increased Federal spending, if manufacturers reduce price concessions in Part D. There is wide variation in the analyses conducted that makes it difficult to project with certainty the impact of the policy change on federal spending. The Secretary, in applying the modeling assumptions and the range of available estimates, coupled with the fifteen-year history of the program (including its competitive dynamic), has projected that there will not be an increase in federal spending, patient out-of-pocket costs, or premiums for Part D beneficiaries as required by the Executive Order. The Department further believes that the rule will make beneficiary medications more affordable and lead to lower cost sharing for patients.

The Department has considered the wide variation of potential transfer impacts in the analyses conducted and has decided to proceed with this rulemaking based on its view that the rule will have significant transparency and prescription adherence benefits for Medicare beneficiaries.

Comment: Multiple commenters suggested that impact estimates indicate that premiums for plans will increase, but the estimates do not account for how this will affect enrollment. One commenter noted that a study shows that a $100 increase in MA–PD premiums leads to 34 percent increase in plan switching.

Response: We appreciate commenters' feedback but would note that a change of $100 in monthly premiums is several orders of magnitude outside the range of potential impacts discussed in this rule. We would further note that since the inception of the Medicare Part D program, the base beneficiary premiums have ranged from $27 to $35, but the number of enrollees in Medicare Part D have increased every year.[70]

Comment: One commenter noted that the estimates rely on the standard plan design (full deductible and 25 percent coinsurance) on all non-low-income beneficiaries in the initial coverage limit and coverage gap, when in reality, the majority of Part D plans use actuarial equivalents of the standard benefit that have smaller deductibles. This commenter suggested that estimates of beneficiary cost-savings are overstated because they assume 100 percent deductibles for all patients.

Response: We disagree with the commenter. Use of the standard benefit design does not inherently build any bias into the estimates. All basic plans must provide coverage that is actuarially equivalent to the standard benefit so the net effects on the modeling are at most modest.

Comment: One commenter stated that the estimates suggest that the transition to a chargeback system will result in $170.9 billion in extra Federal spending that will provide a net benefit to manufacturers.

Response: We agree with the commenter that several of the estimates included in the proposed rule estimated transfers from the Federal government to manufacturers. OACT estimated that there will be $196.1 billion in additional Federal spending that will partly reduce individuals' out-of-pocket spending and will partly result in additional manufacturer revenue. However, other actuarial estimates based on strategic industry responses to this final rule range from $99 billion in reduced federal spending (Part D plan sponsors increased formulary controls and obtained additional price concessions) to $140 billion in increased Federal spending (if manufacturers reduced price concessions in Part D to offset list price decreases in other markets).

Comment: One commenter noted that the estimates do not account for transfers related to the administrative burden necessary for a transition to a wholesaler chargeback system.

Response: We agree in part with the commenter that a wholesaler-led chargeback system is a possible outcome of this rule and note that CBO's estimate does account for changes in premiums related to administrative burden, and CBO's estimates are well within the range of estimates provided in the Proposed Rule. OACT did not make any explicit assumptions with respect to potential additional administrative expenses in administering the wholesaler chargeback system.

C. Affected Entities

Comment: One commenter suggested that the Department underestimated the number of entities (specifically, PBMs and pharmaceutical wholesalers) affected by the rule, underestimated the categories of entities affected by various categories of impacts, and offered suggestions for improving discussion of the impact on pharmacies.

Response: We agree that wholesalers are affected by this rule but lack concrete data to estimate the number of affected wholesalers. The commenter suggested ten wholesalers are affected. To ensure we do not undercount, we will estimate that approximately twenty wholesalers are affected by the rule. The commenter suggests 66 PBMs, rather than the 60 estimated in the Proposed Rule, are affected by the rule. We are unable to verify the source underlying this information and retain the estimate that approximately 60 PBMs are affected by the rule. The commenter suggested small pharmacies largely use 20 pharmacy services administration organizations (PSAOs) to provide administrative services, such as negotiation, on their behalf. As a result, we have adjusted estimates to assume that costs affecting pharmacies occur at each pharmacy and drug store firm and each of 40 PSAOs to ensure we do not undercount. We have also revised the analysis to reflect that a broader pool of entities may be affected by impacts in all categories discussed below.

This rule will affect the operations of entities that are involved in the distribution and reimbursement of prescription drugs to Medicare Part D prescription drug benefit enrollees. According to the U.S. Census[71] and other sources,[72] there were 67,753 community pharmacies (including 19,500 pharmacy and drug store firms and 21,909 small business community pharmacies), 1,775 pharmaceutical and medicine manufacturing firms, and 880

[70] CMS, 2020 Annual Report, Boards of Trustees Fed. Hospital Ins. & Fed. Supp. Medical Ins. Trust Funds, *available at https://www.cms.gov/files/document/2020-medicare-trustees-report.pdf.*

[71] U.S. Census Bureau, Statistics of U.S. Businesses, *available at https://www.census.gov/programs-surveys/susb.html.*

[72] Qato, Zenk, Wilder, et al. PLoS One. 2017 Aug 16;12(8).

direct health and medical insurance carrier firms operating in the U.S. in 2015. In 2018, there were 44 PBMs listed in the Pharmacy Benefit Management Institute directory.[73] Organizations are required to pay a fee if they choose to register, and therefore we estimate that participation in the directory is incomplete and that the total number of PBMs operating in the U.S. is approximately 60. As described above, we estimate that the rule affects approximately 20 pharmaceutical wholesalers. Finally, a 2013 GAO study[74] identifies 22 PSAOs, and notes there may be more in operation. We adjust this upward and estimate the rule affects 40 PSAOs. As noted previously, we assume that costs affecting pharmacies are incurred at each pharmacy and drug store firm and each PSAO.

We note that this rule no longer amends the discount safe harbor to exclude rebates offered to Medicaid MCOs.

Finally, the rule will affect Medicare prescription drug enrollees. CMS reports there were 44,491,003 enrollees with Part D prescription drug coverage in December 2018.[75] CMS reports there were 80,184,501 beneficiaries in Medicaid in 2016, 65,005,748 of which were enrolled in any type of managed care plan. However, these beneficiaries are less likely to be significantly affected, given Medicaid's low beneficiary cost-sharing requirements and the decision not to finalize inclusion of Medicaid MCOs in the amendment to the discount safe harbor.

The Department estimates the hourly wages of individuals affected by this rule using the May 2016 National Occupational Employment and Wage Estimates provided by the U.S. Bureau of Labor Statistics.[76] We note that, throughout, estimates are presented in 2016 dollars. We use the wages of Medical and Health Services Managers as a proxy for management staff, the wages of Lawyers as a proxy for legal staff, and the wages of Network and Computer Systems Administrators as a proxy for information technology (IT) staff throughout this analysis. To value the time of Medicare prescription drug benefit enrollees, we take the average wage across all occupations in the U.S. We assume that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate. Estimated hourly rates for all relevant categories are included below.

TABLE 1—HOURLY WAGES[77]

Medical and Health Services Managers	$52.58
Lawyers	67.25
Network and Computer Systems Administrators	40.63
Medicare Prescription Drug Benefit Enrollees	23.86

D. Costs

Comment: We received a number of comments on our assumptions associated with the costs of the Proposed Rule. Various commenters suggested the Department underestimated administrative burden generated by the Proposed Rule, and two commenters provided quantitative feedback on the burden estimates. In addition, a report discussing the Proposed Rule provides additional quantitative feedback on the cost estimates.[78] Another commenter suggested information technology improvements would require thousands of hours of effort.

Response: The Department has substantially revised estimates of administrative burden in response to public comments. These changes take a number of pieces of information into consideration. First, a single commenter provided the most substantial quantitative feedback on the cost estimates in the Proposed Rule, with alternative estimates greatly exceeding those in the Proposed Rule. The commenter also sponsored the report discussed above; the comment and the report both suggest much more moderate changes to the cost analysis. This suggests a range of reasonable estimates. Second, this commenter represents a subset of entities affected by the rule. Other categories of entities expressed confidence that the rule can be implemented quickly, suggesting the rule is less burdensome for some entities than described in the most comprehensive quantitative comments, and reflecting the fact that the implementation may be more resource intensive for some entities than others. In addition to adjusting estimates in response to this feedback, we have provided ranges of impacts to reflect uncertainty regarding the rule's effects on administrative burden. Finally, we received feedback on the timing of impacts for Medicare enrollees who learn of and respond to the changes generated by this rule. However, the commenter did not provide any rationale to support this feedback, and as a result these estimates were not changed. More detail on specific changes can be found in the sections on affected entities above and the cost estimates below.

In order to comply with the regulatory changes in this rule, affected businesses would first need to review the rule. The Department estimates that this would require an average of 5 to 15 hours, with a primary estimate of 10 hours, for affected businesses to review, divided evenly between managers and lawyers, in the first year following publication of the final rule. As a result, using wage information provided in Table 1, this implies costs of $13.4 to $40.2 million, with a primary estimate of $26.8 million, in the first year following publication of a final rule after adjusting for overhead and benefits.

After reviewing the rule, businesses would need to review their policies in the context of these new requirements and determine how to respond. For some affected businesses, this may mean substantially changing their pricing models, and engaging in lengthy negotiations with other businesses. For others, much more modest changes are likely needed. The Department estimates that this would result in affected businesses spending an average of 50 to 150 hours, with a primary estimate of 100 hours, reviewing their policies and determining how to respond, divided evenly between lawyers and managers, in the first year following publication of the final rule. In years two through five, the Department estimates this would result in affected businesses spending an average of 5–15 hours, with a primary estimate of 10 hours, implementing policy changes, with 20 percent of time spent by lawyers and 80 percent of time spent by managers. As a result, using wage information provided in Table 1, the Department estimates costs of $133.9 to $401.7 million, with a primary estimate of $267.8 million, in the first year and $12.4 to $37.2 million, with a primary estimate of $24.8 million, in years two through five following publication of the final rule after adjusting for overhead and benefits.

This rule imposes documentation and reporting requirements on PBMs for parties choosing to use the PBM services fee safe harbor. In particular, PBMs and pharmaceutical manufacturers must

[73] *https://www.pbmi.com/PBMI/Directory/Pharmacy_Benefit_Manager_Directory.aspx,* last accessed July 13, 2018.

[74] *https://www.gao.gov/products/GAO-13-176.*

[75] *https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/Dashboard/Medicare-Enrollment/Enrollment%20Dashboard.html.*

[76] *https://www.bls.gov/oes/2016/may/oes_nat.htm.*

[77] *https://www.bls.gov/oes/2016/may/oes_nat.htm.*

[78] *See http://getmga.com/wp-content/uploads/2019/04/MGA-Report-on-Proposed-Rebate-Restriction-3.pdf.*

have a written agreement signed by the parties that covers all of the services the PBM provides to the manufacturer in connection with the PBM's arrangements with health plans for the term of the agreement and specifies each of the services to be provided by the PBM and the compensation associated with such services. In addition, PBMs must disclose to the health plan and to the Secretary (upon request) their services rendered to each pharmaceutical manufacturer related to the PBM's arrangements to furnish pharmacy benefit management services to the health plan. In addition, PBMs also must disclose to the Secretary upon request the fees paid for such services. We believe that these written agreements already exist as a matter of standard business practice, as they need to be in place in order to enforce contractual arrangements between these entities. As a result, we believe that the documentation requirement merely codifies standard practice, and therefore imposes no marginal costs on affected entities. We believe that the disclosure requirements will not require PBMs to generate new information or retain additional records related to their interactions with pharmaceutical manufacturers or health plans. However, we believe that the disclosure requirements will result in additional disclosure to health plans and potentially the Secretary. We estimate that each PBM will provide this information an additional 25 to 75 times per year, with a primary estimate of 50 times each year. We estimate that these disclosures will require an average of 4 hours, with 50 percent of time spent by managers, 25 percent of time spent by attorneys, and 25 percent of time spent by IT staff. As a result, using wage information provided in Table 1, the Department estimates costs of $0.7 to $2.1 million, with a primary estimate of $1.4 million, in each year following publication of the final rule after adjusting for overhead and benefits.

We expect that this rule will also lead businesses affected by the rule to update their IT systems for processing claims and payments. For these entities, the Department estimates that this will require an average of 40 to 120 hours, with a primary estimate of 80 hours, in the first year following publication of the final rule to make these changes. In years two through five, the Department estimates this this will require an average of 10 to 30 hours, with an average of 20 hours, in each of these years. We note that these estimates are in line with a comment suggesting thousands of hours are required for covered entities to make IT changes in response to this rule. Using wage information provided in Table 1, we estimate this will generate costs of $66.7 to $200.1 million, with a primary estimate of $133.4 million, in the first year following publication of the final rule, and $16.7 to $50.0 million, with a primary estimate of $33.3 million, per year in years two through five following publication of the final rule after adjusting for overhead and benefits.

Medicare prescription drug benefit enrollees will also spend time responding to the rule. In particular, the Department believes that this rule will result in changes to the characteristics of Medicare prescription drug plans. Once enrollees become aware that changes have been made, we believe they will review available plans to determine the plan which best suits their needs. The Department expects that Medicare enrollees will become aware of these changes gradually over time. In particular, the Department expects that 20 percent of enrollees will become aware of these changes in each of the five years following publication of the final rule, and that responding to these changes will require an average of thirty minutes per enrollee. As a result, using wage information provided in Table 1, we estimate costs of $209 million in each of the first five years following publication of a final rule after adjusting for overhead and benefits.

This rule may lead to shifts in the composition of affected industries by affecting the extent to which entities vertically integrate, and the rate at which entities of various sizes (particularly small entities) enter and exit the market. Vertical integration is a strategy where a firm acquires business operations in a different sector of the supply chain and reimbursement system. Entities are affected by this rule to the extent that their business models depend on using rebates, and rebates are streamlined regardless of where they are paid if a company is vertically integrated. As a result, this rule may affect incentives for vertical integration for affected entities. For example, PBMs, plan sponsors, and pharmacies may want to vertically integrate as a result of this rule. At the same time, the potential loss of retained rebate revenue by PBMs may cause existing vertically integrated businesses to consider new organizational structures. These changes, in turn, may generate costs and benefits.

E. Benefits

Comment: A commenter suggested that the Proposed Rule does not clearly articulate the benefits of replacing rebates with up front price reductions, noting that it only qualitatively describes two possible benefits: Transparency, which the commenter did not find compelling, and adherence and outcomes, which the commenter suggested is not adequately explored. Multiple commenters suggested that the estimates do not account for Part D plan behavioral changes and do not account for offsetting savings in Medicare Parts A and B.

Response: We have updated the analysis to reflect evidence on the rule's effects on behavioral changes and note that these estimates suggest the rule generates substantial benefits to the public.

It is difficult to accurately quantify the benefits of this rule due to the complexity and uncertainty of stakeholder response. As such, the Department relied on qualitatively describing two potential benefits in the Proposed Rule.

First the Department anticipates the enhanced transparency of premiums, out-of-pocket costs, and improved formulary designs will help beneficiaries make more actuarially favorable decisions, because the new point-of-sale price reductions negotiated by PBMs would be reflected in the price paid by beneficiaries at the point of sale for those enrolled in health plans electing to use the new safe harbor protecting certain point-of-sale reductions in price on prescription pharmaceutical products.

Second, with reduced out-of-pocket payments, patient adherence and persistence with prescription drug regimens may improve. Patients abandoned 21 percent of all prescriptions for branded drugs processed by pharmacies in the United States in the fourth quarter of 2017,[79] and copayment or coinsurance amounts can be a predictor of abandonment.[80] While there may be a variety of reasons patients may not pick up a medication, one factor that may impact patient decision-making is the out-of-pocket cost of a prescription. One study suggested that for chronic myeloid leukemia, patients using tyrosine kinase inhibitors were 42 percent more likely to be non-adherent (which may include delaying the purchase of, never purchasing, or switching their prescription to a less optimal choice) if they were in the higher copayment

[79] IQVIA Institute for Human Data Science, *Medicine Use and Spending in the U.S.: A Review of 2017 and Outlook to 2022,* April 2018, p. 31.

[80] William H. Shrank, et al., *The Epidemiology of Prescriptions Abandoned at the Pharmacy,* 153 Annals Internal Med. 633 (2010).

group compared to the lower copayment group.[81] The intent of this rule is to lower the out-of-pocket costs for prescription drugs for some Medicare prescription drug enrollees. The pricing decisions of drug companies, and negotiations between manufacturers and PBMs, will determine how plan sponsors make formulary decisions that determine whether beneficiaries pay more or less in out-of-pocket costs.

Furthermore, lower out-of-pocket costs may lead to fewer enrollees abandoning prescription drugs. This could result in beneficiaries filling more prescriptions, thus increasing spending, as prescriptions that were once unaffordable are now attainable. It could also lead to lower total costs-of-care, if increased adherence led to improved health outcomes. The Department is unable to estimate the extent to which this rule would reduce abandonment across all drug markets or the resulting health benefits of higher adherence of prescription drugs.[82]

In addition, the reduction in abandonment could benefit pharmacies by reducing costs related to storage and tracking of abandoned prescriptions.

F. Transfers

The provisions of this rule are specifically aimed at incentives related to pharmaceutical list prices as set by manufacturers, increases in these prices by manufacturers, rebates paid by manufacturers to PBMs acting on behalf of Part D plan sponsors, and the misalignment of incentives caused by concurrently increasing list prices and rebates. A significant, though difficult to quantify, potential transfer resulting from this rule would be the reduction of list prices and/or a reduction in the annualized increases thereof. Retrospective rebate-based contractual arrangements between manufacturers and PBMs and health insurers may be renegotiated to match these regulations' new conditions. Manufacturers may reset their pricing strategies to better match net pricing trends and strategies. Changes in list prices could flow throughout the entire pharmaceutical supply chain and reimbursement system.

Medicare Part D

If manufacturers reduced their current list prices to an amount equal or similar to their current net prices, there would be less impact on premiums and a decline in net prices could result in a decrease in premiums. If manufacturers did not reduce their list prices, beneficiary and Federal spending on premiums might increase and beneficiary cost-sharing might not decrease.

If Part D plans changed their benefit structures (*e.g.,* increased formulary controls, greater use of generic drugs), and sought to prevent or ameliorate premium increases, they may be able to obtain additional price concessions from manufacturers. If list price reductions and increased price concessions led to lower net prices and gross drug costs in Part D plans, beneficiary and Federal spending on premiums and cost-sharing could decrease. If Part D plans were unable to achieve additional price concessions, and net prices increased, beneficiary and Federal spending on premiums and cost-sharing could increase.

Under the Part D program, plan sponsors pay network pharmacies a negotiated rate for a covered Part D drug that is intended to cover a pharmacy's acquisition cost (termed the negotiated price at section 1860D–2(d) of the Act), plus a dispensing fee. Currently, pharmacies are not a part of the financial flow related to rebates that are paid after the point of sale, nor do beneficiaries receive any out-of-pocket benefit from these rebates. This means that beneficiaries, whose cost-sharing for Part D covered drugs is calculated as coinsurance, or a percentage of the price of the drug dispensed, are charged a percentage of the price paid to pharmacies (or the full price prior to meeting their deductible), which almost always does not include the rebates plans receive through PBMs from manufacturers. Removing the existing safe harbor protection for retrospectively paid rebates that are not reflected in the prices paid at the point of sale may reduce beneficiary out-of-pocket spending for Part D covered drugs. If list prices did not decrease or point-of-sale chargebacks were not reflected in the prices paid at the point of sale, beneficiaries could see an increase in premiums without the benefit of decreased cost-sharing.

Below, this section discusses the potential specific effects within Part D on premiums, benefit design thresholds, and Federal outlays for the portions of the benefit subsidized by the Medicare Part D program.

The Department's Medicare Part D analysis is based on OACT's work commissioned specifically for this rulemaking[83] and two commissioned actuarial analyses independent of OACT.[84] OACT ''directs the actuarial program for CMS and directs the development of and methodologies for macroeconomic analysis of health care financing issues.'' The two external actuarial firms were chosen based on their commercial experience assisting plan sponsors with their plan bids. We have not asked these organizations to revise the estimates they prepared before release of the Proposed Rule.

There are significant differences in the assumptions the respective actuaries used to estimate stakeholder behavior. OACT predicts that while some current rebates will be retained by manufacturers, future price increases will be smaller and fewer. Per OACT's assumption, rather than reducing list prices and offering discounts to achieve current net prices, the expected behavior is to reduce future price increases so that post-rule net prices converge over time to meet the trend on pre-rule net price forecasts. As such, OACT predicts that the Federal government would increase spending on premium subsidies for Medicare beneficiaries, and that consumers and private businesses would experience decreased overall spending.

Because drug manufacturers pay a portion of the drug costs incurred by beneficiaries in the Part D coverage gap, their expenses would be reduced in relation to the reduction of beneficiary spending in the coverage gap. The Milliman non-behavioral analysis estimates gross drug costs would

[81] Stacie B. Dusetzina, et al. ''Cost Sharing and Adherence to Tyrosine Kinase Inhibitors for Patients with Chronic Myeloid Leukemia.'' 32:4 Journal of Clinical Oncology. Feb. 2014.

[82] Given data available at this time, it is not possible to calculate any particular impact from the COVID–19 public health emergency on these effects. However we note that the Medicare Current Beneficiary Survey (MCBS) COVID–19 Summer 2020 Supplement and preliminary 2019 MCBS data'', available at *https://www.cms.gov/files/document/medicare-current-beneficiary-survey-covid-19-data-snapshot.pdf,* indicates that only 8% of Medicare beneficiaries surveyed between June 10, 2020 and July 15, 2020 had forgone prescription drugs or medications during the COVID–19 public health emergency. We would expect such a figure to decrease by the time this rule is implemented in 2022. These points, considered alongside the expected increase in prescriptions from plans' relaxation of 'refill too soon' edits, suggest there is no particular reason to believe the effects of this rule will be materially different as a result of the COVID–19 public health emergency.

[83] CMS Office of the Actuary, Proposed Safe Harbor Regulation (Aug. 30, 2018). The OACT analysis is posted as supplementary material in the docket for this rule at *regulations.gov*.

[84] Wakely Consulting Group, Estimates of the Impact on Beneficiaries, CMS, and Drug Manufacturers in CY2020 of Eliminating Rebates for Reduced List Prices at Point-of-Sale for the Part D Program (Aug. 30, 2018); Milliman, Inc., ''Impact of Potential Changes to the Treatment of Manufacturer Rebates'' (Jan. 31, 2019). The Wakely and Milliman analyses were posted as supplementary material in the docket for this rule at *regulations.gov*. Certain discussions of the Milliman analysis, including some citations and figures, in the Proposed Rule contained unintentional errors that we have corrected throughout this section of the final rule. These corrections do not materially change the RIA.

decrease by $679.7 billion and coverage gap discount payments would decrease by $20.6 billion over the same period.[85] Federal spending would increase by $34.8 billion, and beneficiary spending would decrease by $14.5 billion.[86]

In addition to the actuarial analysis described above, the economic analysis of this rule is also informed by stakeholder comments and meetings in response to the drug pricing blueprint.[87]

All three of these analyses contemplate and quantify the behavioral changes by plans in the form of changes to benefit offerings, or by manufacturers in the form of changes to pricing processes but differed in their assumptions. All three assessed pharmaceutical manufacturers' unique opportunity to adjust their overall pricing and rebate strategy but differed in the assumed amount of rebates that would be retained by manufacturers, if any, and the effect on list and net prices.

The OACT analysis assumed manufacturers would retain 15 percent of the existing Medicare Part D rebates, that 75 percent of the remaining rebates would be applied as discounts to beneficiaries, and that manufacturers would apply the remaining 25 percent to lower list prices. OACT based this assumption on the belief that consumer discounts provide less return on investment to drug manufacturers than rebates and that resetting the rebate system would allow manufacturers to recapture forgone revenue streams such as those that occurred from the changes in the Coverage Gap Discount Program included in the Bipartisan Budget Act of 2018. OACT's assumption would lead to higher net prices in Medicare Part D at the beginning of time period analyzed, while the reduced-price increase trend would lead to post-rule net prices eventually converging to pre-rule net price forecasts. Each of the analyses took varying approaches to the treatment of discounts and acknowledge uncertainty around this assumption. The Milliman and Wakely analyses assumed that all existing manufacturer rebates would be passed along as either list price reductions or discounted prices at the point of sale.

Milliman provided six additional scenarios based on a range of strategic behavior changes by stakeholders, including increased formulary controls, increased price concessions, reduced price concessions in Part D to offset list price decreases in other markets, decreased brand unit cost trend, and increased utilization and decreased brand unit cost trend. These scenarios are intended to bookend the baseline analysis by showing a range of possible scenarios, given the uncertainty inherent in such a policy change. Tables 2 and 4 later in this section present the main assumptions and findings of the analyses we discuss.

Only one analysis contemplated, but did not seek to quantify, the behavioral change of beneficiaries choosing lower-cost plans, switching from PDPs to MA–PDs, or in the form of increased persistence and adherence caused by induced demand due to decreased out-of-pocket costs.

We note that all the actuaries who submitted analyses developed different results based on differing, yet plausible, assumptions. The sheer size of the Medicare Part D program makes these results sensitive to small differences in assumptions, particularly over a ten-year period. As such, there are often good reasons for small differences in assumptions that are neither right nor wrong but may be reasonable within a plausible range of outcomes. The different assumptions made include the initial values used for the direct subsidy and base beneficiary premium, the pattern of future costs, the granularity with which growth rates or future effects are applied uniformly or based on product type. The actuarial analyses used to prepare this impact analysis are posted as supplementary material in the docket for this rule at *regulations.gov*.

Effect on Beneficiary Spending

This rule will likely impact beneficiary spending on the Part D program. As noted above, the Department is presenting three actuarial analyses (six total scenarios) conducted under various behavioral assumptions.

The projected decrease in beneficiary spending on premiums and cost-sharing that would have occurred in 2020 was $1.0 to $1.6 billion. The projected decrease in beneficiary spending on premiums and cost sharing that would have occurred from 2020 to 2029 ranges from a decrease of $59.5 billion to an increase of $12.3 billion. Individuals who qualify for the LIS pay low or no premiums to enroll in the Part D benefit and have their cost-sharing obligations under each benefit phase reduced significantly (called the Low Income Cost Sharing Subsidy or LICS). We expect a smaller effect among these enrollees (about 30 percent of total Part D enrollees) than among those not receiving the LIS and LICS.

All three actuarial reports support the conclusion that non-LIS Medicare beneficiaries enrolled in, and actively utilizing, plans with coinsurance-based cost-sharing structures for covered outpatient drugs for which their respective plan has negotiated a rebate, will likely see lower out-of-pocket cost-sharing at the pharmacy counter as a result of this regulatory change.

OACT, Wakely and five of the six Milliman scenarios considered by the Department suggest total beneficiary cost-sharing would decrease and that the decrease in total beneficiary cost-sharing would offset any increase in premiums across all beneficiaries, regardless of assumptions regarding whether or not manufacturers retained rebates or applied a percentage of them as list price reductions, or PBMs and plan sponsors changed formularies or obtained additional price concessions. However, the analyses that estimated higher premiums found that more beneficiaries would pay more for premiums than they would save in cost-sharing, suggesting that out-of-pocket impacts are likely to vary by individual and the greatest benefit of these transfers accrues to sicker beneficiaries (*e.g.,* those with more drug spending and/or those using high-cost drugs).

However, it is important to note that the effect of this rule on individual beneficiaries depends on whether they use medications, what behavioral responses manufacturers and plans adopt in response to the rule, and whether the manufacturers of the drugs in their regimen are paying rebates.

Analyses that contemplated increased price concessions or benefit design changes predicted beneficiaries having lower premiums and out of pocket costs overall. Table 2 describes the net beneficiary impact predicted by each analysis and assumption. (Scenarios 5, 6, and 7 in the Milliman analysis are available online rather than reproduced here, since they are not referenced further in our write-up.)

[86] Milliman, Inc., Impact of Potential Changes to the Treatment of Manufacturer Rebates (Jan. 31, 2019). *See* Appendix A1, Scenario 1A, page 1.

[87] Comments are available for viewing at *https://www.regulations.gov/document?D=CMS-2018-0075-0001.*

TABLE 2—BENEFICIARY IMPACTS, PER BENEFICIARY PER MONTH, ESTIMATED FOR CY 2020 TO CY 2029

	OACT	Milliman, scenario 1	Milliman, scenario 2	Milliman, scenario 3	Milliman, scenario 4	Wakely
Modeled Assumptions	• 15 percent of current Part D rebates retained by manufacturer. • 75 percent of remaining amount applied to per-sponsor/PBM negotiated discounts. • 25 percent of remainder applied as reduction to list price. • No beneficiary or plan behavioral changes are assumed.	• 100 percent of current Part D rebates are converted into list price concessions (agnostic on list price reductions versus up front discounts).	• 100 percent of current rebates are converted into list price concessions. • Part D plans exert greater formulary control.	• More than 100 percent of rebates are converted into list price concessions (same agnosticism on how applied). • Part D plans exert greater formulary control.	• 20 percent of current Part D rebates are retained by manufacturers (same agnosticism on how applied). • 80 percent of current Part D rebates are converted to price concessions (list price or discounts).	• 100 percent of current manufacturer rebates are converted into reductions in drug costs at the point of sale. • No beneficiary or plan behavioral changes are assumed.
Premium [88]	+25%	+$4.03, +13%	+$1.27, +4%	+$0.61, +2%	+$6.84, +21%	N/A.
Cost-sharing	−18%	−$6.23, −12%	−$9.85, −19%	−$9.68, −19%	−$4.97, −10%	N/A.
Total	−4%	−3%	−10% [89]	−11%	+2%	N/A.

Premiums

As explained in the Proposed Rule, all analyses that assumed no behavioral changes that would reduce net prices below current net prices would have seen Part D premiums increase in 2020 and beyond. The estimated increase in 2020 Part D premiums ranged from $3.20 per beneficiary per month to $5.64 per beneficiary per month (PBPM).

The Milliman analyses that contemplated behavioral changes that increased price concessions beyond current levels and/or greater formulary controls predicted a significant decrease in premiums compared to the baseline scenarios presented in Table 3 of the Milliman analysis. (That is, premiums would increase 2 percent to 4 percent over the ten-year period, a *de minimis* level of variation, rather than 6 percent to 21 percent without such assumptions.)

Out-of-Pocket Spending

Absent behavioral changes leading to lower list and net prices, two groups of beneficiaries would benefit most from this rule: (1) Beneficiaries that are prescribed and dispensed high cost drugs and (2) beneficiaries with total drug spending into the coverage gap. The range of total decreased beneficiary cost-sharing that would have occurred in 2020 was estimated to be −$8.01 PBPM to −$4.85 PBPM.

However, reductions in cost-sharing would only accrue to beneficiaries using drugs for which manufacturers are currently paying rebates. For example, a beneficiary taking a brand-name drug in a competitive class may see his or her coinsurance-based cost-sharing for the drug reduced significantly, if behavioral changes in response to this policy result in rebates largely being converted to point-of-sale reductions in price. By contrast, a beneficiary using high-cost drugs in protected classes is less likely to benefit from a reduced pharmacy purchase price, because manufacturers generally offer low or no rebates to plans for these drugs, since drugs in protected classes must be included on Part D plan formularies.

The analysis by OACT estimated the annual changes in benefit parameters as a result of the proposed rule; this analysis has not been updated to reflect the change in effective date for reasons discussed above. See Table 3 below.

TABLE 3—PART D STANDARD BENEFIT DESIGN PARAMETERS WITH AND WITHOUT THIS RULEMAKING

Year	2020	2021	2022	2023	. . .	2029
Baseline:						
Deductible	$435	$460	$490	$520		$725
Initial Coverage Limit	4,010	4,250	4,520	4,800		6,690
Catastrophic Limit	6,350	6,750	7,150	7,600		10,600
Total Drug Costs at TrOOP Limit [90]	9,296	9,874	10,470	11,126		15,515
Under Rule:						
Deductible	435	405	395	420		580
Initial Coverage Limit	4,010	3,740	3,630	3,840		5,310
Catastrophic Limit	6,350	5,950	5,750	6,100		8,400
Total Drug Costs at TrOOP Limit	9,296	8,699	8,416	8,919		12,297
Difference (Percent):						
Deductible	0%	−12.0%	−19.4%	−19.2%		−20.0%
Initial Coverage Limit	0%	−12.0%	−19.7%	−20.0%		−20.6%
Catastrophic Limit	0%	−11.9%	−19.6%	−19.7%		−20.8%
Total Drug Costs at TrOOP Limit	0%	−11.9%	−19.6%	−19.8%		−20.7%

[88] Since 2010, Medicare has published guidance defining de minimis variation in Medicare Part D plan bids. The de minimis amount was $2 for the 2020 plan year. Milliman scenarios 2 and 3 estimate a de minimis level of variation from existing premium estimates.

[89] Corrected from the Proposed Rule.

Under OACT's analysis, the majority of beneficiaries would see an increase in their total out-of-pocket payments and premium costs; reductions in total cost-sharing will exceed total premium increases. The minority of beneficiaries who utilized drugs with significant manufacturer rebates would experience a substantial decrease in costs, causing average beneficiary cost across the program to decline.

Medicare beneficiaries with lower levels of drug spending were expected to benefit by way of a lowered deductible. Following the first year of this new environment, and into the second year as well, the Part D benefit design thresholds are projected to change to the benefit of lower-cost beneficiaries, providing lower out-of-pocket payments for these beneficiaries. Because the Part D benefit design's parameters are calculated annually to account for aggregate growth in Part D spending, and because the estimated potential effects of this regulation would be to reduce aggregate spending levels to more closely match net spending trends, the applicable deductible would decrease for plan year 2021. Beneficiaries whose spending is above the current deductible amount but lower than the coverage gap would benefit from a reduced deductible.

OACT also found that while the deductible and initial coverage limit would decrease, the patient out-of-pocket spending threshold to enter catastrophic coverage would increase significantly in the second year as the full effects of reduced purchase prices are incorporated. The out-of-pocket threshold is set in statute and updated annually by aggregate Part D program growth. Because overall beneficiary spending levels would now match the net price of drugs rather than their list prices, progress toward the out-of-pocket limit would be slowed, though total dollars paid by beneficiaries would not change aside from statutory and annual updates.

Milliman's analysis did not incorporate changes to the Part D benefit thresholds, and these actuaries based their break-even analyses on the 2019 threshold amounts. Their analysis projects that the distribution of changes is far from uniform, and that the impact of the change is concentrated around the non-LIS beneficiaries who account for about 70 percent of the benefit. The break-even point would be $3.20 per beneficiary per month in cost-sharing reductions. Beneficiaries with cost-sharing reductions above that point would save money, and those with cost-sharing reductions below that figure would spend more on premiums than they saved in cost-sharing. Their analysis also projects about 7 percent of non-LIS beneficiaries do not use any medication, and therefore would see premium costs exceeding reductions in cost-sharing ($0 reductions in cost-sharing). Up to 30 percent of non-LIS beneficiaries have drug costs such that they could directly benefit from the changes in the point-of-sale costs by enough to make up for the average increase in premium. The remaining 63 percent of beneficiaries may or may not have their out-of-pocket costs reduced enough to offset any potential premium increase, depending on the mix of brand and generic drugs used. All else constant, these members generally do not have enough cost-sharing savings to fully offset the increase in premium. However, they may benefit from changes to copayments made by plan sponsors to maintain the minimum required actuarial value of 25 percent.

Taken together, the actuarial analyses project reductions in total cost-sharing would exceed total premium increases; however, impact on beneficiaries will vary greatly with some beneficiaries seeing savings while others experience increases in out-of-pocket spending.

Effect on Federal Government Spending

This rule will impact Federal spending on Part D direct premium subsidies, reinsurance, low income cost-sharing subsidies, and low income premium subsidies.

If there were no behavioral changes by manufacturers and Part D plans (*e.g.,* drug prices and benefit designs were held constant), all three actuarial analyses previously described predicted increased Federal spending. As explained in the Proposed Rule, the projected increase in 2020 Federal spending ranged from $2.8 billion to $13.5 billion. The projected increase in Federal spending from 2020 to 2029 ranged from $34.8 billion to $196.1 billion.

The Milliman analyses that contemplated behavior changes that would lower net prices from current levels predicted Federal spending from 2020 to 2029 could decrease by $78.9 billion if Part D plan sponsors increased formulary controls, decrease by $99.6 billion if Part D plan sponsors increased formulary controls and obtained additional price concessions, but increase by $139.9 billion if manufacturers reduced price concessions in Part D to offset list price decreases in other markets.

Table 4 describes the impacts on Federal spending predicted by each analysis and assumption at the proposed rule stage.

TABLE 4—GOVERNMENT SPENDING IMPACTS, AS ESTIMATED FOR CY 2020 THROUGH 2029

[$Billions]

	OACT	Milliman, scenario 1	Milliman, scenario 2	Milliman, scenario 3	Milliman, scenario 4	Wakely
Modeled Assumptions	• 15 percent of current Part D rebates retained by manufacturer. • 75 percent of remaining amount applied to per-sponsor/PBM negotiated discounts. • 25 percent of remainder applied as reduction to list price. • No beneficiary or plan behavioral changes are assumed.	• 100 percent of current Part D rebates are converted into list price concessions (agnostic on list price reductions versus up front discounts).	• 100 percent of current rebates are converted into list price concessions. • Part D plans exert greater formulary control.	• More than 100 percent of rebates are converted into list price concessions (same agnosticism on how applied). • Part D plans exert greater formulary control.	• 20 percent of current Part D rebates are retained by manufacturers (same agnosticism on how applied). • 80 percent of current Part D rebates are converted to price concessions (list price or discounts).	• 100 percent of current Part D rebates converted to up front discounts. • No beneficiary or plan behavioral changes are assumed.

[90] This limit varies by beneficiary, according to the mix of brand and generic drugs taken. As presented here, this figure is calculated assuming that only brand-name drugs are dispensed, which represents the lowest possible estimate for this threshold.

TABLE 4—GOVERNMENT SPENDING IMPACTS, AS ESTIMATED FOR CY 2020 THROUGH 2029—Continued
[$Billions]

	OACT	Milliman, scenario 1	Milliman, scenario 2	Milliman, scenario 3	Milliman, scenario 4	Wakely
Direct subsidy	+$258.7, (+119%)	+$215.4, (+193%)	+$174.7, (+157%)	+$180.3, (+162%)	+$221.1, (+199%)	Not avail.
Low income premium subsidy.	+$15.4, (+24%)	+$12.0, (+13%)	+$3.8, (+4%)	+$1.9, (+2%)	+$20.5, (+21%).	
Low income cost-sharing subsidy.	−$57.7 (−15%)	−$89.5, (−20%)	−$118.3, (−26%)	−$118.5, (−26%)	−$71.4, (−16%).	
Reinsurance	−$20.3 (−3%)	−$103.1, (−13%)	−$139.1, (−18%)	−$163.2, (−18%)	−$30.2, (−4%).	
Total	+$196.1, (+14%)	+$34.8, (+2%)	−78.8, (−5%)	−$99.6, (−7%)	+$139.9, (+10%)	N/A.

Direct Premium Subsidy Spending

The Medicare program provides a direct subsidy to Part D plans of 74.5 percent of expected costs. Medicare program payments for direct subsidies would have increased by an estimated $14.5 to $20.1 billion (128 percent to 154 percent) in 2020 and $174.7 to $258.7 billion (119 percent to 199 percent) from 2020 to 2029. The increase in program payments would require plans to smooth the effects of negotiated discounts across the entire benefit, rather than concentrate them on the initial coverage limit as is current practice. As noted above, premiums paid by beneficiaries are predicted to increase overall in analyses without behavioral changes that would reduce net prices below current levels.

In the Milliman analysis, the two scenarios that contemplated behavior changes that would reduce net prices compared to current levels predicted that Federal spending on direct premium subsidies from 2020 to 2029 could have increased less compared to a scenario with no behavior change. In these scenarios, Part D plan sponsors increased formulary controls and/or obtained additional price concessions. Payments for direct premium subsidies would be higher than under the scenario with no behavior change, if manufacturers reduced price concessions in Part D to offset list price decreases in other markets (as described in the OACT analysis and Milliman scenario 4). See Table 4 for magnitude and percent changes.

Reinsurance Spending

Transforming rebates into upfront reductions in price may result in fewer beneficiaries reaching catastrophic coverage. This would benefit the government because the government bears the majority of the cost (80 percent) for beneficiaries who reach catastrophic levels of drug spending. As such, all analyses suggested Medicare payments for reinsurance would have decreased by an estimated $3.0 to $7.9 billion (6 percent to 17 percent) in 2020 and 3 percent to 18 percent from 2020 to 2029. In the catastrophic coverage phase, Medicare makes payments to Part D plans for 80 percent of gross drug costs incurred once the beneficiary reaches the out-of-pocket threshold. As discussed above, the effect of this rule would be to reduce the effective purchase price of drugs, which in turn would require more prescriptions before a beneficiary would enter the catastrophic phase. If fewer beneficiaries enter this benefit phase, and the prices of the drugs they receive in this benefit phase are reduced, the Medicare Program would experience lower reinsurance payments to Part D plans.

Milliman's scenarios that contemplated behavior changes predicted Federal spending on reinsurance from 2020 to 2029 could have decreased by $139.1 billion if Part D plan sponsors increased formulary controls, decreased by $163.2 billion if Part D plan sponsors increased formulary controls and obtained additional price concessions, and decreased by only $30.2 billion if manufacturers reduced price concessions in Part D to offset list price decreases in other markets.

Low Income Subsidy Spending

Medicare payments for LIS enrollees would on net have decreased by an estimated $0.9 to $5.5 billion in 2020 and $42.3 to $116.6 billion from 2020 to 2029. Generally, LIS enrollees will not see the same out-of-pocket savings that non-LIS enrollees will, because they are assessed cost-sharing based almost exclusively on copayments. However, payments for the LICS will decrease for the same reasons that Medicare payments for reinsurance will decrease. Under the provisions of LICS, the Medicare program makes payments to plans to cover the difference between the LIS enrollee's copayment and the otherwise applicable coinsurance. As prices are reduced to account for discounts rather than applied to the plan liability exclusively, Medicare payments for these amounts will decrease. These savings were estimated to be $57.7 to $118.5 billion over ten years.

Analyses that contemplated behavior changes predicted Federal spending on low income cost-sharing subsidies from 2020 to 2029 could have decreased by $118 billion if Part D plan sponsors increased formulary controls, decreased by $119 billion if Part D plan sponsors increased formulary controls and obtained additional price concessions, and decreased by $71 billion if manufacturers reduced price concessions in Part D to offset list price decreases in other markets.

Other Stakeholder Impacts

Based on the provisions of this rulemaking, the actuarial estimates we received estimated that drug manufacturers would have seen revenues, as measured by changes in gross drug costs and Coverage Gap Discount Program payments, decrease beginning in CY2020 and each year thereafter. However, when drug costs net of all discounts and rebates are considered, the actuarial analyses results converged in finding net increases in total drug spending. Milliman's Scenario 1 analysis also estimated an increase in government costs of $34.8 billion over ten years, with beneficiary costs decreasing by $14.5 billion.[91] These changes in revenue will predominantly affect brand-name drugs more so than generic drugs. Since 2011, brand-name drug manufacturers have been required to provide a discount applied at the point of sale to beneficiaries whose claims occur during the coverage gap. Since the intent of this rulemaking is to reduce the negotiated prices paid by plans to pharmacies by incorporating up front discounts into them, both the frequency of beneficiaries entering the coverage gap, and the length of the coverage gap itself, are potentially reduced by the rule's effects.

Comment: A commenter suggested that the Proposed Rule did not

[91] Milliman, Inc., Impact of Potential Changes to the Treatment of Manufacturer Rebates, (Jan. 31, 2019). Appendix A1, Scenario 1A, page 1.

adequately account for entities in the pharmaceutical supply chain, Federal purchases, the 340B program, or the uninsured. The commenter also suggested that the Proposed Rule did not account for existing discount programs such as GoodRx when estimating savings for the uninsured.

Response: The impact on the uninsured is implicitly included in our Household estimates. We did not explicitly model the effects for those in the pharmaceutical supply chain, Federal direct purchases, or the 340B program.

Likewise, this rule will affect the way pharmacies are reimbursed. If list prices come down, pharmacies will experience lower acquisition costs, and their combined reimbursement from plan sponsors and beneficiaries will be reduced by the amount of discount provided by manufacturers to beneficiaries of each plan sponsor. The use of chargebacks to make pharmacies whole for the difference between acquisition cost, plan payment, and beneficiary out-of-pocket payment is described earlier in this rule. The actuarial analyses we commissioned were not designed to evaluate the effects on the pharmacy supply chain by moving from a system where reimbursement rates were divorced from actual negotiated prices after accounting for rebates.

Summary of Part D Impacts

This rule will significantly redirect the dollars flowing through the Part D program. Several of the positive and negative transfers are imperfect offsets of one another. For example, the analyses commissioned for this rule estimated that the amount saved by reducing cost-sharing exceeds the cost of any increase in premiums for beneficiaries overall. However, more beneficiaries would pay more for premiums, if premiums rise, than they would save in cost-sharing, suggesting that out-of-pocket impacts are likely to vary by individual and the greatest benefit of these transfers accrues to sicker beneficiaries (*e.g.,* those with more drug spending and/or those using high cost drugs).

It is difficult to predict the full extent of the transfers created by this rule in the absence of information about strategic behavior changes by manufacturers and Part D plan sponsors in response to this rule. In scenarios without behavioral changes, enrolled beneficiaries might have seen premiums increase in 2020 (had the rule become effective then) by $3.15 PBPM to $5.64 PBPM (8 percent to 19 percent) but average cost-sharing under their benefits would have declined by $4.85 PBPM to $8.01 PBPM (10 percent to 14 percent).[92] However, the revised effective date of January 1, 2022 for the amendment to § 1001.952(h)(5) of the discount safe harbor will provide manufacturers and plans with additional time to conduct negotiations and adjust any business practices as necessary based on the amended safe harbor. Premium and cost-sharing estimates were calculated on a different basis by each firm. OACT estimated actual beneficiary paid amounts for all enrollees on average. Milliman estimated beneficiary payments based upon the basic benchmark amounts. We present the range across these calculation types.

In the absence of the stakeholder behavior changes described often in this section, government payments to plans for direct subsidies, subsidies for low income enrollees' premiums and cost sharing will likely increase and be partially offset by reduced payments to plans for reinsurance, increasing overall by 3 percent to 14 percent in the 2020 estimates.

If manufacturer and plan behavior caused net prices to decrease in response to this rule, enrolled beneficiaries might have seen premiums increase 12 percent ($2.70 to $2.77 PBPM) in the first year with a very accelerated implementation timeline, and average cost sharing under their benefits may have declined by 12 percent to 13 percent ($5.22 to $5.44 PBPM) in 2020. Total government payments to plans would have increased 1 percent to 3 percent, as the net result of increased payments for direct subsidies (144 percent to 149 percent) and low-income premium subsidies (12 percent to 14 percent) and decreased payments for low income cost-sharing (−18 percent to −20 percent) and reinsurance (−16 percent to −17 percent).

If manufacturer and plan behavior caused Part D net prices to increase in response to this rule, enrolled beneficiaries would have seen published premiums increase 22 percent ($5.11) and average cost-sharing under their benefits might have declined by 9 percent to 14 percent (−$5.22 to −$8.01). Government payments to plans for direct subsidies and subsidies for low income enrollees' premiums and cost-sharing would have increased and reinsurance payments would have decreased.

Medicaid and State Impacts

OACT estimated that the rule would result in estimated aggregate savings of $4.0 billion for states over ten years, as follows.[93] The impact of the rule on Medicaid prescription drug rebates, MCO premiums, and prescription drug prices could have resulted in net Federal Medicaid costs of $1.7 billion between 2020 and 2029, and net state Medicaid costs of $0.2 billion over the same period. OACT also estimated that state governments would have saved $4.3 billion between 2020 and 2029 through lower prescription drug prices for state employees. These estimates are at the national level; Medicaid costs, state employee savings, and the net of the two may vary among states.

G. Accounting Statement

	Present value over 5 years by discount rate (millions of 2016 dollars)		Annualized value over 5 years by discount rate (millions of 2016 dollars)	
	3 Percent	7 Percent	3 Percent	7 Percent
BENEFITS:				
Non-quantified Benefits				
Improved information for consumers regarding the characteristics of their health insurance plans				

[92] Wakely Consulting Group, Estimate of the Impact on Beneficiaries, CMS, and Drug Manufacturers in CY2020 of Eliminating Rebates for Reduced List Prices at Point-of Sale for the Part D Program (Aug. 30, 2018); Milliman, Inc., Impact of Potential Changes to the Treatment of Manufacturer Rebates'' (Jan. 31, 2019) Scenario 1.

[93] CMS Office of the Actuary. ''Proposed Safe Harbor Regulation.'' August 30, 2018. The OACT analysis was posted as supplementary material in the docket for this rule at *regulations.gov* in February 2019. The estimated impacts on MCO premiums in the OACT analysis do not apply to the Final Rule because we are not finalizing the proposal to remove the existing safe harbor for Medicaid MCOs. Most of the estimated Medicaid costs in the OACT analysis, however, are associated with the impacts on rebates and drug prices rather than the impacts on MCO premiums from the removal of MCO from the existing safe harbor.

	Present value over 5 years by discount rate (millions of 2016 dollars)		Annualized value over 5 years by discount rate (millions of 2016 dollars)	
	3 Percent	7 Percent	3 Percent	7 Percent
COSTS:				
Quantified Costs	1,591	1,448	347	353

Category	Transfers ($billions) 10 years (as estimated for CY 2020–2029)
Decreased Medicare beneficiary spending	−25.2 to −59.5
Decreased employee premium and OOP spending	−11.7
Decreased beneficiary premium and cost-sharing spending	−14.5 to −25.2
Changes in Federal spending	−99.6 to 196.1
Decreased State spending (OACT only)	−4.0
Decreased manufacturer coverage gap discount payments	17 to 39.8

H. Regulatory Alternatives

One option is no action. This means that there would be no change in the safe harbor regulations. None of the costs or benefits of the rule would be realized and Medicare drug plan enrollees will continue to pay deductibles and coinsurance based on the list prices for prescription drugs.

This final rule adopts a delayed effective date for the amendments to § 1001.952(h)(5) of the discount safe harbor consistent with an alternate described in the proposed rule.

Another option contemplated by the Department, unrelated to safe harbor rulemaking, would require sponsors to incorporate into the point-of-sale price for a covered drug a specified minimum percentage of the average rebates expected to be received for the therapeutic class of drugs to which that covered drug belongs. This option, described in an RFI contained in the proposed rule proposing Contract Year 2019 Part C & D policy and technical changes,[94] would require sponsors to report the point-of-sale price for a covered drug as the lowest possible reimbursement that a network pharmacy could receive for that drug, inclusive of all pharmacy price rebates and concessions.

I. Regulatory Flexibility Analysis

As discussed above, the RFA requires agencies that issue a regulation to analyze options for regulatory relief of small entities if a rule has a significant impact on a substantial number of small entities. HHS considers a rule to have a significant economic impact on a substantial number of small entities if at least 5 percent of small entities experience an impact of more than 3 percent of revenue. At the proposed rule stage, the Department calculated the costs of the changes per affected business between 2020 and 2024. The estimated average costs of the rule per business according to this estimate peaked in 2020 at approximately $18,900 and are approximately $2,800 in subsequent years. The Department notes that relatively large entities are likely to experience proportionally higher costs and that costs will occur at a later point in time than if the rule had been finalized with a 2020 effective date. The U.S. Small Business Administration establishes size standards that define a small entity. For entities with standards based on revenue, they ranged from $17.5 million to $38.5 million in 2017. Since the estimated average costs of the rule are a small fraction of these thresholds, the Department anticipates that the rule would not have a significant economic impact on a substantial number of small entities.

[94] 82 FR 56336, 56419–28 (Nov. 28, 2017).

VI. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, we are required to solicit public comments, and receive final OMB approval, on any information collection requirements set forth in rulemaking. This rule imposes documentation and disclosure requirements on PBMs. Specifically, for one of the new safe harbors, PBMs and pharmaceutical manufacturers must have a written agreement that specifies their contractual arrangements and interactions with health plans, and PBMs must disclose their services rendered and compensation associated with transactions with pharmaceutical manufacturers related to interactions between the PBM and the health plan. In addition, PBMs may be required to disclose this information to the Secretary upon request.

We believe that the documentation requirements necessary to enjoy safe harbor protection do not qualify as an added paperwork burden, because the requirements deviate minimally, if at all, from the information PBMs and manufacturers would routinely collect in their normal course of business. We believe it is usual and customary for PBMs and manufacturers to memorialize contracts and other similar agreements in writing. Ensuring that such writings are comprehensive and that the actual business activities are accurately reflected by documentation are standard prudent business practices. However, we recognize that the disclosure of this information to plans, and potentially to the Secretary, is not a routine business practice.

List of Subjects in 42 CFR Part 1001

Administrative practice and procedure, Fraud, Grant programs—health, Health facilities, Health professions, Maternal and child health, Medicaid, Medicare, Social Security.

Accordingly, 42 CFR part 1001 is amended as set forth below:

PART 1001—PROGRAM INTEGRITY—MEDICARE AND STATE HEALTH CARE PROGRAMS

■ 1. The authority citation for part 1001 continues to read as follows:

Authority: 42 U.S.C. 1302; 1320a–7; 1320a–7b; 1395u(j); 1395u(k); 1395w–104(e)(6); 1395y(d); 1395y(e); 1395cc(b)(2)(D), (E), and (F); 1395hh; 1842(j)(1)(D)(iv), 1842(k)(1), and sec. 2455, Pub. L. 103–355, 108 Stat. 3327 (31 U.S.C. 6101 note).

■ 2. Section 1001.952 is amended:

■ a. Effective January 1, 2022, by revising paragraphs (h)(5)(vi) and (vii) and adding paragraph (h)(5)(viii); and
■ b. Effective January 29, 2021, by adding paragraphs (h)(6) through (9), (cc), and (dd).

The revisions and additions read as follows:

§ 1001.952 Exceptions.

* * * * *

(h) * * *

(5) * * *

(vi) Services provided in accordance with a personal or management services contract;

(vii) Other remuneration, in cash or in kind, not explicitly described in this paragraph (h)(5); or

(viii) A reduction in price or other remuneration in connection with the sale or purchase of a prescription pharmaceutical product from a manufacturer to a plan sponsor under Medicare Part D either directly to the plan sponsor under Medicare Part D, or indirectly through a pharmacy benefit manager acting under contract with a plan sponsor under Medicare Part D, unless it is a price reduction or rebate that is required by law.

(6) For purposes of this paragraph (h), the term manufacturer carries the meaning ascribed to it in Social Security Act section 1927(k)(5).

(7) For purposes of this paragraph (h), the terms wholesaler and distributor are used interchangeably and carry the same meaning as the term ''wholesaler'' defined in Social Security Act section 1927(k)(11).

(8) For purposes of this paragraph (h), the term pharmacy benefit manager or PBM means any entity that provides pharmacy benefit management on behalf of a health plan that manages prescription drug coverage.

(9) For purposes of this paragraph (h), a prescription pharmaceutical product means either a drug or biological product as those terms are described in Social Security Act section 1927(k)(2)(A), (B), and (C).

* * * * *

(cc) *Point-of-sale reductions in price for prescription pharmaceutical products.* (1) As used in section 1128B of the Act, ''remuneration'' does not include a reduction in price from a manufacturer to a plan sponsor under Medicare Part D or a Medicaid Managed Care Organization for a prescription pharmaceutical product that is payable, in whole or in part, by a plan sponsor under Medicare Part D or a Medicaid Managed Care Organization, provided the following conditions are met with regard to that reduction in price:

(i) The manufacturer and the plan sponsor under Medicare Part D, a Medicaid MCO, or the PBM acting under contract with either, set the reduction in price in advance, in writing, by the time of the first purchase of the product at that reduced price by the plan sponsor or Medicaid MCO on behalf of an enrollee;

(ii) The reduction in price does not involve a rebate unless the full value of the reduction in price is provided to the dispensing pharmacy by the manufacturer, directly or indirectly, through a point-of-sale chargeback or series of point-of-sale chargebacks, or is required by law; and

(iii) The reduction in price must be completely reflected in the price of the prescription pharmaceutical product at the time the pharmacy dispenses it to the beneficiary.

(2)(i) For purposes of this paragraph (cc), the terms manufacturer, pharmacy benefit manager or PBM, prescription pharmaceutical product, and rebate have the meanings ascribed to them in paragraph (h) of this section.

(ii) For purposes of this paragraph (cc), a point-of-sale chargeback is a payment by a manufacturer made directly or indirectly (through a PBM or other entity) to a dispensing pharmacy equal to the reduction in price agreed upon in writing between the Plan Sponsor under Part D, the Medicaid MCO, or a PBM acting under contract with either, and the manufacturer of the prescription pharmaceutical product.

(iii) For purposes of this paragraph (cc), the term Medicaid Managed Care Organization or Medicaid MCO carries the meaning ascribed to it in section 1903(m) of the Social Security Act.

(dd) *PBM service fees.* (1) As used in section 1128B of the Act, ''remuneration'' does not include any payment by a pharmaceutical manufacturer to a pharmacy benefit manager (PBM) for services the PBM provides to the pharmaceutical manufacturer related to the pharmacy benefit management services that the PBM furnishes to one or more health plans as long as the following conditions are met:

(i) The PBM has a written agreement with the pharmaceutical manufacturer, signed by the parties, that covers all of the services the PBM provides to the manufacturer in connection with the PBM's arrangements with health plans for the term of the agreement and specifies each of the services to be provided by the PBM and the compensation associated with such services.

(ii) The services performed under the agreement do not involve the counseling or promotion of a business arrangement or other activity that violates any State or Federal law.

(iii) The compensation paid to the PBM is:

(A) Is consistent with fair market value in an arm's-length transaction;

(B) Is a fixed payment, not based on a percentage of sales; and

(C) Is not determined in a manner that takes into account the volume or value of any referrals or business otherwise generated between the parties, or between the manufacturer and the PBM's health plans, for which payment may be made in whole or in part under Medicare, Medicaid, or other Federal health care programs.

(iv) The PBM discloses in writing to each health plan with which it contracts at least annually the services rendered to each pharmaceutical manufacturer related to the PBM's arrangements to furnish pharmacy benefit management services to the health plan, and to the Secretary upon request, the services rendered to each pharmaceutical manufacturer related to the PBM's arrangements to furnish pharmacy benefit management services to the health plan and the fees paid for such services.

(2) For purposes of safe harbor in this paragraph (dd), the terms manufacturer, pharmacy benefit manager or PBM, and prescription pharmaceutical product have the meanings ascribed to them in paragraph (h) of this section, and health plan has the meaning ascribed to it in paragraph (l) of this section.

Dated: November 16, 2020.

Christi A. Grimm,

Principal Deputy Inspector General.

Dated: November 17, 2020.

Alex M. Azar II,

Secretary.

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Part III

Bureau of Consumer Financial Protection

12 CFR Part 1006

Debt Collection Practices (Regulation F); Final Rule

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1006

[Docket No. CFPB–2019–0022]

RIN 3170–AA41

Debt Collection Practices (Regulation F)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule; official interpretation.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is issuing this final rule to revise Regulation F, which implements the Fair Debt Collection Practices Act (FDCPA) and currently contains the procedures for State application for exemption from the provisions of the FDCPA. The Bureau is finalizing Federal rules governing the activities of debt collectors, as that term is defined in the FDCPA. The Bureau's final rule addresses, among other things, communications in connection with debt collection and prohibitions on harassment or abuse, false or misleading representations, and unfair practices in debt collection.

DATES: This rule is effective November 30, 2021.

FOR FURTHER INFORMATION CONTACT: Dania Ayoubi, Joseph Baressi, Seth Caffrey, Brandy Hood, David Jacobs, Courtney Jean, Jaclyn Maier, Adam Mayle, Kristin McPartland, Michael Scherzer, or Michael Silver, Senior Counsels, Office of Regulations, at 202–435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Summary of the Final Rule

The Bureau is finalizing amendments to Regulation F, 12 CFR part 1006, which implements the FDCPA.[1] The amendments prescribe Federal rules governing the activities of debt collectors, as that term is defined in the FDCPA (debt collectors or FDCPA debt collectors). The final rule focuses on debt collection communications and related practices by debt collectors.

In 1977, Congress passed the FDCPA to eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.[2] The statute was a response to ''abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors.'' [3] According to Congress, these practices ''contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.'' [4]

The FDCPA established specific consumer protections, enabling consumers to establish controls on when and how debt collectors contact them, establishing privacy protections surrounding the collection of debts, and protecting consumers from certain collection practices. The FDCPA also established broad consumer protections, prohibiting harassment or abuse, false or misleading representations, and unfair practices. As the first Federal agency with authority under the FDCPA to prescribe substantive rules with respect to the collection of debts by debt collectors, the Bureau is adopting this final rule to implement and interpret those consumer protections, including by clarifying how they apply to newer communication technologies. The Bureau intends to issue a disclosure-focused final rule in December 2020 (disclosure-focused final rule) to implement and interpret the FDCPA's requirements regarding consumer disclosures and certain related consumer protections.

A. Coverage and Organization of the Final Rule

The final rule is based primarily on the Bureau's authority to issue rules to implement the FDCPA and, consequently, covers debt collectors, as that term is defined in the FDCPA.[5] The final rule restates nearly all of the FDCPA's substantive provisions largely in the order that they appear in the statute, sometimes without further interpretation. Restating the statutory text in this way should facilitate understanding and compliance by making it possible for stakeholders to, in general, consult only the regulation to view relevant definitions and substantive provisions. Except where specifically stated, by restating the statutory text, the Bureau does not intend to codify existing case law or judicial interpretations of the statute.

The final rule has four subparts. Subpart A contains generally applicable provisions, such as definitions that apply throughout the regulation. Subpart B contains rules for FDCPA debt collectors. Subpart C is reserved for any future debt collection rulemakings. Subpart D contains certain miscellaneous provisions.

B. Scope of the Final Rule

Communications Provisions

Debt collection efforts often begin with attempts by a debt collector to reach a consumer. Communicating with a debt collector may benefit a consumer by helping the consumer either to resolve a debt the consumer owes or to identify and inform the debt collector if the debt is one that the consumer does not owe. However, debt collection communications also may constitute unfair practices, may contain false or misleading representations, or may be harassing or abusive either because of their content (for example, when debt collectors employ profanity) or because of the manner in which they are made (for example, when debt collectors place telephone calls with the intent to harass or abuse).

To address such concerns about debt collection communications and to clarify the application of the FDCPA to newer communication technologies that have developed since the FDCPA's passage in 1977, the final rule, in general:

- Clarifies restrictions on the times and places at which a debt collector may communicate with a consumer, including by clarifying that a consumer need not use specific words to assert that a time or place is inconvenient for debt collection communications.
- Clarifies that a consumer may restrict the media through which a debt collector communicates by designating a particular medium, such as email, as one that cannot be used for debt collection communications.
- Clarifies that a debt collector is presumed to violate the FDCPA's prohibition on repeated or continuous telephone calls if the debt collector places a telephone call to a person more than seven times within a seven-day period or within seven days after engaging in a telephone conversation with the person. It also clarifies that a debt collector is presumed to comply with that prohibition if the debt collector places a telephone call not in excess of either of those telephone call frequencies. The final rule also provides non-exhaustive lists of factors that may

[1] 15 U.S.C. 1692 *et seq.*

[2] 15 U.S.C. 1692(e).

[3] 15 U.S.C. 1692(a).

[4] *Id.*

[5] The record retention requirement in § 1006.100 is based on the Bureau's rulemaking authority under title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Public Law 111–203, 124 stat. 1376 (2010), but applies only to FDCPA debt collectors. *See* the section-by-section analysis of § 1006.100.

be used to rebut the presumption of compliance or of a violation.

• Clarifies that newer communication technologies, such as emails and text messages, may be used in debt collection, with certain limitations to protect consumer privacy and to protect consumers from harassment or abuse, false or misleading representations, or unfair practices. For example, the final rule requires that each of a debt collector's emails and text messages must include instructions for a reasonable and simple method by which a consumer can opt out of receiving further emails or text messages. The final rule also provides that a debt collector may obtain a safe harbor from civil liability for an unintentional third-party disclosure if the debt collector follows the procedures identified in the rule when communicating with a consumer by email or text message.[6]

• Defines a new term related to debt collection communications: Limited-content message. This definition identifies what information a debt collector must and may include in a voicemail message for consumers (with the inclusion of no other information permitted) for the message to be deemed not to be a communication under the FDCPA. This definition permits a debt collector to leave a voicemail message for a consumer that is not a communication under the FDCPA or the final rule and therefore is not subject to certain requirements or restrictions.

Consumer Disclosure Provisions

The FDCPA requires that a debt collector provide certain disclosures to the consumer. The final rule clarifies the standards a debt collector must meet when sending the required disclosures in writing or electronically.

Additional Provisions

The final rule addresses certain other consumer protection concerns in the debt collection market. For example, the final rule includes provisions clarifying debt collectors' obligation to retain records evidencing compliance or noncompliance with the FDCPA and Regulation F; prohibiting the sale, transfer for consideration, or placement for collection of certain debts; and clarifying debt collectors' obligations when responding to duplicative disputes. The final rule also clarifies that the personal representative of a deceased consumer's estate is a consumer for purposes of § 1006.6, which addresses communications in connection with debt collection. This clarification generally allows a debt collector to discuss a debt with the personal representative of a deceased consumer's estate. The final rule also clarifies how a debt collector may locate the personal representative of a deceased consumer's estate.

Disclosure-Focused Final Rule

The Bureau is reserving certain sections of Regulation F for a disclosure-focused final rule that, as noted above, the Bureau intends to publish in December 2020 to clarify the information that a debt collector must provide to a consumer at the outset of debt collection and to provide a model notice containing the information required by FDCPA section 809(a). The Bureau also plans to address in the disclosure-focused final rule consumer protection concerns related to requirements prior to furnishing consumer reporting information and the collection of debt that is beyond the statute of limitations (*i.e.,* time-barred debt).

II. Background

A. Debt Collection Market Background

A consumer debt is commonly understood to be a consumer's obligation to pay money to another person or entity. Sometimes a debt arises out of a closed-end loan. Other times, a debt arises from a consumer's use of an open-end line of credit, commonly a credit card. And in other cases, a debt arises from a consumer's purchase of goods or services with payment due thereafter. Often there is an agreed-upon payment schedule or date by which the consumer must repay the debt.

For a variety of reasons, consumers sometimes are unable or unwilling to make payments when they are due. Collection efforts may directly recover some or all of the overdue amounts owed to debt owners and thereby may indirectly help to keep consumer credit available and more affordable to consumers.[7] Collection activities also can lead to repayment plans or debt restructuring that may provide consumers with additional time to make payments or resolve their debts on more manageable terms.[8]

The debt collection industry includes creditors, third-party debt collectors (including debt collection law firms), debt buyers, and a wide variety of related service providers. Debt collection is estimated to be a $12.7 billion-dollar industry employing nearly 123,000 people across approximately 7,800 collection agencies in the United States.[9]

Creditors

When an account becomes delinquent, initial collection efforts often are undertaken by the original creditor or its servicer. The FDCPA typically does not cover such recovery efforts and, if they result in resolution of the debt, whether through payment in full or another arrangement, the consumer typically will not interact with a third-party debt collector.

Third-Party Debt Collectors

If a consumer's payment obligations remain unmet, a creditor may send the account to a third-party debt collector to recover on the debt in the third-party debt collector's name. A creditor may choose to send an account to a third-party debt collector for several reasons, including because the third-party debt collector possesses capabilities and expertise that the creditor lacks. Third-party debt collectors usually are paid on a contingency basis, typically a percentage of recoveries; debt collectors contracting with creditors on a contingency basis generated a large majority of the industry's 2019 revenue.[10] Contingency debt collectors compete with one another to secure business from creditors based on, among other factors, the debt collectors' effectiveness in obtaining recoveries.[11]

[6] These procedures appear in § 1006.6(d)(3) through (5). Throughout this Notice, the Bureau uses the phrase ''may obtain a safe harbor from civil liability'' to mean that a debt collector who follows the procedures in § 1006.6(d)(3) through (5) may have a bona fide error defense to civil liability under FDCPA section 813(c), 15 U.S.C. 1692k(c), for an unintentional third-party disclosure. The Bureau uses the term ''may'' because, to have a bona fide error defense to civil liability (*i.e.,* to obtain what this Notice refers to, for ease of reference, as a safe harbor from civil liability), a debt collector must affirmatively prove compliance with both § 1006.6(d)(3)(i) and (ii). In addition, for ease of reference, the Bureau sometimes refers to the procedures in § 1006.6(d)(3) through (5) as ''safe harbor procedures.'' The Bureau's use of the term ''safe harbor'' in the context of § 1006.6(d)(3) through (5) is different from its use of the term elsewhere in this Notice, where the term refers to actions that, when taken, permit debt collectors to comply with the FDCPA and Regulation F.

[7] *See* Bureau of Consumer Fin. Prot., *Fair Debt Collection Practices Act: CFPB Annual Report 2013,* at 9 (Mar. 20, 2013), *https://www.consumerfinance.gov/data-research/research-reports/annual-report-on-the-fair-debt-collection-practices-act/* (2013 FDCPA Annual Report).

[8] *See id.*

[9] *See* Bureau of Consumer Fin. Prot., *Fair Debt Collection Practices Act: CFPB Annual Report 2020,* at 7 (Mar. 2020), *https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2020.pdf* (2020 FDCPA Annual Report).

[10] *Id.* at 8.

[11] While third-party collection agencies have been increasing in size in recent years, third-party debt collection continues to include a significant number of smaller entities. *See* Robert M. Hunt, *Understanding the Model: The Life Cycle of a Debt,* at 15, Fed. Reserve Bank of Phila. (June 6, 2013),

Continued

B. Debt Buyers

If contingency collections prove unsuccessful—or if a particular creditor prefers not to use such third-party debt collectors—a creditor may sell unpaid accounts to a debt buyer. In 2009, the Federal Trade Commission (FTC) called the advent and growth of debt buying ''the most significant change in the debt collection business'' in recent years.[12] Debt buyers purchase defaulted debt from creditors or other debt owners and thereby take title to the debt. Credit card debt comprises a large majority of the debt that debt buyers purchase.[13] Debt buyers generated about one-third of debt collection revenue, or about $3.5 billion, in 2017.[14] Creditors who sell their uncollected debt to debt buyers receive a certain up-front return, but these debts typically are sold at prices that are less than their face value. Debt buyers typically price their offers for portfolios based upon their projections of the amount they will be able to collect. The debt buyer incurs the risk of recovering less than the sum of the amount it paid to acquire the debt and its expenses to collect the debt.

Typically, a debt buyer engages in debt collection, attempting to collect debts itself. However, a debt buyer also may use a third-party debt collector or a series of such debt collectors. If the debt buyer is unable to collect some of the debts it purchased, the debt buyer may sell the debt again to another debt buyer. Any single debt thus may be owned by multiple entities over its lifetime. The price paid for a debt generally will decline as the debt ages and passes from debt buyer to debt buyer, because the probability of payment decreases.[15]

Debt Collection Law Firms

A debt owner may try to recover on a debt through litigation, either after unsuccessful debt collection attempts or as a primary collection activity. Most debt collection litigation is filed in State courts. Debt owners often retain law firms and attorneys that specialize in debt collection and that are familiar with State and local rules. If a debt owner obtains a judgment in its favor, post-litigation efforts may include garnishment of wages or seizure of assets.

B. Debt Collection Methods

The debt collection experience is a common one—approximately one in three consumers with a credit record reported having been contacted about a debt in collection in 2014.[16] Of those, 27 percent reported having been contacted about a single debt over the prior year, 57 percent reported having been contacted about two to four debts, and 16 percent reported having been contacted about more than four debts.[17]

A creditor typically stops communicating with a consumer once responsibility for an account has moved to a third-party debt collector. Active debt collection efforts typically begin with the debt collector attempting to locate the consumer, usually by identifying a valid telephone number or mailing address, so that the debt collector can establish contact with the consumer. To obtain current contact information, a debt collector may look to information that transferred with the account file, public records, data sellers, or proprietary databases of contact information. A debt collector may also attempt to obtain location information for a consumer from third parties, such as family members who share a residence with the consumer or colleagues at the consumer's workplace.

Once a debt collector has obtained contact information for a consumer, the debt collector typically will seek to communicate with the consumer to obtain payment on some or all of the debt. The debt collector may tailor the collection strategy depending on a variety of factors, including the size and age of the debt and the debt collector's assessment of the likelihood of obtaining money from the consumer.

Other types of debt are subject to statutory or regulatory requirements that may affect how a debt collector tries to recover on them. For example, privacy protections may affect how a debt collector seeks to recover on a medical debt, and the availability of administrative wage garnishment and tax refund intercepts may affect how a debt collector seeks to recover on a Federal student loan.

Changes in a consumer's situation may warrant a change in a debt collector's recovery strategy, such as when information purchased from consumer reporting agencies or other third parties indicates that the consumer has started a new job. A debt owner also may ''warehouse'' a debt and cease collection efforts for a significant period. A new debt collector may later be tasked with resuming collection efforts because, for example, the debt owner has sold the account, detected a possible change in the consumer's financial situation, or, as part of their portfolio management strategy, makes periodic attempts at some recovery. Each time a new debt collector obtains responsibility for collecting the debt, the consumer likely will be subject to communications or communication attempts from the new debt collector. For the consumer, this may mean contact from a series of different debt collectors over a number of years for a single debt. During this time, the consumer may make payments to multiple debt collectors or may receive communication attempts from multiple debt collectors that may stop and restart at irregular intervals, until the debt is paid or settled in full or collection activity ceases for other reasons.

C. Consumer Protection Concerns

Each year, consumers submit tens of thousands of complaints about debt collection to Federal regulators;[18] many

https://www.ftc.gov/sites/default/files/documents/public_events/life-debt-data-integrity-debt-collection/understandingthemodel.pdf.

[12] Fed. Trade Comm'n, *The Structure and Practices of the Debt Buying Industry,* at i (Jan. 2013), *https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf* (FTC Debt Buying Report).

[13] *Id.* at 7 (citing *Credit Card Debt Sales in 2008,* 921 Nilson Rep. 10 (Mar. 2009)).

[14] Bureau of Consumer Fin. Prot., *Fair Debt Collection Practices Act: CFPB Annual Report 2018,* at 10 (Mar. 2018), *https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2018.pdf* (2018 FDCPA Annual Report) (citing Edward Rivera, *Debt Collection Agencies in the US,* IBIS World (Dec. 2017)). Although debt buyers represent about one-third of industry revenue, this overstates debt buyers' share of dollars collected, since debt buyer revenue includes all amounts recovered, whereas the revenue of contingency debt collectors includes only the share of recoveries retained by the debt collector. *Id.*

[15] FTC Debt Buying Report, *supra* note 12, at 23–24.

[16] Bureau of Consumer Fin. Prot., *Consumer Experience with Debt Collection: Findings from CFPB's Survey of Consumer Views on Debt,* at 5 (2017), *http://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf* (CFPB Debt Collection Consumer Survey). This figure includes consumers contacted only by creditors as well as those contacted by one or more debt collection firms. *Id.* at 13.

[17] *Id.*

[18] *See, e.g.,* 2020 FDCPA Annual Report, *supra* note 9, at 13; Fed. Trade Comm'n, *2019 Consumer Sentinel Network Databook,* at 7 (Jan. 2020), *https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2019/consumer_sentinel_network_data_book_2019.pdf;* Bureau of Consumer Fin. Prot., *Fair Debt Collection Practices Act: CFPB Annual Report 2020,* at 15–16 (Mar. 2019), *https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2019.pdf* (2019 FDCPA Annual Report); Fed. Trade Comm'n, *2018 Consumer Sentinel Network Databook,* at 4, 7 (Feb. 2019), *https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2018/consumer_sentinel_network_data_book_2018_0.pdf;* 2018 FDCPA Annual Report, *supra* note 14, at 14–15; Fed. Trade Comm'n, *2017 Consumer Sentinel Network Databook,* at 3, 6 (Mar. 2018), *https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2017/consumer_sentinel_data_book_2017.pdf;* Bureau of Consumer Fin. Prot., *2017 Fair Debt Collection Practices Act: CFPB*

of those complaints relate to practices addressed in the final rule. Consumers also file thousands of private actions each year against debt collectors who allegedly have violated the FDCPA. Since the Bureau began operations in 2011, it has brought numerous debt collection cases against third-party debt collectors, alleging both FDCPA violations and unfair, deceptive, or abusive debt collection acts or practices in violation of the Dodd-Frank Act.[19] In many of these cases, the Bureau has obtained civil penalties, monetary compensation for consumers, and other relief. In its supervisory work, the Bureau similarly has identified many FDCPA violations during examinations of debt collectors. Over the past decade, the FTC and State regulators also have brought numerous additional actions against debt collectors for violating Federal and State debt collection and consumer protection laws.

D. FDCPA and Dodd-Frank Act Protections for Consumers

Federal and State governments historically have sought to protect consumers from harmful debt collection practices. From 1938 to 1977, the Federal government primarily protected consumers through FTC enforcement actions against debt collectors who engaged in unfair or deceptive acts or practices in violation of section 5 of the FTC Act.[20] When Congress enacted the FDCPA in 1977, it found that ''[e]xisting laws and procedures for redressing . . . injuries [were] inadequate to protect consumers.'' [21] Congress found that ''[t]here [was] abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors'' and that these practices ''contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.'' [22]

The FDCPA was enacted, in part, ''to eliminate abusive debt collection practices by debt collectors, [and] to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged.'' [23] Among other things, the FDCPA: (1) Prohibits debt collectors from engaging in harassment or abuse, making false or misleading representations, and engaging in unfair practices in debt collection; (2) restricts debt collectors' communications with consumers and others; and (3) requires debt collectors to provide consumers with disclosures concerning the debts they owe or allegedly owe.

The FDCPA, in general, applies to debt collectors as that term is defined under the statute. As discussed further in the section-by-section analysis of § 1006.2(i), the FDCPA generally provides that a debt collector is any person: (1) Who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts (*i.e.,* the ''principal purpose'' prong), or (2) who regularly collects, or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due to another (*i.e.,* the ''regularly collects'' prong). FDCPA section 803(6) also sets forth several exclusions from the general definition.

Until the creation of the Bureau, no Federal agency was authorized to issue regulations to implement the substantive provisions of the FDCPA. Courts have issued opinions providing differing interpretations of various FDCPA provisions, and there is considerable uncertainty with respect to how the FDCPA applies to communication technologies that have developed since 1977. The Dodd-Frank Act amended the FDCPA to provide the Bureau with authority to ''prescribe rules with respect to the collection of debts by debt collectors.'' [24]

III. The Rulemaking Process

A. The 2019 Proposal and 2020 Supplemental Proposal

On May 21, 2019, the Bureau published a proposed rule (the proposal) in the **Federal Register** to amend Regulation F, which implements the FDCPA.[25] The proposal provided a 90-day comment period that would have closed on August 19, 2019. To allow interested persons more time to consider and submit their comments, the Bureau issued an extension of the comment period until September 18, 2019.[26] In response to the proposal, the Bureau received more than 14,000 comments from consumers, consumer groups, members of Congress, other government agencies, creditors, debt collectors, industry trade associations, and others. As discussed below, the Bureau has considered these comments in adopting this final rule.[27]

In the proposal, the Bureau proposed to address concerns about debt collection communications and to clarify the application of the FDCPA to newer communication technologies, to clarify the steps a debt collector must take to provide required disclosures in writing and electronically, to clarify the information that a debt collector must provide to a consumer at the outset of debt collection, and to address other consumer protection concerns in the debt collection market. The proposal, among other things, proposed to set a bright-line rule for telephone call frequency and proposed a model form for providing the information required by FDCPA section 809(a). These interventions, along with the many others included in the proposal, generated a robust response. While some consumers and consumer advocate commenters supported various aspects of the proposal, in general they questioned whether the proposal provided adequate protection for consumers. Similarly, while some industry commenters supported various aspects of the proposal, in general they questioned whether the proposal provided sufficient clarity to allow for compliance or was properly tailored to the consumer protection problems and evidence at hand.

Annual Report 2017, at 15–16 (Mar. 2017), *https://files.consumerfinance.gov/f/documents/201703_cfpb_Fair-Debt-Collection-Practices-Act-Annual-Report.pdf* (2017 FDCPA Annual Report); Fed. Trade Comm'n, *Consumer Sentinel Network Data Book for January–December 2016,* at 3, 6 (Mar. 2017), *https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2016/csn_cy-2016_data_book.pdf.*

[19] *See, e.g.,* Stipulated Final Judgment and Consent Order, *Consumer Fin. Prot. Bureau* v. *Encore Capital Grp., Inc.,* 3:20-cv-01750 (S.D. Cal. Oct. 15, 2020), *https://www.courtlistener.com/recap/gov.uscourts.casd.686719/gov.uscourts.casd.686719.5.1.pdf;* Consent Order, *In re Asset Recovery Assocs.,* 2019–BCFP–0009 (Aug. 28, 2019), *https://www.consumerfinance.gov/documents/7938/cfpb_asset-recovery-associates_consent-order_2019-08.pdf;* Consent Order, *In re Encore Capital Grp., Inc.,* 2015–CFPB–0022 (Sept. 9, 2015), *http://files.consumerfinance.gov/f/201509_cfpb_consent-order-encore-capital-group.pdf;* Consent Order, *In re Portfolio Recovery Assocs., LLC,* 2015–CFPB–0023 (Sept. 9, 2015), *http://files.consumerfinance.gov/f/201509_cfpb_consent-order-portfolio-recovery-associates-llc.pdf;* Complaint, *Consumer Fin. Prot. Bureau* v. *Nat'l Corrective Grp., Inc.,* 1:15–cv–00899–RDB (D. Md. Mar. 30, 2015), *http://files.consumerfinance.gov/f/201503_cfpb_complaint-national-corrective-group.pdf.*

[20] 15 U.S.C. 45.

[21] 15 U.S.C. 1692(b).

[22] 15 U.S.C. 1692(a).

[23] 15 U.S.C. 1692(e).

[24] FDCPA section 814(d), 15 U.S.C. 1692*l*(d).

[25] *See* 84 FR 23274 (May 21, 2019).

[26] 84 FR 37806 (Aug. 2, 2019).

[27] The Bureau received feedback asking the Bureau to include in the final rule certain interventions that the Bureau did not propose; many such comments addressed debt collectors' obligation to substantiate debts. The Bureau concludes that it is not advisable to finalize such interventions without the benefit of public notice and comment and therefore does not address such comments further in this Notice.

On February 21, 2020, the Bureau released a supplemental notice of proposed rulemaking to amend Regulation F to require debt collectors to make certain disclosures when collecting time-barred debts (the February 2020 proposal).[28] Time-barred debts are debts for which the applicable statute of limitations has expired. The February 2020 proposal provided a 60-day comment period that would have closed on May 4, 2020. To allow interested persons more time to consider and submit their comments, the Bureau issued two extensions of the comment period, the first until June 5, 2020 and the second until August 4, 2020.[29] As noted above, the Bureau intends to issue a disclosure-focused final rule regarding the February 2020 proposal and certain provisions of the May 2019 proposal related to consumer disclosures and to the collection of time-barred debt.

B. Other Outreach [30]

In November 2013, the Bureau began the rulemaking process with the publication of an Advance Notice of Proposed Rulemaking (ANPRM) regarding debt collection.[31] As discussed in the proposal, the ANPRM sought information about a wide variety of both first- and third-party debt collection practices. The Bureau received more than 23,000 comments in response to the ANPRM, which the Bureau considered when developing the proposal.

The Bureau also conducted a variety of consumer testing and surveys, beginning in 2014 when the Bureau contracted with a third-party vendor, Fors Marsh Group (FMG), to develop and conduct qualitative consumer testing of two potential consumer-facing debt collection model disclosure forms: the validation notice and the statement of consumer rights. The Bureau also conducted a nationwide survey of consumers' experiences with debt collection and published a report of the findings in January 2017 (CFPB Debt Collection Consumer Survey or Consumer Survey).[32] In 2017, the Bureau contracted with ICF International, Inc. (ICF) to conduct a web survey of approximately 8,000 individuals possessing a broad range of demographic characteristics to obtain additional information about consumer comprehension and decision-making in response to sample debt collection disclosures relating to time-barred debt. A report summarizing the findings of this testing was published in connection with the February 2020 proposal.[33]

To better understand the operational costs of debt collection firms, including law firms, the Bureau also surveyed debt collection firms and vendors and published a report based on that study in July 2016 (CFPB Debt Collection Operations Study or Operations Study).[34] The Operations Study focused on understanding how debt collection firms obtain information about delinquent consumer accounts and attempt to collect on those accounts.

In August 2016, the Bureau convened a Small Business Review Panel (Small Business Review Panel or Panel) with the Chief Counsel for Advocacy of the Small Business Administration (SBA) and the Administrator of the Office of Information and Regulatory Affairs with the Office of Management and Budget (OMB).[35] As part of this process, the Bureau prepared an outline of proposals under consideration and the alternatives considered (Small Business Review Panel Outline or Outline),[36] which the Bureau posted on its website for review by the small entity representatives participating in the Panel process and by the general public. The Panel gathered information from the small entity representatives and made findings and recommendations regarding the potential compliance costs and other impacts on those entities of the proposals under consideration. Those findings and recommendations are set forth in the Small Business Review Panel Report, which is part of the administrative record in this rulemaking and is available to the public.[37] The Bureau considered these findings and recommendations in preparing the proposals and this final rule.

The Bureau has also met on many occasions with various stakeholders, including consumer advocacy groups, debt collection trade associations, industry participants, academics with expertise in debt collection, Federal prudential regulators, and other Federal and State consumer protection regulators. The Bureau also received a number of comments specific to the debt collection rulemaking in response to its Request for Information Regarding the Bureau's Adopted Regulations and New Rulemaking Authorities [38] and its Request for Information Regarding the Bureau's Inherited Regulations and Inherited Rulemaking Authorities; [39] the Bureau considered these comments in developing the proposals and this final rule. In addition, the Bureau has engaged in general outreach, speaking at consumer advocacy group and industry events and visiting consumer organizations and industry stakeholders. The Bureau has provided other regulators with information about the proposals and this final rule, has sought their input, and has received feedback that has helped the Bureau to prepare this final rule.

Under the Dodd-Frank Act, the Bureau is required to conduct an assessment of significant rules within five years of the rule's effective date. The Bureau anticipates that this final rule may be significant and therefore may require an assessment within five years of the rule's effective date. The Bureau is preparing now for this possible assessment. Specifically, the Bureau is considering how best to obtain information now to serve as a baseline for evaluation of the costs, benefits, and other effects of the final

[28] *See* 85 FR 12672 (Mar. 3, 2020).

[29] *See* 85 FR 17299 (Mar. 27, 2020) (first extension) and 85 FR 30890 (May 21, 2020) (second extension).

[30] The preamble to the proposal includes a more thorough discussion of the outreach the Bureau conducted prior to issuing the proposal. *See* 84 FR 23274, 23278–80 (May 21, 2019).

[31] 78 FR 67848 (Nov. 12, 2013).

[32] CFPB Debt Collection Consumer Survey, *supra* note 16. The survey was approved under OMB control number 3170–0047, Debt Collection Survey from the Consumer Credit Panel.

[33] Bureau of Consumer Fin. Prot., *Disclosure of Time-Barred Debt and Revival: Finding from CFPB's Quantitative Disclosure Testing* (Feb. 2020), *https://files.consumerfinance.gov/f/documents/cfpb_debt-collection-quantitative-disclosure-testing_report.pdf* (CFPB Quantitative Testing Report).

[34] *See generally* Bureau of Consumer Fin. Prot., *Study of Third-Party Debt Collection Operations* (July 2016), *https://www.consumerfinance.gov/documents/755/20160727_cfpb_Third_Party_Debt_Collection_Operations_Study.pdf* (CFPB Debt Collection Operations Study).

[35] The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), as amended by section 1100G(a) of the Dodd-Frank Act, requires the Bureau to convene a Small Business Review Panel before proposing a rule that may have a substantial economic impact on a significant number of small entities. *See* Public Law 104–121, tit. II, 110 stat. 857 (1996) (as amended by the Small Business and Work Opportunity Act of 2007, Public Law 110–28, tit. VIII, subtit. C, sec. 8302, 121 stat. 204 (2007)).

[36] Bureau of Consumer Fin. Prot., *Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered* (July 28, 2016), *https://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf* (Small Business Review Panel Outline). The Bureau also gathered feedback on the Small Business Review Panel Outline from other stakeholders, members of the public, and the Bureau's Consumer Advisory Board and Community Bank Advisory Council.

[37] Bureau of Consumer Fin. Prot., U.S. Small Bus. Admin. & Office of Mgmt. & Budget, *Final Report of the Small Business Review Panel on the CFPB's Proposals Under Consideration for the Debt Collector and Debt Buying Rulemaking* (Oct. 2016), *https://files.consumerfinance.gov/f/documents/cfpb_debt-collector-debt-buyer_SBREFA-report.pdf* (Small Business Review Panel Report).

[38] 83 FR 12286 (Mar. 21, 2018).

[39] 83 FR 12881 (Mar. 26, 2018).

rule. The Bureau expects to collect data and other information from consumers, debt collectors, and other stakeholders to understand whether the rule is achieving its goals under the FDCPA and the Dodd-Frank Act, and to help the Bureau measure the costs and benefits of the rule. Topics of data collection could include: Whether consumers find themselves less harassed by calls from debt collectors; whether debt collectors are better able to understand how to communicate with consumers using modern technology in a way that complies with the FDCPA; whether greater clarity about FDCPA requirements helps reduce litigation; and costs of the rule, both anticipated and unexpected, for consumers or for industry. The Bureau expects to conduct outreach in 2021 to explore how best to obtain such data, including potentially through surveying consumers or firms or by collecting operational data.

IV. Legal Authority

The Bureau is issuing this final rule primarily pursuant to its authority under the FDCPA and the Dodd-Frank Act. As amended by the Dodd-Frank Act, FDCPA section 814(d) provides that the Bureau ''may prescribe rules with respect to the collection of debts by debt collectors,'' as defined in the FDCPA.[40] Section 1022(a) of the Dodd-Frank Act provides that ''[t]he Bureau is authorized to exercise its authorities under Federal consumer financial law to administer, enforce, and otherwise implement the provisions of Federal consumer financial law.'' [41] Section 1022(b)(1) of the Dodd-Frank Act provides that the Director may prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.[42] ''Federal consumer financial law'' includes title X of the Dodd-Frank Act and the FDCPA.[43] No provisions in this final rule are based on section 1031 of the Dodd-Frank Act.

These and other authorities are discussed in greater detail in parts IV.A through E below. Part IV.A discusses the Bureau's authority under sections 806 through 808 of the FDCPA. Parts IV.B through E discuss the Bureau's relevant authorities under the Dodd-Frank Act and the Electronic Signatures in Global and National Commerce Act (E–SIGN Act).[44]

A. FDCPA Sections 806 Through 808

As discussed in part V, the Bureau is finalizing several provisions, in whole or in part, pursuant to its authority to interpret FDCPA sections 806, 807, and 808, which set forth general prohibitions on, and requirements relating to, debt collectors' conduct and are accompanied by non-exhaustive lists of examples of unlawful conduct. This section provides an overview of how the Bureau interprets FDCPA sections 806 through 808.

FDCPA section 806 generally prohibits a debt collector from ''engag[ing] in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.'' [45] Then, ''[w]ithout limiting the general application of the foregoing,'' it lists six examples of conduct that violate that section.[46] Similarly, FDCPA section 807 generally prohibits a debt collector from ''us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt.'' [47] Then, ''[w]ithout limiting the general application of the foregoing,'' section 807 lists 16 examples of conduct that violate that section.[48] Finally, FDCPA section 808 prohibits a debt collector from ''us[ing] unfair or unconscionable means to collect or attempt to collect any debt.'' [49] Then, ''[w]ithout limiting the general application of the foregoing,'' FDCPA section 808 lists eight examples of conduct that violate that section.[50] The Bureau interprets FDCPA sections 806 through 808 in light of: (1) The FDCPA's language and purpose; (2) the general types of conduct prohibited by those sections and, where relevant, the specific examples enumerated in those sections; and (3) judicial decisions.[51]

Interpreting General Provisions in Light of Specific Prohibitions or Requirements

By their plain terms, FDCPA sections 806 through 808 make clear that their examples of prohibited conduct do not ''limit[ ] the general application'' of those sections' general prohibitions. The FDCPA's legislative history is consistent with this understanding,[52] as are opinions by courts that have addressed this issue.[53] Accordingly, the Bureau may interpret the general provisions of FDCPA sections 806 to 808 to prohibit conduct that the specific examples in FDCPA sections 806 through 808 do not address if the conduct violates the general prohibitions.

The Bureau uses the specific examples in FDCPA sections 806 through 808 to inform its interpretation of those sections' general prohibitions. Accordingly, the final rule interprets the general provisions of FDCPA sections 806 through 808 to prohibit or require certain conduct that is similar to the types of conduct prohibited or required by the specific examples. For example, the final rule interprets the general provisions in FDCPA sections 806 through 808 as protecting consumer privacy in debt collection in ways similar to the specific restrictions in: (1) FDCPA section 806(3), which prohibits, with certain exceptions, the publication of a list of consumers who allegedly refuse to pay debts; [54] (2) FDCPA section 808(7), which prohibits communicating with a consumer regarding a debt by postcard; and (3) FDCPA section 808(8), which prohibits the use of certain language and symbols on envelopes.[55] The interpretative approach of looking to specific provisions to inform general provisions is consistent with judicial decisions indicating that the general prohibitions in the FDCPA should be interpreted ''in light of [their] associates.'' [56] For example, courts have held that violating a consumer's privacy interest through public exposure of a debt violates the FDCPA, noting that

[40] 15 U.S.C. 1692*l*(d). As noted, the Bureau is the first Federal agency with authority to prescribe substantive debt collection rules under the FDCPA. Prior to the Dodd-Frank Act's grant of authority to the Bureau, the FTC published various materials providing guidance on the FDCPA. The FTC's materials have informed the Bureau's rulemaking and, if relevant to particular provisions, are discussed in part V.

[41] 12 U.S.C. 5512(a).

[42] 12 U.S.C. 5512(b)(1).

[43] 12 U.S.C. 5481(12)(H), (14).

[44] 15 U.S.C. 7001 *et seq.*

[45] 15 U.S.C. 1692d.

[46] 15 U.S.C. 1692d(1)–(6).

[47] 15 U.S.C. 1692e.

[48] 15 U.S.C. 1692e(1)–(16).

[49] 15 U.S.C. 1692f.

[50] 15 U.S.C. 1692f(1)–(8).

[51] Where the Bureau prescribes requirements pursuant only to its authority to implement and interpret sections 806 through 808 of the FDCPA, the Bureau does not take a position on whether such practices also would constitute an unfair, deceptive, or abusive act or practice under section 1031 of the Dodd-Frank Act.

[52] *See, e.g.,* S. Rep. No. 382, 95th Cong., 1st Sess. 2, 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1698 (S. Rep. No. 382) (''[T]his bill prohibits in general terms any harassing, unfair, or deceptive collection practice. This will enable the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed.''). Courts have also cited legislative history in noting that, ''in passing the FDCPA, Congress identified abusive collection attempts as primary motivations for the Act's passage.'' *Hart* v. *FCI Lender Servs., Inc.,* 797 F.3d 219, 226 (2d Cir. 2015).

[53] *See, e.g., Stratton* v. *Portfolio Recovery Assocs., LLC,* 770 F.3d 443, 450 (6th Cir. 2014) (''[T]he listed examples of illegal acts are just that—examples.'').

[54] 15 U.S.C. 1692d(3).

[55] 15 U.S.C. 1692f(7)–(8).

[56] *Currier* v. *First Resolution Inv. Corp.,* 762 F.3d 529, 534 (6th Cir. 2014) (citing *Limited, Inc.* v. *Comm'r,* 286 F.3d 324, 332 (6th Cir. 2002)).

violating a consumer's privacy is a type of conduct prohibited by several specific examples.[57] In this way, the Bureau uses the specific examples in FDCPA sections 806 through 808 to inform its understanding of the general provisions, consistent with the statute's use of the phrase ''[w]ithout limiting the general application of the foregoing'' to introduce the specific examples.[58]

Judicial Decisions

The Bureau interprets the general prohibitions in FDCPA sections 806 through 808 in light of the significant body of existing court decisions interpreting those provisions, which provide instructive examples of collection practices that are not addressed by the specific prohibitions in those sections but that nonetheless run afoul of the FDCPA's general prohibitions in sections 806 through 808.[59] For example, courts have held that a debt collector could violate FDCPA section 808 by using coercive tactics such as citing speculative legal consequences to pressure the consumer to engage with the debt collector.[60] Additionally, courts have held that a debt collector could violate FDCPA sections 806 through 808 by taking certain actions to collect a debt that a consumer does not actually owe or that is not actually delinquent.[61] Similarly, a debt collector could violate FDCPA section 807 by, for example, giving ''a false impression of the character of the debt,'' [62] such as by failing to disclose that an amount collected includes fees.[63]

Several courts have applied an objective standard of an ''unsophisticated'' or ''least sophisticated'' consumer to FDCPA sections 807 [64] and 808 [65] and an objective, vulnerable consumer standard to FDCPA section 806.[66] In determining whether particular acts violate FDCPA sections 806 through 808, the Bureau interprets those sections to incorporate ''an objective standard'' that is designed to protect consumers who are ''of below-average sophistication or intelligence'' or who are ''especially vulnerable to fraudulent schemes.'' [67]

Courts have reasoned, and the Bureau agrees, that ''[w]hether a consumer is more or less likely to be harassed, oppressed, or abused by certain debt collection practices does not relate solely to the consumer's relative sophistication'' and may be affected by other circumstances, such as the consumer's financial and legal resources.[68] Courts have further reasoned that section 807's prohibition on false, deceptive, or misleading representations incorporates an objective, ''unsophisticated'' consumer standard.[69] This standard ''protects the consumer who is uninformed, naive, or trusting, yet it admits an objective element of reasonableness.'' [70] The Bureau agrees with the reasoning of courts that have applied this standard or a ''least sophisticated consumer'' standard.[71] The Bureau uses the term unsophisticated consumer to describe the standard it applies when assessing the effect of conduct on consumers.

FDCPA's Purposes

FDCPA section 802 establishes that the purpose of the statute is to eliminate abusive debt collection practices by debt collectors, to ensure that debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.[72] In particular, FDCPA section 802 delineates certain specific harms that the general and specific prohibitions in sections 806

[57] *See id.* at 535.

[58] 15 U.S.C. 1692d–1692f.

[59] This interpretive approach is consistent with courts' reasoning that these general prohibitions should be interpreted in light of conduct that courts have already found violate them. *See, e.g., Todd* v. *Collecto, Inc.,* 731 F.3d 734, 739 (7th Cir. 2013). While judicial decisions inform the Bureau's interpretation of the general prohibitions in FDCPA sections 806 through 808, the Bureau does not adopt specific judicial interpretations through its restatement of the general prohibitions except where noted.

[60] *See, e.g., Hosseinzadeh* v. *M.R.S. Assocs., Inc.,* 387 F. Supp. 2d 1104, 1117 (C.D. Cal. 2005) (denying debt collector's motion for summary judgment on section 808 claim where debt collector used false name and implied that consumer ''would have legal problems'' if consumer did not return debt collector's telephone call).

[61] *See, e.g., Ferrell* v. *Midland Funding, LLC,* No. 2:15–cv–00126–JHE, 2015 WL 2450615, at *3–4 (N.D. Ala. May 22, 2015) (denying debt collector's motion to dismiss section 806 claim where debt collector allegedly initiated collection lawsuit even though it knew plaintiff did not owe debt); *Fox* v. *Citicorp Credit Servs., Inc.,* 15 F.3d 1507, 1517 (9th Cir. 1994) (reversing grant of summary judgment to debt collector in part because ''a jury could rationally find'' that filing writ of garnishment was unfair or unconscionable under section 808 when debt was not delinquent); *Pittman* v. *J.J. Mac Intyre Co. of Nev., Inc.,* 969 F. Supp. 609, 612–13 (D. Nev. 1997) (denying debt collector's motion to dismiss claims under sections 807 and 808 where debt collector allegedly attempted to collect fully satisfied debt).

[62] *Fields* v. *Wilber Law Firm, P.C.,* 383 F.3d 562, 565–66 (7th Cir. 2004) (reversing dismissal of plaintiff's claims brought under sections 807 and 808 because dunning letter that failed to communicate that total amount due included attorneys' fees ''could conceivably mislead an unsophisticated consumer'').

[63] *Id.*

[64] *Jensen* v. *Pressler & Pressler,* 791 F.3d 413, 419 (3d Cir. 2015) (''The standard is an objective one, meaning that the specific plaintiff need not prove that *she* was actually confused or misled, only that the objective least sophisticated debtor would be.''); *Hartman* v. *Great Seneca Fin. Corp.,* 569 F.3d 606, 613 (6th Cir. 2009) (applying least sophisticated consumer standard to section 807 claim); *Bentley* v. *Great Lakes Collection Bureau,* 6 F.3d 60, 62 (2d Cir. 1993) (same); *Swanson* v. *S. Or. Credit Serv., Inc.,* 869 F.2d 1222, 1227 (9th Cir. 1988) (per curiam) (same).

[65] *See, e.g., Crawford* v. *LVNV Funding, LLC,* 758 F.3d 1254, 1258 (11th Cir. 2014) (''[W]e have adopted a 'least-sophisticated consumer standard to evaluate whether a debt collector's conduct is 'deceptive,' 'misleading,' 'unconscionable,' or 'unfair' under the statute.''); *LeBlanc* v. *Unifund CCR Partners,* 601 F.3d 1185, 1200–01 (11th Cir. 2010) (per curiam) (applying least sophisticated consumer standard to section 808 claim); *Turner* v. *J.V.D.B. & Assocs., Inc.,* 330 F.3d 991, 997 (7th Cir. 2003) (applying unsophisticated consumer standard to section 808 claim). Circuit courts have also held, for example, that the least sophisticated consumer standard applies to a consumer's understanding of a validation notice required under FDCPA section 809 and threats to take legal action under FDCPA section 807(5). *See Swanson,* 869 F.2d at 1225–27; *Wilson* v. *Quadramed Corp.,* 225 F.3d 350, 353 (3d Cir. 2000).

[66] For example, in *Jeter* v. *Credit Bureau, Inc.,* 760 F.2d 1168, 1179 (11th Cir. 1985), the court applied a standard analogous to the ''least sophisticated consumer'' to an FDCPA section 806 claim, holding that claims under section 806 ''should be viewed from the perspective of a consumer whose circumstances makes him relatively more susceptible to harassment, oppression, or abuse.''

[67] *See, e.g.,* Brief for the Consumer Financial Protection Bureau in Support of Appellee and Affirmance at 13, *DeGroot* v. *Client Servs., Inc.,* 2020 WL 5951360 (7th Cir. 2020) (No. 20–1089), *https://www.consumerfinance.gov/documents/8865/cfpb_amicus-brief_degroot-v-client-services.pdf* (explaining that whether a debt collection notice is deceptive is '' 'an objective test' '' based on a ''hypothetical unsophisticated consumer'') (citation omitted); Brief for the United States as Amicus Curiae Supporting Respondents, *Sheriff* v. *Gillie,* 136 S. Ct. 1594 (2016) (No. 15–338), 2016 WL 836755, at *29 (quoting *Gammon* v. *GC Servs. Ltd. P'ship,* 27 F.3d 1254, 1257 (7th Cir. 1994) (quoting *Clomon* v. *Jackson,* 988 F.2d 1314, 1319 (2d Cir. 1993))).

[68] *Jeter,* 760 F.2d at 1179 (''[R]ather, such susceptibility might be affected by other circumstances of the consumer or by the relationship between the consumer and the debt collection agency. For example, a very intelligent and sophisticated consumer might well be susceptible to harassment, oppression, or abuse because he is poor (*i.e.,* has limited access to the legal system), is on probation, or is otherwise at the mercy of a power relationship.'').

[69] *See* Brief for the United States as Amicus Curiae Supporting Respondents, *supra* note 67, at *10, 27–30.

[70] *Gammon,* 27 F.3d at 1257.

[71] *See, e.g., Rosenau* v. *Unifund Corp.,* 539 F.3d 218, 221 (3d Cir. 2008) (''We use the 'least sophisticated debtor' standard in order to effectuate the basic purpose of the FDCPA: To protect all consumers, the gullible as well as the shrewd.'') (citations and some internal quotation marks omitted); *Clomon,* 988 F.2d at 1319 (''To serve the purposes of the consumer-protection laws, courts have attempted to articulate a standard for evaluating deceptiveness that does not rely on assumptions about the 'average' or 'normal' consumer. This effort is grounded, quite sensibly, in the assumption that consumers of below-average sophistication or intelligence are especially vulnerable to fraudulent schemes. The least-sophisticated-consumer standard protects these consumers in a variety of ways.'').

[72] 15 U.S.C. 1692(e).

through 808 were designed to alleviate. Section 802 states: ''[T]he use of abusive, deceptive, and unfair debt collection practices by many debt collectors . . . contribute[s] to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.'' [73]

B. Dodd-Frank Act Section 1031

The Bureau proposed to rely on its Dodd-Frank Act section 1031 authority (relating to unfair, deceptive, or abusive acts or practices in connection with consumer financial products or services) to support two interventions in the proposal. As discussed in more detail in the section-by-section analysis of §§ 1006.14 and 1006.30, the Bureau is not finalizing any provisions of the rule pursuant to its authority under Dodd-Frank Act section 1031.

C. Dodd-Frank Act Section 1032

Dodd-Frank Act section 1032(a) provides that the Bureau may prescribe rules to ensure that the features of any consumer financial product or service, ''both initially and over the term of the product or service,'' are ''fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.'' [74] Under Dodd-Frank Act section 1032(a), the Bureau is empowered to prescribe rules regarding the disclosure of the ''features'' of consumer financial products and services generally. Accordingly, the Bureau may prescribe rules containing disclosure requirements even if other Federal consumer financial laws do not specifically require disclosure of such features. Dodd-Frank Act section 1032(c) provides that, in prescribing rules pursuant to Dodd-Frank Act section 1032, the Bureau ''shall consider available evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of consumer financial products or services.'' [75] The Bureau is finalizing §§ 1006.6(e) and 1006.38 based in part on its authority under Dodd-Frank Act section 1032.

D. Other Authorities Under the Dodd-Frank Act

Section 1022(b)(1) of the Dodd-Frank Act provides that the Bureau's Director ''may prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.'' [76] ''Federal consumer financial laws'' include the FDCPA and title X of the Dodd-Frank Act.[77] Section 1022(b)(2) of the Dodd-Frank Act prescribes certain standards for rulemaking that the Bureau must follow in exercising its authority under Dodd-Frank Act section 1022(b)(1).[78] See part VII for a discussion of the Bureau's standards for rulemaking under Dodd-Frank Act section 1022(b)(2).

Dodd-Frank Act section 1024(b)(7)(A) authorizes the Bureau to prescribe rules to facilitate supervision of persons identified as larger participants of a market for a consumer financial product or service as defined by rule in accordance with section 1024(a)(1)(B) of the Dodd-Frank Act. Dodd-Frank Act section 1024(b)(7)(B) authorizes the Bureau to require a person described in Dodd-Frank Act section 1024(a)(1) to retain records for the purpose of facilitating supervision of such persons and assessing and detecting risks to consumers. As discussed in the section-by-section analysis, the Bureau is finalizing § 1006.100 pursuant to the Bureau's authorities under Dodd-Frank Act sections 1022 and 1024.

E. The E–SIGN Act

The E–SIGN Act provides standards for determining if delivery of a disclosure by electronic record satisfies a requirement in a statute, regulation, or other rule of law that the disclosure be provided or made available in writing to a consumer. E–SIGN Act section 104(b)(1) permits the Bureau to interpret the E–SIGN Act through the issuance of regulations. As discussed in part V, the Bureau is finalizing comments 6(c)(1)–1 and –2 (providing an interpretation of the E–SIGN Act as applied to a debt collector responding to a consumer's notification that the consumer refuses to pay the debt or wants the debt collector to cease communication) and comments 38–1 and –2 (providing an interpretation of the E–SIGN Act as applied to a debt collector responding to a consumer dispute or request for original-creditor information) pursuant to E–SIGN Act section 104(b)(1).

V. Section-by-Section Analysis

Subpart A—In General

Section 1006.1 Authority, Purpose, and Coverage

1(a) Authority

Existing § 1006.1(a) states that the purpose of part 1006, known as Regulation F, is to establish procedures and criteria for any State to request that the Bureau exempt debt collection practices within that State from the requirements of the FDCPA as provided in FDCPA section 817. Consistent with the Bureau's proposal to revise part 1006 to regulate the debt collection activities of FDCPA debt collectors, the Bureau proposed to revise existing § 1006.1(a) to set forth the Bureau's authority to issue such rules.[79] Specifically, proposed § 1006.1(a) stated that part 1006 is known as Regulation F and is issued by the Bureau pursuant to sections 814(d) and 817 of the FDCPA,[80] title X of the Dodd-Frank Act,[81] and section 104(b)(1) and (d)(1) of the E–SIGN Act.[82] The Bureau proposed to move the remainder of existing § 1006.1(a), regarding State law exemptions from the FDCPA, to paragraph I(a) of appendix A of the regulation.

The Bureau did not receive comments on proposed § 1006.1(a). Pursuant to its authority under FDCPA section 814(d), the Bureau is finalizing § 1006.1(a) largely as proposed. However, the Bureau is removing section 104(d)(1) of the E–SIGN Act from the list of authorizing statutory provisions because, as discussed in the section-by-section analysis of § 1006.42, the Bureau is not relying on that provision as authority for the final rule.

1(b) Purpose

Existing § 1006.1(b) defines terms relevant to the procedures and criteria for States to apply to the Bureau for an exemption as provided in FDCPA section 817. Consistent with the Bureau's proposal to revise part 1006 to regulate the debt collection activities of FDCPA debt collectors, the Bureau proposed to revise § 1006.1(b) to identify the purposes of part 1006 and proposed to move the definitions in existing § 1006.1(b) to paragraph 1(b) of appendix A of the regulation.[83] The Bureau did not receive comment on proposed § 1006.1(b) and is finalizing it

[73] 15 U.S.C. 1692(a).
[74] 12 U.S.C. 5532(a).
[75] 12 U.S.C. 5532(c).
[76] 12 U.S.C. 5512(b)(1).
[77] 12 U.S.C. 5481(14).
[78] 12 U.S.C. 5512(b)(2).
[79] 84 FR 23274, 23286 (May 21, 2019).
[80] 15 U.S.C. 1692*l*(d), 1692o.
[81] 12 U.S.C. 5481 *et seq.*
[82] 15 U.S.C. 7004(b)(1), (d)(1).
[83] 84 FR 23274, 23286 (May 21, 2019).

as proposed pursuant to its authority under FDCPA section 814(d).

1(c) Coverage

Section 814(d) of the FDCPA gives the Bureau authority to prescribe rules with respect to the collection of debts by debt collectors, but it prohibits the Bureau from applying those rules to motor vehicle dealers as described in section 1029(a) of the Dodd-Frank Act. Consistent with that authority, the Bureau proposed to add § 1006.1(c) to describe the applicability of proposed part 1006.[84] Proposed § 1006.1(c)(1) stated that, with the exception of proposed § 1006.108 and appendix A, proposed part 1006 would apply to debt collectors as defined in proposed § 1006.2(i), *i.e.,* FDCPA debt collectors, but not to motor vehicle dealers as described in section 1029(a) of the Dodd-Frank Act.[85] Proposed § 1006.1(c)(2) stated that certain provisions that were proposed only under sections 1031 or 1032 of the Dodd-Frank Act,[86] specifically proposed §§ 1006.14(b)(1)(ii), 1006.34(c)(2)(iv) and (3)(iv), and 1006.30(b)(1)(ii), applied to FDCPA debt collectors only to the extent that such debt collectors were collecting a debt related to an extension of consumer credit or another consumer financial product or service, as defined in the Dodd-Frank Act.[87] Proposed § 1006.1(c)(2) did not propose to expand coverage to any party not covered by the FDCPA.

The Bureau received a number of comments on the coverage of the proposal. Some commenters requested that the Bureau exempt certain entities (*e.g.,* servicers and attorneys) from coverage. Such comments are discussed in the section-by-section analysis of § 1006.2(i), which is the provision that implements FDCPA section 803(6), *i.e.,* the definition of debt collector.

A number of comments discussed coverage of non-FDCPA debt collectors, *i.e.,* parties who collect debts but who do not meet the FDCPA's definition of debt collector—a group that typically includes creditors. For ease of reference throughout this section-by-section analysis, the Bureau refers to such parties as first-party debt collectors.

A handful of consumer advocates and a group of State Attorneys General advocated that the Bureau expand the rule to apply to first-party debt collectors.

Nearly all of the comments regarding first-party debt collector coverage were from industry stakeholders such as credit unions, banks, and installment lenders, and their trade associations. These commenters generally expressed concern that the rule would be applied to first-party debt collectors, with some such commenters expressing particular concern that the Bureau's reliance on its authority under Dodd-Frank Act section 1031 for certain proposed provisions would be used by the Bureau or others to expand the rule to apply to such parties. Dodd-Frank Act section 1031 grants the Bureau authority to write regulations applicable to covered persons and service providers to identify and prevent unfair, deceptive, or abusive acts or practices in connection with a transaction with a consumer for, or the offering of, a consumer financial product or service.[88] Because first-party debt collectors are likely covered persons or service providers under Dodd-Frank Act section 1031, the commenters expressed concern that the Bureau's reliance on that provision effectively would expand the scope of the rule to cover them, even if they were not FDCPA debt collectors. The SBA also commented that the Bureau's use of its section 1031 Dodd-Frank Act authority would create uncertainty and legal risk for first-party debt collectors that were not in the SBREFA process or any subsequent process. The commenters asked the Bureau to clarify the rule's coverage, either by issuing a final rule without relying on Dodd-Frank Act section 1031 or by clearly stating that the final rule, including any provisions that rely on Dodd-Frank Act section 1031, does not apply to first-party debt collectors.

The Bureau declines to expand the rule to apply to first-party debt collectors who are not FDCPA debt collectors, as requested by some commenters. The proposal was intended to implement provisions of the FDCPA, and the Bureau did not solicit feedback on whether or how such provisions should apply to first-party debt collectors. This rule also is not intended to address whether activities performed by entities that are not subject to the FDCPA may violate other laws, including the prohibitions against unfair, deceptive, or abusive practices in Dodd-Frank Act section 1031.

For the same reasons, the Bureau also declines to clarify whether any particular actions taken by a first-party debt collector who is not an FDCPA debt collector would constitute an unfair, deceptive, or abusive practice under Dodd-Frank Act section 1031. Indeed, for the reasons discussed in the section-by-section analysis of §§ 1006.14 and 1006.30, the Bureau is not finalizing any provisions of the rule pursuant to its authority under Dodd-Frank Act section 1031.

For these reasons, and because the Bureau plans to finalize proposed § 1006.34(c)(2)(iv) and (3)(iv) as part of the Bureau's disclosure-focused final rule,[89] the Bureau is adopting § 1006.1(c)(1) as proposed and is reserving § 1006.1(c)(2). The Bureau is adopting § 1006.1(c) pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors.

Section 1006.2 Definitions

Existing § 1006.2 describes how a State may apply for an exemption from the FDCPA as provided in FDCPA section 817.[90] Consistent with the Bureau's proposal to revise part 1006 to regulate the debt collection activities of FDCPA debt collectors, the Bureau proposed to repurpose existing § 1006.2 to implement and interpret FDCPA section 803,[91] which defines terms used throughout the statute, and to define additional terms that would be used in the regulation.[92] The Bureau proposed to move existing § 1006.2 to paragraph II of appendix A of the regulation.

The Bureau received no substantive comments on proposed § 1006.2(a) (defining the term Act or FDCPA) or on proposed § 1006.2(c), (g), or (*l*) (implementing the FDCPA section 803 definitions of Bureau, creditor, and State, respectively). The Bureau therefore is adopting those provisions as proposed and is not discussing them further in the section-by-section analysis below. The Bureau received a number of comments on the other definitions in proposed § 1006.2 and is finalizing them as discussed in the section-by-section analysis of § 1006.2(b), (d) through (f), and (h) through (k) below. As proposed, the Bureau is finalizing § 1006.2 to implement and interpret FDCPA section 803, pursuant to its authority under FDCPA section 814(d).

[84] *Id.* at 23286–87.

[85] This proposed exclusion would apply only to Regulation F. Any motor vehicle dealers who are FDCPA debt collectors would still need to comply with the FDCPA.

[86] 12 U.S.C. 5531(b), 5532.

[87] Proposed §§ 1006.14(b)(1)(ii) and 1006.30(b)(1)(ii) would have relied on the Bureau's authority under Dodd-Frank Act section 1031. Proposed § 1006.34(c)(2)(iv) and (3)(iv) would have relied on the Bureau's authority under Dodd-Frank Act section 1032.

[88] 12 U.S.C. 5531(b).

[89] *See* the section-by-section analysis of § 1006.34.

[90] 15 U.S.C. 1692o.

[91] 15 U.S.C. 1692a.

[92] *See* 84 FR 23274, 23287–93 (May 21, 2019).

2(b) Attempt To Communicate

The Bureau proposed in § 1006.2(b) to define an attempt to communicate as any act to initiate a communication or other contact with any person through any medium, including by soliciting a response from such person.[93] Proposed § 1006.2(b) further stated that an attempt to communicate includes providing a limited-content message, as defined in § 1006.2(j). For the reasons discussed below, the Bureau is finalizing § 1006.2(b) with a narrower definition of attempt to communicate and is adopting new commentary to clarify the definition's scope.

The Bureau received a number of comments on proposed § 1006.2(b)'s definition of attempt to communicate. Industry commenters generally requested additional clarity on, or exclusions for, certain messages or activity. Specifically, these commenters asked about the following: (1) Telephone calls that do not result in a voicemail message or conversation with a consumer for various reasons (such as a full voicemail inbox, a voicemail message system that records only a partial message from the debt collector, a telephone number that has been disconnected, or a consumer who disconnects the call after answering); (2) activity directed to groups of consumers or the general public, such as marketing or advertising; (3) personal communications, such as ordering lunch; (4) legally required communications; (5) visits by a consumer to a debt collector's website or online portal; and (6) administrative communications, such as any communications with financial institutions necessary to facilitate a consumer's payment arrangement. These commenters believed that, without additional clarity or exclusions for such situations, the definition of attempt to communicate would be overbroad.

As an initial matter, the Bureau notes that the definition of attempt to communicate, by itself, imposes no direct obligations on debt collectors. Other sections of the final rule, including §§ 1006.6(b) and (c) and 1006.14(h), however, restrict or prohibit attempts to communicate in certain circumstances. While commenters generally did not express concern about the proposed definition of attempt to communicate as it relates to those provisions, the Bureau interprets commenters' feedback in light of the conduct those provisions were designed to address.

The Bureau finds that certain messages or activity discussed by commenters, such as telephone calls that do not result in a voicemail message or conversation with a consumer, should be considered attempts to communicate. These messages or activity may raise consumer protection concerns that provisions of the final rule regulating attempts to communicate are designed to address. For example, a debt collector might call a consumer to discuss the consumer's debt at a time that the consumer has designated as inconvenient but fail to reach the consumer because the consumer declines to answer the telephone. Final § 1006.6(b)(1) prohibits a debt collector from communicating or attempting to communicate with a consumer in connection with the collection of any debt at a time or place that the debt collector knows or should know is inconvenient to the consumer. In this example, the debt collector likely would have ''act[ed] to initiate a communication''—and thus attempted to communicate—with the consumer at an inconvenient time in violation of § 1006.6(b)(1)(i).[94] As discussed in the section-by-section analysis of final § 1006.6(b), a consumer who hears a telephone ringing at an inconvenient time or place but who does not answer it may experience the natural consequence of harassment from the telephone ringing in much the same way as a consumer who answers and speaks to the debt collector on the telephone. Therefore, such activity remains covered under final § 1006.2(b) so that final §§ 1006.6(b) and (c) and 1006.14(h) have their intended effect.

At the same time, the Bureau finds that other messages or activity discussed by commenters, such as general marketing and advertising directed to groups of consumers or the general public, or personal communications, should not be considered attempts to communicate. These messages or activity may not raise the same consumer protection concerns that motivated other provisions of the final rule regulating attempts to communicate. For example, a debt collector might place a general advertisement on a website, and a consumer might then view that advertisement at a time that the consumer has designated as inconvenient. As noted above, final § 1006.6(b)(1) prohibits a debt collector from communicating or attempting to communicate with a consumer in connection with the collection of any debt at a time or place that the debt collector knows or should know is inconvenient to the consumer. In this example, the debt collector likely would have ''act[ed] to initiate a . . . contact''—and thus attempted to communicate under proposed § 1006.2(b)—with the consumer at an inconvenient time in violation of § 1006.6(b)(1)(i). But consumers likely consider a general online advertisement about a debt collector's business, which contains no reference to the consumer's specific debt, to be less intrusive, and therefore less inconvenient than, for example, a telephone call placed to them by a debt collector. Consumers also are more likely to be able to ignore a general advertisement. Moreover, a debt collector likely cannot control when a consumer visits a website displaying the debt collector's advertisement or reconcile all the communications preferences of all the consumers who might see the advertisement. To tailor the covered activity, the Bureau is finalizing the definition of attempt to communicate in § 1006.2(b) with the phrase or other contact ''about a debt.''[95]

The Bureau determines that the other categories of messages or activity raised by industry commenters are sufficiently addressed by other provisions of this final rule and therefore do not require a revision to the definition of attempt to communicate. As to consumers' visits to a debt collector's website or online portal, comment 6(b)(1)–2.iii illustrates that, notwithstanding an inconvenient time designation by a consumer, a debt collector may provide information to a consumer who visits or navigates the debt collector's website or online portal. As to legally required communications, § 1006.14(h)(2)(iii) provides that, if otherwise required by applicable law, a debt collector may communicate or attempt to communicate with a person in connection with the collection of any debt through a medium of communication that the person has requested the debt collector not use to communicate with the person. And finally, as to administrative communications, § 1006.6(d)(2)(ii) allows debt collectors to communicate with third parties with the prior consent of the consumer given directly to the debt collector, which should permit communications necessary to facilitate a consumer's payment plan. The relevant

[93] *See id.* at 23287.

[94] Similar reasoning would apply to telephone calls that do not result in a voicemail message or conversation with a consumer for various reasons, described above.

[95] Similarly, a debt collector's personal communications would not be an act to initiate a contact about a debt and therefore not an attempt to communicate.

section-by-section analyses provide more information about the operation of these provisions.[96]

Finally, a group of consumer advocates noted that, although they generally opposed the limited-content message in proposed § 1006.2(j), they supported the fact that the proposal would impose some limitations on attempts to communicate. However, these commenters stated that certain protections did not apply to attempts to communicate, such as the prohibition on third-party disclosures in proposed § 1006.6(d)(1) and the prohibition on communicating by postcard in proposed § 1006.22(f)(1). The Bureau has evaluated the scope of this final rule and determines that each substantive provision addresses a range of conduct appropriate to achieve the goals of that section. The section-by-section analysis throughout part V provides additional explanation for the final rule's substantive provisions.

For the reasons discussed above, the Bureau is finalizing § 1006.2(b) to provide that an attempt to communicate means any act to initiate a communication or other contact about a debt with any person through any medium, including by soliciting a response from such person.

Comment 2(b)–1 clarifies that an act to initiate a communication or other contact about a debt with a person is an attempt to communicate regardless of whether the attempt, if successful, would be a communication that conveys information regarding a debt directly or indirectly to any person, and includes two illustrative examples.

2(d) Communicate or Communication

FDCPA section 803(2) defines the term communication to mean the conveying of information regarding a debt directly or indirectly to any person through any medium.[97] The Bureau proposed § 1006.2(d) to restate the statutory definition of communication, with only minor changes for clarity.[98] Proposed § 1006.2(d) further stated that a debt collector does not convey information regarding a debt directly or indirectly to any person—and therefore does not communicate with any person—if the debt collector provides only a limited-content message, as defined in § 1006.2(j). For the reasons discussed below, the Bureau is finalizing § 1006.2(d) largely as proposed, with minor revisions for clarity.

The Bureau received several comments on proposed § 1006.2(d)'s definition of communicate or communication. As with comments on the proposed definition of attempt to communicate discussed above, industry commenters generally requested the Bureau provide clarity on, or exclusions for, certain types of activity. These commenters asked about the following: (1) Marketing, advertising, or other promotional materials; (2) automated replies acknowledging a consumer's message; (3) visits by a consumer to a debt collector's website or online portal; (4) legally required communications; and (5) caller ID information that discloses the debt collector's business name.

The Bureau agrees that it would be useful to clarify that certain types of advertising and marketing are not communications under § 1006.2(d). For example, a debt collector might develop general advertising or marketing materials to build the debt collector's brand, promote the debt collector's services, or establish the debt collector's legitimacy. If such activity includes no information about a specific debt, it likely would not meet the definition of a communication.

The Bureau determines that other provisions in this final rule sufficiently address the other categories of messages or activity raised by industry commenters. Therefore, these messages or activity do not require clarification in the definition of communication. First, as to automated replies, comment 6(b)(1)–2.iv illustrates that a debt collector may send an automated reply generated in response to a message sent by a consumer at a time that the consumer previously had designated as inconvenient. Second, comment 6(b)(1)–2.iii illustrates that, notwithstanding an inconvenient time designation by a consumer, a debt collector may provide information to a consumer who visits or navigates the debt collector's website or online portal. Third, § 1006.14(h)(2)(iii) provides that, if otherwise required by applicable law, a debt collector may communicate with a person in connection with the collection of any debt through a medium of communication that the person has requested the debt collector not use to communicate with the person. And, finally, § 1006.2(j) defines a type of message—the limited-content message—that includes a debt collector's business name but is not a communication. Although the final rule does not explicitly address caller ID, a debt collector's business name that does not indicate that the debt collector is in the debt collection business is part of the required content of a limited-content message under the final rule, so caller ID information that discloses that content alone would not transform what is otherwise an attempt to communicate into a communication. The relevant section-by-section analyses provide more information about the operation of these provisions.[99]

Finally, consumer advocates objected to the proposed clarification that a limited-content message is not a communication. The Bureau finds that the limited-content message is appropriately considered an attempt to communicate rather than a communication, as discussed below in the section-by-section analysis of final § 1006.2(j).

For the reasons discussed above, the Bureau is finalizing § 1006.2(d) and comment 2(d)–1 largely as proposed.[100] The Bureau is also adopting new comment 2(d)–2 to clarify the status of limited-content messages, as defined in § 1006.2(j), and marketing or advertising messages that do not contain information about a specific debt.

2(e) Consumer

FDCPA section 803(3) defines a consumer as any natural person obligated or allegedly obligated to pay any debt.[101] The Bureau proposed § 1006.2(e) to implement this definition and to interpret it to include a deceased natural person who is obligated or allegedly obligated to pay a debt.[102] Proposed § 1006.2(e) also provided that, for purposes of §§ 1006.6 and 1006.14(h), the term consumer included the persons described in the special definition of consumer in § 1006.6(a).

The Bureau received a number of comments regarding its proposal to interpret the term consumer to include deceased natural persons. The Bureau proposed that interpretation, in large part, to facilitate the delivery of validation notices under proposed § 1006.34 when the consumer obligated, or allegedly obligated, on the debt has died. The Bureau plans to address comments received regarding that interpretation, and to determine whether to finalize that interpretation,

[96] *See* the section-by-section analyses of §§ 1006.6(b)(1) and (d)(2)(ii) and 1006.14(h)(2)(iii).

[97] 15 U.S.C. 1692a(2).

[98] *See* 84 FR 23274, 23287–88 (May 21, 2019).

[99] *See* the section-by-section analyses of §§ 1006.2(j), 1006.6(b)(1), and 1006.14(h)(2)(iii).

[100] Comment 2(d)–1 explains that a communication can occur through ''any medium'' and explains that ''any medium'' includes any oral, written, electronic, or other medium. The Bureau did not receive any relevant feedback regarding this comment and, therefore, is finalizing it as proposed.

[101] 15 U.S.C. 1692a(3).

[102] *See* 84 FR 23274, 23288 (May 21, 2019).

as part of the Bureau's disclosure-focused final rule.[103]

The Bureau's proposed § 1006.2(e) cross-referenced proposed § 1006.14(h). The Bureau proposed that the prohibition on communication media under § 1006.14(h) apply to ''a consumer'' as defined under § 1006.6(a) but, as finalized, § 1006.14(h) applies to ''a person.'' [104] It therefore is not necessary for § 1006.2(e) to include the proposed cross-reference § 1006.14(h).

For the reasons discussed above, the Bureau is finalizing § 1006.2(e) to provide that the term consumer means any natural person obligated or allegedly obligated to pay any debt. Final § 1006.2(e) further provides that, for purposes of § 1006.6, the term consumer includes the persons described in § 1006.6(a). It also provides that the Bureau may further define the term by regulation to clarify its application when the consumer is deceased.

2(f) Consumer Financial Product or Service Debt

The Bureau proposed § 1006.2(f) to define consumer financial product or service debt to mean any debt related to any consumer financial product or service, as consumer financial product or service is defined in section 1002(5) of the Dodd-Frank Act.[105]

The Bureau is not finalizing § 1006.2(f) as proposed. As discussed in the section-by-section analysis of § 1006.1(c), the Bureau proposed certain provisions pursuant to its authority under Dodd-Frank Act sections 1031 and 1032, and those provisions would have applied to a debt collector only if the debt collector was collecting a debt related to a consumer financial product or service, as that term is defined in section 1002(5) of the Dodd-Frank Act.[106] However, as discussed in more detail in the section-by-section analyses of §§ 1006.14, 1006.30 and 1006.34, the Bureau is not finalizing those provisions in this rulemaking. As a result, there is no need to define consumer financial product or service debt in this rulemaking.

2(h) Debt

FDCPA section 803(5) defines the term debt for purposes of the FDCPA.[107] Proposed § 1006.2(h) would have implemented FDCPA section 803(5) and generally restated the statute by defining debt as any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services that are the subject of the transaction are primarily for personal, family, or household purposes, whether or not the obligation has been reduced to judgment. Proposed § 1006.2(h) also would have clarified that, for purposes of § 1006.2(f), the term debt means debt as that term is used in the Dodd-Frank Act.[108]

Several consumer advocates and an industry trade group stated that the proposal to define debt for purposes of § 1006.2(f) as that term is used in the Dodd-Frank Act was confusing and should be removed or revised. In addition, one industry trade group commenter recommended that the Bureau clarify that debt subject to the FDCPA is limited to debt incurred only by a natural person.

The Bureau is finalizing § 1006.2(h) generally as proposed. However, the Bureau is not finalizing proposed § 1006.2(h)'s cross-reference to § 1006.2(f) because, as discussed in the section-by-section analysis of § 1006.2(f), the Bureau is not finalizing § 1006.2(f). This change should address commenters' concerns about the regulation including different definitions of the term debt.

The final rule also adds new comment 2(h)–1 to clarify, as requested, that debt subject to the FDCPA is limited to debt incurred by a natural person. The comment explains that § 1006.2(h) defines debt to mean, in part, an obligation of a consumer, and that § 1006.2(e), in turn, defines a consumer as a natural person obligated or allegedly obligated to pay any debt. Thus, only natural persons can incur the debts defined in § 1006.2(h).

2(i) Debt Collector

FDCPA section 803(6) defines the term debt collector for purposes of the FDCPA.[109] The introductory language of FDCPA section 803(6) generally provides that a debt collector is any person: (1) Who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts (*i.e.,* the ''principal purpose'' prong), or (2) who regularly collects, or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due to another (*i.e.,* the ''regularly collects'' prong). FDCPA section 803(6) also sets forth several exclusions from the general definition.

Proposed § 1006.2(i) generally restated FDCPA section 803(6)'s definition of debt collector, with only minor wording and organizational changes for clarity [110] and to specify that the term excludes private entities that operate certain bad check enforcement programs that comply with FDCPA section 818.[111] The preamble to the proposal discussed the Supreme Court's holding in *Henson* v. *Santander Consumer USA Inc.*[112] and, consistent with that decision, noted that a debt buyer collecting debts that it purchased and owned could be considered a debt collector for purposes of the rule if the debt buyer either met the ''principal purpose'' prong of the definition or regularly collected or attempted to collect debts owned by others, in addition to collecting debts that it purchased and owned.[113]

The Bureau received a number of comments on the proposed definition of debt collector. The Bureau received comments from both consumer advocate and industry commenters discussing the extent to which debt buyers would be considered debt collectors under Regulation F and asking the Bureau to provide additional explanation or include the proposed preamble

[103] *See* the section-by-section analysis of § 1006.34.

[104] *See* the section-by-section analysis of § 1006.14(h)(1).

[105] 84 FR 23274, 23288–89 (May 21, 2019).

[106] 12 U.S.C. 5531(b).

[107] 12 U.S.C. 1692a(5).

[108] *See* 84 FR 23274, 23289 (May 21, 2019).

[109] 15 U.S.C. 1692a(6).

[110] For example, to avoid obsolete language, proposed § 1006.2(i) uses the term ''mail'' instead of ''the mails.''

[111] 15 U.S.C. 1692p.

[112] 137 S. Ct. 1718 (2017). In *Henson,* the Court held that a company may collect defaulted debts that it has purchased from another without being an FDCPA debt collector. Furthermore, the Court decided only whether, by using its own name to collect debts that it had purchased, Santander met the ''regularly collects'' prong of the introductory language in FDCPA section 803(6). *Id.* at 1721 (quoting 15 U.S.C. 1296a(6)). The Court held that Santander was not a debt collector within the meaning of the ''regularly collects'' prong because Santander was collecting debts that it purchased and owned, not collecting debts owed to another. *Id.* at 1721–22. The Court expressly declined to address two other ways that a debt buyer like Santander might qualify as a debt collector under FDCPA section 803(6): (1) By meeting the ''regularly collects'' prong by regularly collecting or attempting to collect debts owned by others, in addition to collecting debts that it purchased and owned; or (2) by meeting the ''principal purpose'' prong of the definition. *Id.* at 1721 (quoting 15 U.S.C. 1296a(6)). The Court had not identified these questions as being presented when it granted certiorari. *Id.*

[113] 84 FR 23274, 23289 (May 21, 2019). In addition to *Henson,* the Supreme Court also recently interpreted FDCPA section 803(6) to hold that a business engaged in no more than nonjudicial foreclosure proceedings is not an FDCPA debt collector, except for the limited purpose of FDCPA section 808(6). *See Obduskey* v. *McCarthy & Holthus LLP,* 139 S. Ct. 1029 (2019). And the Third Circuit provided in *Barbato* v. *Greystone Alliance, LLC,* 916 F.3d 260 (3d Cir.), cert. denied, 140 S. Ct. 245 (2019), that a debt buyer whose principal purpose was debt collection was an FDCPA debt collector even though the debt buyer outsourced its collection activities to third parties.

discussion of the *Henson* decision in commentary to the final rule. Several industry commenters also requested carve outs for certain entities, including mortgage servicers and, citing Dodd-Frank Act section 1027(e)(1),[114] licensed attorneys engaged in litigation activities or the practice of law.

The Bureau is finalizing § 1006.2(i) as proposed, except the final rule corrects an inaccurate cross-reference that had been included in the proposal and includes new comment 2(i)–1 to respond to requests to clarify the scope of the term debt collector as interpreted by the Supreme Court in *Henson.* Specifically, new comment 2(i)–1 provides that a person who collects or attempts to collect defaulted debts that the person has purchased, but who does not collect or attempt to collect, directly or indirectly, debts owed or due, or asserted to be owed or due, to another, and who does not have a business the principal purpose of which is the collection of debts, is not a debt collector as defined in § 1006.2(i).

The Bureau declines to exclude licensed attorneys or mortgage servicers from the definition of debt collector. The FDCPA's definition of debt collector does not exempt licensed attorneys or mortgage servicers who otherwise meet the definition of debt collector. Interpreting the definition to exclude these or other entities would constitute a significant interpretation of the FDCPA on which the public did not have the opportunity to comment. These suggestions thus are outside the scope of the proposal. In addition, the FDCPA applies to attorneys who regularly engage in debt collection activity, even when that activity consists of litigation,[115] and the Bureau disagrees that it does not have authority to engage in rulemaking or other activities covering attorneys engaged in litigation or the practice of law. Dodd-Frank Act section 1027(e)(1) does not restrict the Bureau's rulemaking authority, and the Bureau considered and rejected arguments that Dodd-Frank Act section 1027(e)(1) constrains the Bureau's supervisory or enforcement authority over larger participant debt collectors in its 2012 final rule defining larger participants of the consumer debt collection market.[116]

2(j) Limited-Content Message

FDCPA section 803(2) defines the term communication to mean the conveying of information regarding a debt directly or indirectly to any person through any medium.[117] Proposed § 1006.2(d) would have implemented and interpreted that definition, including by specifying that a debt collector does not engage in an FDCPA communication if the debt collector provides only a limited-content message.[118] The Bureau proposed in § 1006.2(j) to further interpret FDCPA section 803(2) by defining a type of message, the ''limited-content message,'' that would not convey information about a debt directly or indirectly to any person. Therefore, as proposed, a debt collector could provide such a message for a consumer without communicating with any person for the purposes of the FDCPA or Regulation F. Proposed § 1006.2(j)(1) would have required that limited-content messages include certain content, and proposed § 1006.2(j)(2) would have permitted certain additional content.[119]

Proposed comment 2(j)–1 explained that any message that included content other than the required or optional content specified in § 1006.2(j)(1) and (2) would not be a limited-content message. The proposed comment further explained that, if a message included any other content and such other content directly or indirectly conveyed any information about a debt, the message would be a communication, as defined in proposed § 1006.2(d). Proposed comment 2(j)–2 provided examples of limited-content messages, proposed comment 2(j)–3 illustrated ways in which a debt collector could transmit a limited-content message to a consumer (*e.g.,* by voicemail, text message, or with a third party, but not by email), and proposed comment 2(j)–4 provided that a debt collector who placed a telephone call and left only a limited-content message would not have, with respect to that telephone call, violated FDCPA section 806(6)'s prohibition on the placement of telephone calls without meaningful disclosure of the caller's identity.

The Bureau received a large number of comments from industry and trade association commenters, consumer advocates, government commenters, and others on the proposal to define a limited-content message. After considering that feedback, the Bureau is finalizing the proposed definition with several modifications as discussed below.

Limited-Content Message Concept

Many commenters addressed the overall concept of a limited-content message and general aspects of the proposed definition.[120] Federal government agency staff noted the uncertainty surrounding voicemail messages and supported efforts to clarify debt collectors' obligations. Industry commenters also supported the limited-content message in principle and explained that such a provision would have several benefits. Many of these commenters argued that a limited-content message would facilitate communication between consumers and debt collectors, which would benefit consumers by reducing the frequency of debt collection calls, lowering the interest and fees accrued by outstanding debts, reducing the number of lawsuits filed against consumers, and giving consumers more control over when they listen to debt collection messages and respond to debt collectors. Several of these commenters stated that consumers believe that calls from unknown telephone numbers are scams, especially if such callers fail to leave voicemail messages. One industry commenter observed that consumers expected callers to leave voicemail messages, while another commenter reported that, without voicemail messages, consumers may think debt collectors are unresponsive to consumers' efforts to communicate.

[114] 12 U.S.C. 5515(e)(1) (establishing an exclusion for the practice of law, subject to certain exceptions, as to the Bureau's exercise of supervisory or enforcement authority).

[115] *See Heintz* v. *Jenkins,* 514 U.S. 291, 299 (1995) (holding that ''attorneys who 'regularly' engage in consumer-debt-collection activity'' are subject to the FDCPA, ''even when that activity consists of litigation.''). In reaching this decision, the Supreme Court discussed the history of the FDCPA, which contained an express exemption for lawyers until Congress repealed the exemption in its entirety in 1986 ''without creating a narrower, litigation-related exemption to fill the void.'' *Id.* at 294–95.

[116] *See* 77 FR 65775, 65784 (Oct. 31, 2012) (citing Dodd-Frank Act section 1027(e)(3), 12 U.S.C. 5515(e)(3), which states that Dodd-Frank Act section 1027(e)(1) ''shall not be construed so as to limit the authority of the Bureau with respect to any attorney, to the extent that such attorney is otherwise subject to any of the enumerated consumer laws or the authorities transferred under subtitle F or H'').

[117] 15 U.S.C. 1692a(2).

[118] *See* 84 FR 23274, 23290–93 (May 21, 2019).

[119] Proposed § 1006.2(j)(1) would have required limited-content messages to include: The consumer's name, a request that the consumer reply to the message, the name or names of one or more natural persons whom the consumer can contact to reply to the debt collector, a telephone number that the consumer can use to reply to the debt collector, and, if delivered electronically, a disclosure explaining how the consumer can stop receiving messages through that medium. Proposed § 1006.2(j)(2) would have permitted limited-content messages to include the following additional items: A salutation, the date and time of the message, a generic statement that the message relates to an account, and suggested dates and times for the consumer to reply to the message. *See* the section-by-section analysis of § 1006.2(j)(1) and (2).

[120] To the extent that comments addressed elements of the proposed required or optional content, the Bureau discusses them in the section-by-section analysis of final § 1006.2(j)(1) and (2), respectively.

Other industry commenters argued that a limited-content message would reduce unjustified lawsuits against debt collectors. One trade group commenter stated that legal uncertainty and fear of liability cause many debt collectors to avoid leaving messages entirely. Another trade group commenter asserted that debt collectors have tried leaving various messages but are still threatened by lawsuits. Finally, a trade group commenter reported that most of its members leave a message found not to be a communication by one Federal district court in *Zortman* v. *J.C. Christensen & Assocs., Inc.*[121]

Many individual consumers and consumer advocates opposed any limited-content message. Most of these commenters asserted that such a message was an impermissible exemption from the FDCPA sections defining and regulating communications. Other commenters argued that the proposal would violate consumer privacy by permitting third parties to hear or see limited-content messages. And other commenters appeared to assert, incorrectly, that none of the proposal's provisions regulating attempts to communicate or communications would apply to limited-content messages.

As explained in the proposal, uncertainty about what constitutes a communication under FDCPA section 803(2) has led to questions about how debt collectors can leave voicemails or other messages for consumers while complying with certain FDCPA provisions.[122] If a voicemail or other message is a communication with a consumer, FDCPA section 807(11) requires that the debt collector identify itself as a debt collector or inform the consumer that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.[123] A debt collector who leaves a message with such disclosures, however, risks violating FDCPA section 805(b)'s prohibition against revealing debts to third parties if the disclosures are seen or heard by a third party.[124] Thus, certain messages may put a debt collector who wants to avoid FDCPA liability in the position of having to disclose the debt collector's identity and purpose, while avoiding disclosure of the debt to third parties.

As explained in the proposal, many debt collectors state that they err on the side of caution and make repeated telephone calls instead of leaving messages for a consumer or sending text messages.[125] Such repeated telephone calls may frustrate many consumers. Indeed, consumers often complain to the Bureau about the number of collection calls they receive and, to a lesser degree, about debt collectors' reluctance to leave voicemails.[126] And, as noted in the proposal, the FTC and the U.S. Government Accountability Office also have previously noted the need to clarify the law regarding debt collectors' ability to leave voicemails for consumers.[127]

The Bureau determines that defining the content of a message that debt collectors may leave without engaging in an FDCPA communication will decrease uncertainty and benefit both debt collectors and consumers by reducing the need for debt collectors to rely on repeated telephone calls without leaving messages to establish contact with consumers. This, in turn, may benefit consumers by increasing their ability to learn whether they are being asked to pay the right debt, in the right amount. And debt collectors will benefit from the ability to leave certain messages without risking exposure to liability for violating the FDCPA while consumers will benefit from receiving messages that do not disclose information about a debt. Therefore, the Bureau is finalizing a definition of the limited-content message. At the same time, having considered commenters' concerns, the Bureau is finalizing certain changes to the definition, as discussed below.

Permissible Communication Media

Proposed § 1006.2(j) would have enabled a debt collector to transmit a limited-content message by voicemail, by text message, or orally.[128] However, the proposal would not have allowed a debt collector to transmit a limited-content message by email because emails typically require additional information (*e.g.,* a sender's email address) that may in some circumstances convey information about a debt, and consumers may be unlikely to read or respond to an email containing solely the information included in a limited-content message (*e.g.,* consumers may disregard such an email as spam or a security risk).

The Bureau received many comments on the communication media through which debt collectors could send limited-content messages. The majority of these comments concerned email. Most industry commenters recommended allowing limited-content messages by email.[129] These commenters made various arguments in support of their recommendation. Some commenters asserted that email was more private than other communication media because email accounts are password-protected, unique to a consumer, and generally not reassigned to other consumers. One commenter believed that the sender's email address revealed no more information than would be disclosed by caller ID, while other commenters stated that debt collectors could configure their email services to omit information from the sender's email address and signature line that might result in a prohibited third-party disclosure. Other commenters claimed that limited-content email messages would benefit consumers because consumers might prefer communicating by email, could research the debt collector before responding, and could decide when and how to respond. One commenter stated that limited-content email messages could help compensate for what the commenter viewed as barriers to electronic communication under proposed § 1006.6(d)(3). Another commenter argued that, although the proposed limited-content message would closely resemble a spam or scam message if delivered by email, future technology might enable consumers to verify the legitimacy of email messages, and for this reason, the Bureau should allow limited-content email messages.

Relatedly, a State government commenter asserted that email and text messages were the only appropriate communication media for leaving limited-content messages because of the relatively low risk of third-party disclosure, but only after a consumer had opted in to receiving electronic communications from a debt collector.

A few consumer advocates stated that limited-content messages should not be permitted to be sent by email, with one suggesting that the Bureau incorporate this restriction into regulation text or commentary. Another stated that limited-content email messages may be

[121] 870 F. Supp. 2d 694, 696 (D. Minn. 2012) (holding that debt collector did not violate FDCPA section 805(b) by leaving a voicemail message that stated, ''We have an important message from J.C. Christensen & Associates. This is a call from a debt collector. Please call 866–319–8619.'').

[122] *See* 84 FR 23274, 23290 (May 21, 2019).

[123] 15 U.S.C. 1692e(11). *See also* the section-by-section analysis of § 1006.18(e).

[124] 15 U.S.C. 1692c(b). *See also* the section-by-section analysis of § 1006.6(d).

[125] *See* 84 FR 23274, 23290 (May 21, 2019).

[126] *See id.*

[127] *See id.*

[128] Proposed § 1006.2(j) did not directly address social media; however, proposed § 1006.22(f) would have prohibited a debt collector from sending any message to a consumer, including a limited-content message, by publicly viewable social media.

[129] Several industry commenters misunderstood proposed § 1006.2(j) and claimed that they would use email to send limited-content messages.

inappropriate because they include other content that might convey information about a debt, but argued that the same was true of telephone numbers, which a third party could look up using online search engines.

Several commenters also addressed limited-content text messages. Industry commenters generally supported allowing limited-content text messages. Some of these commenters stated that many consumers prefer to use written communication media, such as text messages, that give them time to compose their thoughts, and these commenters explained that the opt-out notice under proposed § 1006.6(e) would effectively prevent debt collectors from sending too many limited-content text messages. One industry commenter recommended also allowing limited-content messages by mobile communication applications because they are similar to text messages.

One consumer commenter stated that, of all the permissible limited-content message communication media, text messages have the greatest chance of being viewed only by the consumer. But most individual consumers and consumer advocates who addressed limited-content text messages opposed them. One consumer advocate argued that allowing limited-content text messages would subject consumers to unsolicited text message scams that could install malware on a consumer's mobile telephone or lead to identity theft. Another consumer advocate stated that limited-content text messages may be more likely to lead to prohibited third-party disclosures than limited-content voicemail messages because of the text message preview that often appears automatically on a smart phone screen. And one consumer advocate and one government commenter noted that, because the proposed frequency limits for telephone calls would not apply to text messages, debt collectors could send numerous limited-content text messages to consumers that, the commenters explained, would increase the chances of a prohibited third-party disclosure.

A few commenters addressed limited-content social media messages. One industry commenter recommended allowing limited-content social media messages in general, while another industry commenter suggested allowing only direct messages sent privately to the consumer. A consumer advocate and a group of State Attorneys General, however, opposed all limited-content social media messages. The consumer advocate stated that any limited-content social media messages would be overly invasive and that debt collectors have demonstrated a willingness to abuse social media platforms to harass consumers. The group of State Attorneys General asserted that limited-content social media messages would contain information about the sender similar to limited-content email messages. This commenter also suggested that advertising algorithms could identify limited-content social media messages as debt collection messages, and then target the consumer for debt collection advertisements on social media or across the internet.

Two industry commenters asked the Bureau to clarify that debt collectors may send ''ringless voicemail'' limited-content messages, or voicemail messages sent directly to a consumer's voicemail service provider without interacting with the consumer's mobile telephone.

Finally, one industry commenter recommended allowing limited-content mail messages because they would be less costly than validation notices. In contrast, consumer advocates believed the proposal would allow limited-content postcard messages, which, the commenter asserted, would violate FDCPA section 808(7)'s prohibition on communicating with a consumer regarding a debt by postcard.

After considering the comments received, the Bureau is finalizing only limited-content voicemail messages. As explained in the proposal, uncertainty regarding debt collector's obligations and consumer's rights under FDCPA sections 805(b) and 807(11) arose in the context of voicemail messages.[130] With this medium of communication, debt collectors face the dilemma of either repeatedly calling a consumer and hanging up, or leaving a voicemail message that might convey too much information in violation of FDCPA section 805(b) or too little information in violation of FDCPA section 807(11). And the Bureau understands that voicemail messages have been the subject of most litigation surrounding the intersection of these provisions. Accordingly, the need to define a specific message that is not a communication may be less pressing for other communication media, such as text messages, emails, or social media messages.

Apart from the absence of uncertainty and litigation comparable to voicemail messages, other communication media differ from voicemail messages in ways that are relevant to the limited-content message. Consumers may behave differently in response to voicemail messages than messages sent through other communication media. For example, because of cybersecurity concerns, consumers may be more likely to delete or ignore a generic text or email message from an unfamiliar sender than a similar voicemail message. As several commenters noted, email and text messages can contain links or other content that could install malware on a consumer's mobile telephone or computer. Indeed, several Federal agencies advise consumers to delete suspicious emails and text messages.[131] Finally, messages sent through other communication media might include information beyond that permitted by final § 1006.2(j). For example, a social media platform may limit debt collectors' ability to send messages to people outside a user's network, but a debt collector joining a consumer's network may create a prohibited third-party disclosure.[132]

For these reasons, final § 1006.2(j) limits the definition of limited-content messages to voicemail messages for a consumer.[133]

Final § 1006.2(j) identifies a voicemail message that debt collectors may leave for consumers without conveying information about a debt—and therefore communicating—under the final rule. Final § 1006.2(j) neither defines the exclusive means by which debt collectors can avoid conveying information about a debt nor reflects a determination that messages sent using other communication media are always communications under the FDCPA and the final rule. In addition, as noted above, final § 1006.6(d)(3) through (5) provides procedures that debt collectors

[130] *See* 84 FR 23274, 23290 (May 21, 2019). *See also Foti* v. *NCO Fin. Sys., Inc.,* 424 F. Supp. 2d 643, 655–56 (S.D.N.Y. 2006); *Hosseinzadeh,* 387 F. Supp. 2d at 1104.

[131] Fed. Trade Comm'n, *How to Recognize and Avoid Phishing Scams* (May 2019), *https://www.consumer.ftc.gov/articles/how-recognize-and-avoid-phishing-scams;* Fed. Deposit Ins. Corp., *Learning Bank—Frauds & Scams* (Jan. 30, 2018), *https://www.fdic.gov/about/learn/learning/scams.html;* Fed. Commc'ns Comm'n, *Avoid the Temptation of Smishing Scams* (Nov. 9, 2018), *https://www.fcc.gov/avoid-temptation-smishing-scams.*

[132] LinkedIn Messaging—Overview (July 4, 2018), *https://www.linkedin.com/help/linkedin/answer/61106/linkedin-messaging-overview?lang=en* (''On LinkedIn, you can only message your 1st-degree connections (and, within group pages, fellow group members) for free.''); Colin Hector, *Debt collectors: You may ''like'' social media and texts, but are you complying with the law?,* Fed. Trade Comm'n Bus. Blog (Mar. 28, 2016), *https://www.ftc.gov/news-events/blogs/business-blog/2016/03/debt-collectors-you-may-social-media-texts-are-you-complying.*

[133] The Bureau finds that voicemail messages include ringless voicemail messages. The Bureau concludes that, from a consumer's perspective, ringless voicemail messages present no greater risk of third-party disclosure than traditional voicemail messages.

may follow to obtain a safe harbor from civil liability for unintentional third-party disclosures when communicating with consumers by email or text message.

Messages Left With Third Parties

Proposed § 1006.2(j) would have allowed a debt collector to leave a limited-content message orally with a third party. For example, a debt collector could have left a limited-content message in a live conversation with a third party who answered the consumer's home, mobile, or work telephone number. The Bureau received many comments on this aspect of the proposal.

Several industry commenters supported it. One trade group commenter explained that debt collectors often do not know whether a telephone number they are dialing belongs to the consumer, while another industry commenter argued that, without the ability to leave a limited-content message with anyone who answers a consumer's telephone, debt collectors would have to continue calling until they reach the consumer. Another trade group commenter requested that the Bureau allow debt collectors to ask third parties to convey the message to the consumer. One industry commenter asked whether debt collectors could combine limited-content messages with location calls, asserting that this would reduce the number of attempts to speak to a third party.

Many commenters, including consumer advocates, government commenters, numerous individual consumer commenters, and an academic commenter, opposed allowing debt collectors to leave limited-content messages with third parties. These commenters raised several issues with the proposal. First, most of these commenters believed that, after receiving a limited-content message in a live conversation, a third party would ask questions that, if answered, would reveal that the consumer owes or is alleged to owe a debt. These commenters further asserted that, even if the debt collector avoided answering a third party's questions, such evasiveness would also disclose that the call related to debt collection. Along with the risks created by the interactive nature of live conversations with third parties, Federal government agency staff encouraged the Bureau to consider the effect of debt collectors leaving limited-content messages in multiple live conversations with the same third party.

Second, some of these commenters expressed concern with limited-content messages left with particular third parties. For example, commenters, including many consumer advocates, expressed concern that a limited-content message left with an employer could threaten a consumer's continued employment. And one consumer advocate stated that domestic abusers could learn details of a consumer's financial situation or manipulate the debt collector into revealing other private information.

Third, some commenters asserted that the proposal could encourage debt collectors to intentionally contact third parties for the purpose of leaving limited-content messages. These commenters believed that a debt collector could indirectly harass a consumer by leaving limited-content messages with the consumer's friends, employers, coworkers, family, or other associates.

Fourth, consumer advocates expressed concern about the proposal's impact on third parties. Third parties, this commenter argued, may also find limited-content messages harassing or annoying and, as this commenter observed, the proposal would not have granted them the same rights as consumers to cease communications, designate inconvenient times and places, or restrict communication media.

Finally, consumer advocates asserted that allowing third-party limited-content messages would upset the statutory balance Congress struck between consumers' and debt collectors' interests. Under this commenter's interpretation, the FDCPA created a narrow exception to the prohibition on third-party communications only for location communications, which the proposal would violate by also permitting limited-content messages.

After further consideration, the Bureau is declining to finalize a definition of limited-content message that allows for third-party limited-content messages. As discussed above, final § 1006.2(j) is limited to voicemail messages. Thus, a limited-content message left in a live conversation with third parties would not meet the definition in § 1006.2(j). Regarding voicemail messages left with third parties, the section-by-section analysis of final § 1006.2(j)(1) requires debt collectors to include a business name for the debt collector that does not indicate that the debt collector is in the debt collection business but not the name of the consumer. Prohibiting debt collectors from including the consumer's name greatly reduces the probability of any message left for a third party eventually reaching the consumer. Without a clear connection to the consumer, the Bureau finds that third-party voicemail messages would benefit neither consumers nor debt collectors. Therefore, final § 1006.2(j)'s definition of limited-content message does not permit third-party messages, either in live conversations or as voicemail messages.

The Bureau recognizes, however, that debt collectors are often unsure whether a person with whom they are attempting to communicate is the consumer. Indeed, the restricted content of the limited-content message contemplates the possibility of a third party hearing the information. Prohibiting all third-party limited-content messages, no matter how inadvertent, would unreasonably limit final § 1006.2(j). Therefore, messages left without knowledge that the voicemail belongs to a third party, or if a debt collector is unsure to whom the voicemail belongs, are limited-content messages. Accordingly, the Bureau is finalizing comment 2(j)–2 to clarify that a message knowingly left for a third party is not a limited-content message.

Importantly, nothing in final § 1006.2(j) places additional restrictions on debt collectors' abilities to communicate or attempt to communicate with third parties. Final § 1006.2(j) identifies a voicemail message that debt collectors may leave for consumers without conveying information about a debt—and therefore communicating—under the final rule. Final § 1006.2(j) does not attempt to define the exclusive means by which debt collectors can avoid conveying information about a debt. By finalizing a definition of limited-content message that excludes third-party messages, therefore, the Bureau has not determined that messages other than limited-content messages sent to third parties are always communications under the FDCPA and the final rule. The Bureau also notes that the final rule authorizes certain communications with third parties. For example, debt collectors may communicate with third parties to seek location information under § 1006.10 or with the prior consent of the consumer given directly to the debt collector as provided for under § 1006.6(d)(2)(ii).

Meaningful Disclosure of Identity

Proposed comment 2(j)–4 provided that a debt collector who placed a telephone call and left only a limited-content message for a consumer would not have, with respect to that telephone call, violated FDCPA section 806(6)'s prohibition on the placement of telephone calls without meaningful

disclosure of the caller's identity. The Bureau based this interpretation on the fact that proposed § 1006.2(j)(1) would have required a limited-content message to include the name of a natural person whom the consumer could contact as well as a telephone number that the consumer could use to reply to the debt collector and that a limited-content message could not have contained any content that was not described in proposed § 1006.2(j)(1) or (2). The interpretation in proposed comment 2(j)–4 would have applied only when a debt collector placed a telephone call and left only a limited-content message for a consumer.

Two industry commenters believed that the proposed limited-content message satisfied the meaningful disclosure requirement because it required debt collectors to include the name of a natural person to whom the consumer could reply. But two groups of consumer advocates commented that the proposed limited-content message failed to meaningfully disclose the caller's identity because the natural person would likely be unknown to the consumer, might use an assumed name, and might not be the same person who leaves the voicemail message. Meaningful disclosure, these commenters asserted, would require disclosing the identity of the debt collector employing the natural person.

The Bureau determines that consumers benefit from the inclusion in the limited-content message of the name of a natural person, and a telephone number, to which a consumer may reply, as well as from the prohibition on false or misleading statements about the caller's identity or the purpose of the call. But the Bureau agrees with commenters' concerns regarding meaningful disclosure of the caller's identity. Consumers are unlikely to recognize the name of a natural person working for the debt collector, and who might be using an alias. And, as proposed, if the natural person to whom the consumer could reply was different from the natural person leaving the limited-content message, the only information concerning the caller's identity would have been the telephone number included under proposed § 1006.2(j)(1)(iv). For this reason, and as discussed in the section-by-section analysis of § 1006.2(j)(1)(i), the final rule requires limited-content messages to include a business name for the debt collector that does not indicate that the debt collector is in the debt collection business. Not only is the debt collector's business name more useful to consumers, but it also better ensures that debt collectors who leave limited-content messages do not violate FDCPA section 806(6) requiring meaningful disclosure of a debt collector's identity in telephone calls. Because § 1006.2(j)(1)(i) requires that the business name included in a limited-content message not reveal that a debt collector is in the debt collection business, debt collectors may be uncertain whether business names with abbreviations designed to satisfy § 1006.2(j)(1)(i) satisfy the meaningful disclosure requirement. The Bureau is adopting proposed comment 2(j)–4, renumbered as comment 2(j)–3, to clarify that a debt collector who leaves a limited-content message does not violate the requirement to meaningfully disclose the caller's identity with respect to that message.

Implementation Issues

A few industry commenters raised implementation issues related to the proposed limited-content message. These commenters cited issues that may prevent debt collectors from leaving limited-content messages, such as disconnected telephone numbers, voicemail message system limitations, and telephone network errors. They requested that the Bureau clarify that debt collectors who leave incomplete limited-content messages because of technological issues have still left a limited-content message.

Final § 1006.2(j) reflects a carefully tailored message designed to meaningfully disclose the caller's identity and include enough information to permit a consumer to decide how to respond while avoiding conveying information regarding a debt. A partial limited-content message would be less likely to achieve these purposes. Accordingly, the Bureau declines to define partial limited-content messages as limited-content messages. The Bureau notes, however, that nothing in the final rule automatically transforms a partial limited-content message into a communication. If such a message is inconsistent with the final rule despite being caused by inadvertent technological issues, *e.g.,* because the call is dropped before the debt collector can leave its business name, and thereby does not disclose its identity, the Bureau notes that such issues can arise in the context of any telephone call (not just a limited-content message). Depending on the circumstances the bona fide error defense to civil liability in FDCPA section 813(c) may also apply.

Limited-Content Messages and State Laws

A few commenters raised issues related to State laws. A local government commenter asserted that the proposed limited-content message would confuse debt collectors who must also comply with State laws that lack similar provisions. More specifically, a trade group commenter claimed that debt collectors would be unable to leave limited-content messages in States requiring disclosure of the debt collector's business name in every communication. One trade group commenter asked the Bureau to add optional language to proposed § 1006.2(j)(2) to accommodate additional State law disclosures, while another trade group commenter asked the Bureau to preempt such State laws. These commenters did not specifically mention items of information other than the debt collector's name that would be inconsistent with the proposed limited-content message.

As noted above, final § 1006.2(j) identifies a voicemail message that debt collectors can leave for consumers without conveying information about a debt—and therefore communicating—under the final rule. Accordingly, § 1006.2(j) is a definition and by itself neither requires nor prohibits any action. Circumstances might exist, such as when State law requires additional or different information to be included in a voicemail message, under which debt collectors are unable to take advantage of the ability to leave limited-content messages. To the extent commenters' concerns about inconsistent State law concern the name of the debt collector, final § 1006.2(j)(1)(i) requires limited-content messages to include a business name for the debt collector that does not indicate that the debt collector is in the debt collection business.[134]

Fraudulent Messages

A few consumer advocates and local government commenters stated that the proposed limited-content message would enable fraud. These commenters argued that the limited-content message was so generic that it could be adopted by scammers and used for fraudulent purposes. Some of these commenters believed that, by proposing to define the limited-content message, the Bureau was contradicting the advice that Federal agencies have given consumers about how to recognize and respond to fraudulent messages. These commenters stated that Federal agencies recommend that consumers ignore messages

[134] *See* the section-by-section analysis of § 1006.2(j)(1)(i).

containing limited information or coming from unfamiliar senders. But these commenters claimed that the Bureau would encourage consumers to respond to such messages if they took the form of the proposed limited-content message. One consumer advocate cited the heightened cybersecurity risks of limited-content text or email messages, which might contain links or other content that could install malware on a consumer's mobile telephone or computer.

The Bureau has considered these risks and determines that final § 1006.2(j) does not heighten the risk of exploitation by scammers. First, the Bureau is aware of no evidence that voicemail messages currently left by debt collectors, some of which closely resemble final § 1006.2(j)'s limited-content message, have increased bad actors' abilities to harm consumers. Second, the final rule limits the definition of limited-content message to voicemail messages, which should lessen commenters' concerns about limited-content email and text messages. Third, final § 1006.2(j)(1)(i) requires limited-content messages to include a business name for the debt collector that does not indicate that the debt collector is in the debt collection business. Improved information about the identity of the caller decreases any similarity between the limited-content message adopted under this final rule and the types of fraudulent messages about which Federal agencies have warned consumers.

Familiarity With Limited-Content Messages

Several consumer advocates and government commenters argued that the public would eventually become familiar with the limited-content message and associate it with debt collection, suggesting the limited-content message itself would create a prohibited third-party disclosure even if its content alone did not convey information regarding a debt.

As an initial matter, the Bureau notes that limited-content messages may vary slightly in their content because debt collectors may choose to include different items of optional information described in final § 1006.2(j)(2). The Bureau understands that, despite the legal uncertainty in the voicemail context, some debt collectors have been leaving messages that some courts have held are not communications. The Bureau is not aware of any evidence that these messages, some of which closely resemble final § 1006.2(j)'s limited-content message, are so familiar to consumers that the message itself automatically creates a prohibited third-party disclosure. And the Bureau does not believe that any level of familiarity would allow a third party to exclude alternative plausible explanations for a limited-content message, such as a debt collector dialing the wrong telephone number or a debt collector calling for non-collection purposes.

Interaction With Other Provisions of Regulation F

Consumer advocates expressed concern that certain provisions of the proposal governing communications would not apply to the proposed limited-content message, including proposed § 1006.6(d)(1)'s prohibitions regarding communications with third parties, proposed § 1006.10's provisions regarding location communications, proposed § 1006.18(e)'s disclosures, proposed § 1006.22(f)(1)'s prohibition on communicating with consumers by postcard, and proposed § 1006.34's requirements regarding sending validation notices to consumers. The Bureau has evaluated the scope of the final rule and determines that each substantive provision addresses a range of conduct appropriate to achieve the goals of that section. The section-by-section analysis throughout part V provides additional explanation for each of the final rule's substantive provisions.

Interaction With Other Federal Law

One trade group commenter stated that the proposed limited-content message was potentially inconsistent with the Federal Communications Commission's (FCC) rules implementing the Telephone Consumer Protection Act of 1991 (TCPA) [135] and the Cellular Telecommunications Industry Association (CTIA)'s industry standards. Specifically, this commenter argued that limited-content text messages sent without a consumer's prior consent may violate the TCPA or industry standards. As explained above, final § 1006.2(j) is limited to voicemail messages. The Bureau declines to address limited-content text messages.

For the reasons discussed above and pursuant to its authority to interpret FDCPA section 803(2), the Bureau is finalizing the proposed definition of limited-content message with revisions. Specifically, final § 1006.2(j) provides that a limited-content message is a voicemail message for a consumer that includes all of the content described in § 1006.2(j)(1), that may include any of the content described in § 1006.2(j)(2), and that includes no other content.

[135] Public Law 102–243, 105 Stat. 2394 (1991).

The Bureau is finalizing comment 2(j)–1 largely as proposed but with revisions to the reflect the decision to limit the definition of limited-content message to messages left for a consumer by voicemail and to provide an example of a message that is not a limited-content message. New comment 2(j)–2 clarifies that, for the reasons discussed above, a message knowingly left for a third party is not a limited-content message because it is not for a consumer and provides an example. Finally, the Bureau is finalizing proposed comment 2(j)–4 regarding meaningful disclosure of a caller's identity as comment 2(j)–3.

2(j)(1) Required Content

Proposed § 1006.2(j)(1) would have required limited-content messages to include the following content to ensure that they facilitate contact between debt collectors and consumers: The consumer's name (proposed § 1006.2(j)(1)(i)); a request that the consumer reply to the message (proposed § 1006.2(j)(1)(ii)); the name or names of one or more natural persons whom the consumer can contact to reply to the debt collector (proposed § 1006.2(j)(1)(iii)); a telephone number that the consumer can use to reply to the debt collector (proposed § 1006.2(j)(1)(iv)); and, if delivered electronically, a disclosure explaining how the consumer can stop receiving messages through that medium (proposed § 1006.2(j)(1)(iv)). Proposed comment 2(j)(1)(iv)–1 explained that a voicemail or a text message that spells out, rather than enumerates numerically, a vanity telephone number is not a limited-content message. Spelling out a vanity telephone number could, in some circumstances, convey information about a debt or otherwise disclose that the message is from a debt collector.

For the reasons described below, the Bureau is finalizing § 1006.2(j)(1) largely as proposed but with modifications to reflect the revised scope of the definition, as discussed in the section-by-section analysis of § 1006.2(j), and to require a business name for the debt collector that does not indicate that the debt collector is in the debt collection business, in lieu of the consumer's name in § 1006.2(j)(1)(i).

Many industry commenters requested that the Bureau require or permit additional information in the limited-content message. Without additional content, these commenters asserted, consumers would view the limited-content message as uninformative, confusing, or suspicious. Most of these commenters asked the Bureau to allow debt collectors to disclose their business

name, especially if the name did not reveal that the debt collector was in the debt collection business. A few commenters pointed to FDCPA section 808(8), which allows debt collectors to include their business name on an envelope if the name does not indicate that the debt collector is in the debt collection business. Three commenters cited the Bureau's Debt Collection Consumer Survey, which found that almost 90 percent of consumers reported that they preferred voicemail messages to include the creditor or debt collector's name. Along with the debt collector's name, industry commenters asked the Bureau to include various items of information, including: the creditor's name; the debt collector's website address; the type of account, such as a student loan or branded credit card; the debt collector's email address or other electronic contact information; an invitation to enroll in a debt collector's text messaging service; and four consecutive digits from an account number.

After considering the comments, the Bureau is finalizing § 1006.2(j)(1) to require a business name for the debt collector that does not indicate that the debt collector is in the debt collection business, in lieu of the consumer's name in § 1006.2(j)(1)(i). As commenters who referred to the Bureau's Debt Collection Consumer Survey noted, most consumers prefer that voicemail messages disclose the caller's institutional identity.[136] Including the debt collector's business name will enable consumers to verify the debt collector's legitimacy and make a better-informed decision about what action, if any, to take in response to the limited-content voicemail message. Consistent with the advice of several Federal agencies, consumers who are suspicious of a limited-content message can use the debt collector's business name to research the company and reply using contact information the consumer finds rather than relying on the telephone number included in the message.[137] Consumers may also be more likely to reply to a limited-content message if they believe the message is legitimate. Finally, requiring limited-content messages to include the debt collector's business name ensures meaningful disclosure of the caller's identity consistent with FDCPA section 806(6), as discussed in the section-by-section analysis of § 1006.2(j), above.

The Bureau is not finalizing the consumer's name as a required or optional element of the limited-content message as proposed. The Bureau finds that a message containing a business name for the debt collector that does not indicate that the debt collector is in the debt collection business, but not the consumer's name avoids conveying information regarding a debt under FDCPA section 803(2). A third party overhearing such a message would be unable, based on the message's content alone, to rule out several alternative explanations for the message other than that the consumer owes a debt. For example, the third party may believe that a business other than a debt collector has left the message, because final § 1006.2(j)(1) permits only business names that do not indicate that a debt collector is in the debt collection business. Even if a third party believes that a debt collector has left the message, the debt collector might have dialed the wrong telephone number; the debt collector might have dialed the intended telephone number but have inaccurate information about to whom the telephone number is assigned; the debt collector might be calling to seek location information from the consumer;[138] or the debt collector might be calling for a non-debt-collection purpose.[139] Including the consumer's name would narrow the range of alternative explanations and increase the risk of third-party disclosure.[140] Accordingly, final § 1006.2(j)(1) does not include the consumer's name in the limited-content message.

Based on the range of industry commenters who supported including a business name for the debt collector that does not indicate that the debt collector is in the debt collection business, the Bureau expects that many debt collectors will be able to disclose a business name (*e.g.,* a doing business as (d/b/a) name) without revealing that they are in the debt collection business. Moreover, industry has long been subject to FDCPA section 808(8), which allows debt collectors to include their business name on an envelope only if the name does not indicate that the debt collector is in the debt collection business. But circumstances might exist that would prevent debt collectors from taking advantage of the limited-content message definition. For example, a debt collector's business name might reveal that the debt collector is in the debt collection business. In such circumstances, a message that includes the debt collector's business name would not be a limited-content message, as defined in final § 1006.2(j). But, as explained above, final § 1006.2(j) identifies a voicemail message that debt collectors may leave for consumers without conveying information about a debt—and therefore communicating—under the final rule. Final § 1006.2(j) neither defines the exclusive means by which debt collectors can avoid conveying information about a debt nor

[136] CFPB Debt Collection Consumer Survey, *supra* note 16, at 38.

[137] *See, e.g.,* Bureau of Consumer Fin. Prot., *How to tell the difference between a legitimate debt collector and scammers* (Nov. 20, 2019), *https://www.consumerfinance.gov/about-us/blog/how-tell-difference-between-legitimate-debt-collector-and-scammers/* (''If you're uncomfortable providing any information, you can request the caller's name, company name, street address, and a callback number. You can use this information to verify that they are not a scammer before providing any personal information.''); Fed. Trade Comm'n, *How to Recognize and Avoid Phishing Scams* (May 2019), *https://www.consumer.ftc.gov/articles/how-recognize-and-avoid-phishing-scams#suspect* (''[C]ontact the company using a phone number or website you know is real. Not the information in the email.''); Fed. Commc'ns Comm'n, *Avoid the Temptation of Smishing Scams* (Nov. 9, 2018), *https://www.fcc.gov/avoid-temptation-smishing-scams* (''If you get a text purportedly from a company or government agency, check your bill for contact information or search the company or agency's official website. Call or email them separately to confirm whether you received a legitimate text. A simple web search can thwart a scammer.'').

[138] Like FDCPA section 804, final § 1006.10(b)(1) permits a debt collector seeking location information to identify the debt collector's employer ''only if expressly requested,'' but even a third party who overhears the limited-content message and is generally aware that debt collectors make location communications may be unaware of the precise form and content provisions governing those communications.

[139] For example, in a case where the plaintiff worked for a debt collector, a court noted that ''[i]t would not be unreasonable that a call from a debt collector related to her employment.'' *Zortman,* 870 F. Supp. 2d at 705.

[140] Although courts disagree about when a message conveys information about a debt, the Bureau's analysis is consistent with several cases considering messages similar to final § 1006.2(j). *See Zortman,* 870 F. Supp. 2d at 701 (finding that the following message was not a communication: ''We have an important message from J.C. Christensen & Associates. This is a call from a debt collector. Please call 866–319–8619.''); *Miller* v. *MediCredit, Inc.,* No. 3:18–CV–00603 (DJN), 2019 WL 6709388, at *7–8 (E.D. Va. Dec. 9, 2019) (finding that a message similar to the *Zortman* voicemail was not a communication); *Jackson* v. *Eltman, Eltman & Cooper, P.C.,* 128 F. Supp. 3d 980, 985 (E.D. Mich. 2015) (finding a fax message was a communication because it ''identifies [the consumer] by name and states its purpose as ''COLLECTION''); *Gearman* v. *Heldenbrand,* No. 15–cv–2039 (DSD/FLN), 2015 WL 5255335, at *1 (D. Minn. Sept. 9, 2015) (''[M]erely identifying oneself as a debt collector does not convey information regarding a debt.''); *Zweigenhaft* v. *Receivables Performance Mgmt., LLC,* No. 14 CV 01074 RJD JMA, 2014 WL 6085912, at *1 (E.D.N.Y. Nov. 13, 2014) (finding that a message similar to the *Zortman* voicemail was not a communication); *Hanson* v. *Green Tree Servicing, LLC,* No. 12–cv–2933 (DSD/SER), 2013 WL 4504290, at *2 (D. Minn. Aug. 23, 2013) (similar). Indeed, § 1006.2(j) is more protective of consumer privacy than the messages at issue in the *Zortman* line of cases because it includes the condition that the debt collector's business name not reveal that the debt collector is in the debt collection business.

reflects a determination that messages that include a business name that reveals that a debt collector is in the debt collection business are always communications under the FDCPA and the final rule.

The Bureau declines to require other information in the content of the limited-content message as requested by commenters. Some information commenters requested be included, such as invitations to enroll in a debt collector's text messaging service, is less relevant given that final § 1006.2(j) is limited to voicemail messages. In addition, the Bureau finds that debt collectors can better convey information regarding electronic communication options to consumers by emailing or texting them consistent with the safe harbor procedures for electronic communications in final § 1006.6(d)(3) through (5). Other requested information, such as descriptions of, or digits from, an account, or the fact that the account was held with a particular creditor, would convey information regarding a debt, as discussed in the section-by-section analysis of § 1006.2(j)(2), below.

A trade group commenter asked whether caller ID information that discloses the debt collector's business name would prevent a debt collector from leaving a limited-content message. As explained immediately above, the final rule requires limited-content messages to include a business name for the debt collector that does not indicate that the debt collector is in the debt collection business. Accordingly, caller ID information that discloses no more than the business name or other content required or permitted by § 1006.2(j) is consistent with the definition of a limited-content message. The Bureau acknowledges that caller ID information may disclose more information than permitted by § 1006.2(j). In these circumstances, such voicemail messages would not meet the definition of limited-content message. The Bureau does not determine, however, that messages with different content, such as a business name displayed by caller ID that reveals that a debt collector is in the debt collection business, are always communications under the FDCPA and the final rule.

The Bureau is not finalizing proposed § 1006.2(j)(1)(v), which would have required the limited-content message to include, if delivered electronically, a disclosure explaining how the consumer can stop receiving messages through that medium. Because final § 1006.2(j) is limited to voicemail messages, this element is no longer applicable.

Similarly, the Bureau is not finalizing proposed comment 2(j)(1)(iv)–1, which would have explained that a voicemail or a text message that spells out, rather than enumerates numerically, a vanity telephone number is not a limited-content message. This comment was intended to address concerns that spelling out a vanity telephone number might convey information about a debt or otherwise disclose the name of the debt collector. Because § 1006.2(j)(1)(i) requires disclosing a business name for the debt collector that does not indicate that the debt collector is in the debt collection business, this comment is less relevant to the limited-content message as finalized. The Bureau notes, however, that a vanity telephone number that reveals that the debt collector is in the debt collection business would not comply with final § 1006.2(j)(1)(i). As explained above, the Bureau finds that a message containing the debt collector's business name but not the consumer's name avoids conveying information regarding a debt under FDCPA section 803(2) and under § 1006.2(d).

For the reasons discussed above, § 1006.2(j)(1) requires that limited-content messages include the following content: A business name for the debt collector that does not indicate that the debt collector is in the debt collection business, a request that the consumer reply to the message, the name or names of one or more natural persons whom the consumer can contact to reply to the debt collector, and a telephone number or numbers that the consumer can use to reply to the debt collector. Comment 2(j)(1)–1 provides an example of a limited-content message containing only required content.

2(j)(2) Optional Content

Proposed § 1006.2(j)(2) would have permitted a debt collector to include in a limited-content message the following optional information: A salutation (proposed § 1006.2(j)(2)(i)), the date and time of the message (proposed § 1006.2(j)(2)(ii)), a generic statement that the message relates to an account (proposed § 1006.2(j)(2)(iii)), and suggested dates and times for the consumer to reply to the message (proposed § 1006.2(j)(2)(iv)). As discussed in the proposal, the Bureau believed that this content might prompt a consumer to reply but, unlike the content described in proposed § 1006.2(j)(1), might not be necessary to enable the consumer to reply to the message or to prevent harassment through an overly generic or uninformative message. For the reasons described below, the Bureau is finalizing § 1006.2(j)(2) largely as proposed, but with revisions to prohibit inclusion of a generic statement that the message relates to an account, and to permit a statement that a consumer who replies to the message can speak to any of the debt collector's representatives or associates.

Numerous commenters addressed proposed § 1006.2(j)(2)(iii)'s optional generic statement that the message relates to an account. Only a few commenters supported this provision. A trade group commenter stated that it had considered alternative language but found it potentially confusing, while an individual believed the word ''account'' was too general to result in any prohibited third-party disclosures.

In contrast, most of the commenters who addressed the issue opposed the optional reference to an account. Industry commenters generally believed that the word account was too vague to be useful to consumers. These commenters argued that such a reference would be unlikely to prompt consumers to reply. One trade group commenter asserted that fraudulent voicemail messages often contain references to a generic account. Another industry commenter believed that the word ''account'' might reveal more information than the name of the creditor or debt collector.

Several consumer advocates and government commenters also opposed allowing debt collectors to refer to an account. These commenters argued that the word account would itself reveal the existence of a debt or otherwise invade a consumer's privacy. Some of these commenters argued that the word account inherently discloses the existence of a debt. An academic commenter asserted that most non-debt collection messages include more information about the nature of the consumer's account. One group of consumer advocates cited cases holding that certain messages were not communications under the FDCPA and argued that the absence of a reference to an account was important to the holding in those cases.

The Bureau does not believe that the word account necessarily discloses the existence of a debt because consumers may receive messages about their accounts with companies other than debt collectors. In the context of the final rule's limited-content message, however, referring to an account would increase the risk of a prohibited third-party disclosure. As discussed above in the section-by-section analysis finalizing § 1006.2(j)(1)(i)'s requirement to include the debt collector's business name, a third party overhearing a

limited-content message on a consumer's voicemail system would be unable to determine whether a debt collector or another business left the message, or assuming a debt collector left the message, whether the debt collector left it because the consumer owes a debt or for another reason. But including the word account narrows the range of possible alternative explanations for the message. For example, a message to a consumer referring to ''your account'' is unlikely to be a message seeking location information from the recipient. This raises the probability of a third party inferring that the message relates to a consumer's debt.[141]

Additionally, the proposal may have overestimated the benefits of an optional generic statement that the message relates to an account. As commenters noted, debt collectors could not include information about the account, such as the type of account or the company with whom the account is held. The presence of such information would risk conveying information about a debt, but its absence leaves the consumer without important context that may prompt consumers to reply, if they so choose. As explained in the section-by-section analysis of § 1006.2(j)(1)(i), the business name of the debt collector is more beneficial to consumers. In light of the limited utility of a reference to an account, the Bureau finds that such content would create an unjustified risk of prohibited third-party disclosure. Accordingly, final § 1006.2(j) no longer provides that a limited-content message may include a generic reference to an account.

Several industry commenters asked the Bureau to modify proposed § 1006.2(j)(1)(iii)'s requirement that a limited-content message include the name or names of one or more natural persons whom the consumer can contact to reply to the debt collector. These commenters stated that large debt collectors would be unable to predict which natural person might be available to answer a consumer's reply. These commenters offered several solutions, including permitting limited-content messages to refer generally to ''agents,'' ''associates,'' ''representatives,'' or particular groups or organizations within the debt collector. Such an approach, some commenters asserted, would allow debt collectors to maintain consistency with other Federal rules that provide more flexibility in identifying the individuals with whom a consumer might communicate.

The Bureau finds that the name of a natural person to whom a consumer may reply is an important element of the limited-content message.[142] Such information helps efficiently direct the consumer's reply call to a person who is able to discuss the consumer's debt. But the Bureau agrees with commenters that some flexibility regarding this information would benefit consumers and debt collectors. If someone other than the natural person identified in the limited-content message answered their reply call, consumers likely would not be confused or frustrated, and large debt collectors could more easily employ the limited-content message. Certain references to a debt collector's groups or offices, such as the ''credit card receivables group,'' however, might heighten the risk of a prohibited third-party disclosure. A general reference to other ''representatives or associates,'' on the other hand, would minimize such risk while achieving the purposes identified by commenters. Accordingly, final § 1006.2(j)(2)(iv) defines the limited-content message to include an optional statement that, if the consumer replies, the consumer may speak to any of the company's representatives or associates.

For the reasons discussed above, final § 1006.2(j)(2) permits a limited-content message to include the following content: A salutation, the date and time of the message, suggested dates and times for the consumer to reply to the message, and a statement that, if the consumer replies, the consumer may speak to any of the company's representatives or associates. Comment 2(j)(2)–1 clarifies that a message that includes a more detailed description of a company's representative or associate group is not a limited-content message and provides an illustrative example. Comment 2(j)(2)–2 provides an example of a limited-content message that includes all of the information required under § 1006.2(j)(1) and all of the content permitted under § 1006.2(j)(2).

2(k) Person

The FDCPA frequently uses, but does not define, the term person. The Bureau proposed § 1006.2(k) to define person, consistent with the definition of that term in 1 U.S.C. 1, to include ''corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.''[143]

Three industry associations stated that the proposed definition was overly expansive and would impermissibly expand standing to bring an FDCPA claim to artificial entities even though the purpose of the FDCPA is to protect consumers. The commenters requested that the proposed definition either be deleted or limited to natural persons.

The Bureau is finalizing the definition of person as proposed. Including this definition will clarify who is subject to provisions of the regulation that use the term person. The Bureau declines to delete the definition of person or to narrow it to include only natural persons because the plain language of the FDCPA illustrates that Congress did not intend to limit the term person, as used in the FDCPA, to natural persons. For example, the definition of debt collector in the FDCPA uses the phrase ''any person'' repeatedly, and there is no doubt that Congress intended to include non-natural persons in the definition of debt collector. Where the statute was intended to be limited to natural persons, Congress achieved that intent by using the term consumer. For example, FDCPA section 803(5) defines the term debt to include obligations of a consumer, and FDCPA section 803(3) limits the term consumer to a natural person. As a result, the Bureau concludes that the proposed definition of person would not expand the scope of the FDCPA beyond the scope that Congress intended. However, the Bureau is clarifying in the definition of debt at § 1006.2(h) that debt subject to the FDCPA is limited to debt incurred by a natural person. See the section-by-section analysis of § 1006.2(h) for additional discussion.

Subpart B—Rules for FDCPA Debt Collectors[144]

Section 1006.6 Communications in Connection With Debt Collection

FDCPA section 805 generally limits how debt collectors may communicate with consumers and third parties when collecting debts.[145] The Bureau proposed § 1006.6 to implement and interpret FDCPA section 805, and to

[141] Two commenters stated that the Bureau had not conducted consumer testing regarding what information does or does not reveal the existence of a debt. Although the Bureau recognizes the value of consumer testing, there are other legitimate grounds on which to base a provision of a final rule. Here, the Bureau is relying on its interpretation of FDCPA section 803(2)'s definition of communication, after considering comments received and existing case law.

[142] *See* 84 FR 23274, 23292 (May 21, 2019).

[143] *See* 84 FR 23274, 23293 (May 21, 2019). 1 U.S.C. 1 states that ''in determining the meaning of any Act of Congress, unless the context indicates otherwise,'' the term person includes ''corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.''

[144] As proposed, the final rule moves existing §§ 1006.3 through 1006.8 regarding applications for State exemptions from the FDCPA to appendix A of the regulation. *See* the section-by-section analysis of § 1006.108 and appendix A.

[145] 15 U.S.C. 1692c.

interpret FDCPA sections 806 and 808 to provide certain additional protections regarding debt collection communications. As discussed in more detail below, § 1006.6, among other things, specifies and clarifies a debt collector's obligation to abide by a consumer's preferences when communicating in connection with the collection of any debt. Section 1006.6 also interprets FDCPA sections 805, 806, and 808 with respect to newer communication technologies. And to protect consumer privacy, § 1006.6 identifies procedures reasonably adapted to avoid a violation of FDCPA section 805(b)'s prohibition on third-party disclosures when communicating by email or text message. Pursuant to its authority under FDCPA section 814(d) to write rules with respect to the collection of debts by debt collectors, the Bureau is finalizing § 1006.6 with certain changes to address feedback and other consumer protection concerns.

Electronic Communications in Debt Collection

As proposed, § 1006.6 would have clarified how various provisions in FDCPA section 805, such as the prohibitions against communications at inconvenient times and places and the prohibition against communicating about a debt with a third party, would have applied to electronic communications such as emails and text messages. The proposal would not have prohibited any particular methods of electronic communication or established an opt-in framework for such communications. The Bureau received a large number of comments in response to the particular proposed interventions, and the Bureau addresses those comments in the section-by-section analysis below.

In addition, the Bureau received many comments addressing the risks and benefits of electronic communications in debt collection. In general, industry commenters supported the use of electronic communications, noting that, compared to non-electronic communications such as mail and telephone calls, electronic communications are faster and more cost effective; enable debt collectors to reach consumers who do not answer the telephone or who change addresses frequently; provide consumers with more privacy and greater control over the time and place of engagement; and create a digital record of a consumer's interactions with a debt collector. Many industry commenters asserted that, because of these benefits, consumers wish to communicate electronically, and several industry commenters reported receiving such requests from consumers. But industry commenters also generally stated that they refrain from communicating electronically because they fear liability under FDCPA section 805(b) for an unintentional third-party disclosure, such as if they send an email or a text message to an email address or telephone number that does not belong to the consumer.

A few individual consumers expressed a general interest in communicating with debt collectors electronically. But most individual consumer and consumer advocate commenters, as well as consumer attorney, academic, and government commenters, raised concerns about the Bureau's proposals and either opposed electronic communications in debt collection, or supported them only if the consumer had first explicitly consented, or opted in, to receiving them. These commenters argued that an opt-in approach would enable consumers, before agreeing to electronic communications, to: (1) Weigh any risks due to irregular internet or cellphone access; (2) confirm the addresses and telephone numbers to which electronic communications may be directed, ensuring that, particularly for consumers who regularly change telephone numbers or email addresses, communications are sent to the consumer rather than to a third party; (3) weigh the financial cost, if any, of electronic communications; (4) familiarize themselves with the sender and weigh any security risks, helping to ensure that consumers actually open emails and minimizing the chance that such emails are blocked by spam filters and other screening devices;[146] and (5) weigh any privacy-related risks, including the risk that emails and text messages could be viewed by a consumer's telephone or email provider, could appear on a publicly visible computer or telephone screen, or could be coming from a phony, rather than legitimate, debt collector.[147]

The Bureau determines that electronic communications can offer benefits to consumers and debt collectors. Technologies such as email and text messaging allow consumers to exert greater control over the timing, frequency, and duration of communications with debt collectors, including by choosing when, where, and how much time to spend responding to a debt collector's email or text message. For debt collectors, these technologies are a more effective and efficient means of communicating with some consumers. The Bureau declines to categorically prohibit the use of these potentially beneficial communication media where Congress has not amended the FDCPA to prohibit their use.

As to commenters' specific concerns regarding privacy and the risks of third-party disclosure, § 1006.6(d)(3) through (5) sets forth procedures that a debt collector may follow to obtain a safe harbor from civil liability for a third-party disclosure when sending an email or a text message to a consumer. The Bureau expects that most debt collectors will use the procedures, which are designed to protect consumers against the risk of third-party disclosure, when communicating by email and text message. As to commenters' other concerns, the Bureau notes that, as discussed in the section-by-section analyses of §§ 1006.6(b) and (e) and 1006.14(h), the Bureau is finalizing provisions that will require debt collectors to provide consumers with a reasonable and simple method of opting out of electronic communications and that will permit consumers to control the time, place, and media through which debt collectors may communicate. In addition, as discussed in the section-by-section analysis of § 1006.42, the Bureau is finalizing a general standard for electronic delivery of required disclosures. The Bureau determines that the final rule's overall approach to electronic communications addresses commenters' concerns.

Consumer and consumer advocate commenters, some members of Congress, a group of State Attorneys General, and other State and local government commenters also expressed specific concern about the costs of text messaging.[148] For consumers who lack unlimited text messaging plans, sending and receiving text messages may not be free. Some consumers with limited text messaging plans may pay for each text message; others may pay for each text message above a cap. Consumer advocate commenters noted that many of their clients maintain limited text messaging plans. The prevalence of such plans among the general public, or among consumers with debts in collection, is not clear, although some information suggests that most

[146] As the Bureau noted in the proposal, several Federal agencies advise consumers not to open emails from senders they do not recognize. *See* 84 FR 23274, 23363 n.578 (May 21, 2019).

[147] Many commenters raised specific concerns about the frequency with which consumers might receive emails and text messages from debt collectors. Those comments are addressed in the section-by-section analysis of § 1006.14(a).

[148] Although a few commenters noted that, for consumers with limited data plans, sending and receiving emails may not be free either, most commenters focused on the costs of text messaging.

consumers in general have unlimited text messaging plans.[149]

Consumer and consumer advocate commenters, some members of Congress, a group of State Attorneys General, and other State and local government commenters urged the Bureau to address the costs associated with text messaging by requiring debt collectors to obtain affirmative consent before sending text messages. These commenters argued that an opt-in system would enable consumers to weigh the costs of text messages before agreeing to receive them from a debt collector. As discussed in detail below, § 1006.6(d)(5) specifies procedures that, when followed, provide a debt collector with a safe harbor from civil liability for an unintentional third-party disclosure when sending a text message to a telephone number. These procedures effectively create an opt-in system for the use of text messages, and, as noted, the Bureau expects that most debt collectors will use them.

Several consumer advocate commenters, some members of Congress, a State Attorney General, and other government commenters suggested that the Bureau address the costs associated with text messaging by requiring debt collectors to use free-to-end-user (FTEU) text messaging or otherwise require debt collectors to pay for text messages. The Bureau believes that the limitations in final § 1006.6(d)(5)—which, as noted, effectively create an opt-in system for text messages—offer a more practical solution than requiring debt collectors to use FTEU text messaging. Consumers who do not wish to incur the cost of text messages are unlikely to opt into a debt collector's use of text messages, and, as discussed in the section-by-section analysis of § 1006.6(e), a consumer who no longer wishes to receive text messages from a debt collector must be provided with a reasonable and simple way to opt out of such communications. Further, as the Bureau noted in the proposal, because FTEU text messaging may only be supported by certain wireless platforms, requiring debt collectors to use FTEU text messaging may not offer a solution for all consumers—a concern that commenters generally did not address.[150] For these reasons, and in light of the other provisions in the final rule addressing debt collectors' use of text messages, the Bureau declines to finalize a requirement that debt collectors use FTEU technology.

6(a) Definition

FDCPA section 805(d) provides that, for purposes of section 805, the term consumer includes certain individuals other than the person obligated or allegedly obligated to pay the debt. These individuals include the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.[151] Accordingly, the protections in FDCPA section 805 apply both to these individuals and to the person obligated or allegedly obligated to pay the debt. Also, debt collectors may communicate with these individuals in connection with the collection of any debt without violating the FDCPA's prohibition on third-party disclosures.[152]

The Bureau proposed § 1006.6(a) to implement and interpret FDCPA section 805(d) and to define consumer for purposes of § 1006.6. Proposed § 1006.6(a) generally mirrored FDCPA section 805(d), except that proposed § 1006.6(a)(5) would have interpreted the term to include a confirmed successor in interest, and proposed comments 6(a)(1)–1, 6(a)(2)–1, and 6(a)(4)–1 would have clarified how the term applied when the consumer obligated or allegedly obligated on the debt had died. For the reasons discussed below, the Bureau is finalizing § 1006.6(a) largely as proposed, but is making minor changes for clarity.[153]

6(a)(1) and (2)

FDCPA section 805(d) defines the term consumer for purposes of section 805 to include the consumer's spouse and (if the consumer is a minor) parent.[154] Proposed § 1006.6(a)(1) and (2) would have implemented these aspects of the definition.[155] In addition, the Bureau proposed comments 6(a)(1)–1 and 6(a)(2)–1 to clarify that deceased consumers' surviving spouses and deceased minor consumers' parents, respectively, are consumers for purposes of § 1006.6. This interpretation was consistent with the Bureau's proposal to interpret the general definition of consumer in § 1006.2(e) to include deceased persons.[156]

A group of consumer advocates objected to proposed comments 6(a)(1)–1 and 6(a)(2)–1. These commenters argued that the language of the FDCPA forecloses the proposed interpretation because it includes present-tense language in describing the consumer's parent and avoids the term surviving spouse, which Congress used elsewhere in the U.S. Code. These commenters further argued that no legitimate reason existed for a debt collector to communicate with consumers' surviving spouses or parents of deceased minor consumers because the FDCPA permits (as would a final rule) location communications and communications with executors or administrators of a deceased consumer's estate. Finally, the commenters urged the Bureau to expressly prohibit debt collectors from communicating with anyone in the decedent debt context unless the debt collector had determined that the person owed a debt or was the executor or administrator of a deceased consumer's estate.

On several issues related to decedent debt, the Bureau is finalizing an approach consistent with the FTC's Policy Statement on Decedent Debt.[157] The FTC stated that it would decline to take enforcement actions against debt collectors who communicated with ''the decedent's spouse [or] parent (if the decedent was a minor at the time of death).'' [158] The FTC rejected the same legal arguments that the commenter raised against proposed comments 6(a)(1)–1 and 6(a)(2)–1 for reasons that

[149] In 2015, a company that develops text message surveys estimated that between 83 and 92 percent of U.S. mobile telephones had unlimited text messaging plans. *See* Josh Zagorsky, *Almost 90% of Americans Have Unlimited Texting,* Instant Census (Dec. 8, 2015), *https://instantcensus.com/blog/almost-90-of-americans-have-unlimited-texting.*

[150] According to one industry website, FTEU is supported by six carriers (AT&T, Boost, Sprint, T-Mobile, Verizon Wireless, and Virgin Mobile). iVision Mobile, *Free to End User (FTEU), http://www.ivisionmobile.com/text-messaging-software/free-to-end-user-fteu.asp* (last visited Sept. 23, 2020); Mobile Mktg. Ass'n, *U.S. Consumer Best Practices for Messaging: Version 7.0,* at 43 (Oct. 16, 2012), *https://www.mmaglobal.com/files/bestpractices.pdf* (describing FTEU ''Cross Carrier Guidelines'' as providing that ''[c]ontent providers must obtain opt-in approval from subscribers before sending them any SMS or MMS messages or other content from a short code'').

[151] 15 U.S.C. 1692c(d).

[152] *See* 15 U.S.C. 1692b, 1692c(b). A debt collector may communicate with third parties to seek location information about consumers, but the debt collector may not state that the consumer owes any debt. For additional discussion of these provisions, see the section-by-section analyses of §§ 1006.6(d) and 1006.10(c).

[153] The Bureau received no comments regarding proposed § 1006.6(a)(3), which would have implemented FDCPA section 805(d)'s definition regarding a consumer's guardian. The Bureau is finalizing § 1006.6(a)(3) as proposed and does not address it further in the section-by-section analysis below.

[154] 15 U.S.C. 1692c(d).

[155] *See* 84 FR 23274, 23293 (May 21, 2019).

[156] *See* the section-by-section analysis of § 1006.2(e).

[157] Fed. Trade Comm'n, *Statement of Policy Regarding Communications in Connection with the Collection of Decedents' Debts* (July 27, 2011), *https://www.ftc.gov/sites/default/files/documents/federal_register_notices/statement-policy-regarding-communications-connection-collection-decedents-debts-policy-statement/110720fdcpa.pdf* (FTC Policy Statement on Decedent Debt).

[158] FTC Policy Statement on Decedent Debt, *supra* note 157, at 44918.

the Bureau finds persuasive here.[159] In addition, the Bureau finds that legitimate reasons exist for communications between debt collectors and a deceased consumer's surviving spouse or the parents of a deceased minor consumer, especially if they had previously communicated with a debt collector while the consumer was alive. For example, such individuals may wish to obtain information from, or continue conversations with, the debt collector about the consumer's financial condition. Accordingly, the Bureau is finalizing comments 6(a)(1)–1 and 6(a)(2)–1, as proposed, to clarify that surviving spouses and parents of deceased minor consumers, respectively, are consumers for purposes of § 1006.6.

6(a)(4)

FDCPA section 805(d) defines the term consumer for purposes of section 805 to include executors and administrators.[160] Proposed § 1006.6(a)(4) would have implemented this aspect of the definition and, in commentary, interpreted it to include the personal representative of the deceased consumer's estate, *i.e.,* any person ''authorized to act on behalf of the estate.'' [161]

Several commenters supported the description of personal representative. One trade group commenter stated that the proposal's accommodation of informal estate resolution processes would help prevent consumers from experiencing frustration when trying to contact debt collectors to resolve a deceased consumer's estate. Federal government agency staff commented that the proposal largely mirrored the FTC's Policy Statement on Decedent Debt and expressed support for the goals of the proposal.

A few commenters suggested modifications to proposed comment 6(a)(4)–1. Three trade group commenters stated that the interpretation regarding personal representative was so important that the Bureau should add it to the regulation text rather than describing it in commentary. One trade group commenter suggested that the Bureau expand the description of personal representative to encompass anyone that a debt collector ''has reason to believe'' is authorized to act on behalf of the deceased consumer's estate. Another trade group commenter recommended incorporating a reference to State law in proposed § 1006.6(a)(4) because the commenter believed that the term personal representative would not accommodate States that use different language to describe such individuals. Similarly, an industry commenter suggested that the Bureau should expand proposed § 1006.6(a)(4) by adding several terms that might refer to individuals handling a deceased consumer's estate.

A group of consumer advocates stated that the description of the term personal representative would be overly broad unless the Bureau limited it to individuals ''authorized under State probate or estate law'' to act on behalf of the deceased consumer's estate. For example, these commenters explained that many people might dispose of a deceased consumer's assets extrajudicially by selling or donating personal possessions and that such people should not be considered personal representatives.

As described in the proposal and in the FTC's Policy Statement on Decedent Debt, the ability to resolve the debts of estates outside of the formal probate process through informal processes benefits consumers and debt collectors.[162] If a debt collector does not communicate with an estate because no executor or administrator exists, the debt collector might force the estate into probate, which could substantially burden the resources of the estate and the deceased consumer's heirs or beneficiaries. These burdens may be particularly acute for small estates and for individuals of limited means. Probate also adds costs and delays for debt collectors. Accordingly, the Bureau is finalizing § 1006.6(a)(4) and its commentary largely as proposed.

The Bureau finds that certain changes requested by commenters are unnecessary. First, it is unnecessary to incorporate comment 6(a)(4)–1, which describes other persons authorized to act on behalf of the deceased consumer's estate, into the regulation text. The commentary to Regulation F is issued under the same authority as the corresponding provisions of the regulation and has been adopted in accordance with the notice-and-comment procedures of the Administrative Procedure Act (APA).[163] Second, the Bureau declines to expand the description of personal representative to encompass anyone that a debt collector ''has reason to believe'' is authorized to act on behalf of the deceased consumer's estate. This revision is unnecessary because, as the FTC explained, debt collectors have a variety of tools available to locate persons authorized to act on behalf of the deceased consumer's estate, including public record searches and location communications, which are discussed in the section-by-section analysis of final § 1006.10.[164] Furthermore, such a standard would be inconsistent with the FDCPA's treatment of the other persons included under section 805(d)'s definition of consumer. Finally, commenters are mistaken in asserting that proposed § 1006.6(a)(4) and comment 6(a)(4)–1 failed to accommodate State laws that use terms other than personal representative. As comment 6(a)(4)–1 explained, the proposal would have included anyone who performs the functions of an executor, administrator, or personal representative, and does not require that such persons be identified by a specific term in State law, such as personal representative. Thus, an explicit reference to State law is not necessary.

In response to consumer advocates' concern that the proposed definition of personal representative was too broad, the Bureau revises comment 6(a)(4)–1 to clarify the description of persons who dispose of the deceased consumer's assets extrajudicially. The Bureau understands that, although many individuals might sell or dispose of a deceased consumer's property extrajudicially, these individuals would not necessarily ''be authorized to act on behalf of the deceased consumer's estate,'' as the commentary requires. The Bureau is also unaware of any attempts by debt collectors to interpret the FTC's Policy Statement on Decedent Debt in such a manner. Nevertheless, to increase clarity, final comment 6(a)(4)–1 refers to ''financial assets or other assets of monetary value'' in describing such individuals.

For the reasons discussed above, the Bureau is finalizing § 1006.6(a)(4), which defines the term consumer for purposes of § 1006.6 to include executors and administrators. Final comment 6(a)(4)–1 clarifies that the

[159] *Id.* at 44918 n.29 (explaining that Congress created an omnibus definition for ''spouse'' to apply in determining the meaning of any Act of Congress, and ''[t]he only court to address whether a surviving spouse is a 'spouse' within the omnibus definition held that a surviving spouse remains a 'spouse' in determining the meaning of any Act of Congress'').

[160] 15 U.S.C. 1692c(d).

[161] *See* 84 FR 23274, 23293–94 (May 21, 2019). The Bureau adapted this phrasing from Regulation Z and explained that it encompassed the same individuals as those recognized by the FTC's Policy Statement on Decedent Debt (*i.e.,* persons with the ''authority to pay the decedent's debts from the assets of the decedent's estate''). *See* 12 CFR 1026.11(c), comment 11(c)–1; FTC Policy Statement on Decedent Debt, *supra* note 157, at 44918.

[162] *See* 84 FR 23274, 23294 (May 21, 2019).

[163] 5 U.S.C. 551 *et seq.,* 701 *et seq.*

[164] *See* FTC Policy Statement on Decedent Debt, *supra* note 157, at 44919–20.

terms executor or administrator include the personal representative of the consumer's estate. A personal representative is any person who is authorized to act on behalf of the deceased consumer's estate. Persons with such authority may include personal representatives under the informal probate and summary administration procedures of many States, persons appointed as universal successors, persons who sign declarations or affidavits to effectuate the transfer of estate assets, and persons who dispose of the deceased consumer's financial assets or other assets of monetary value extrajudicially.

6(a)(5)

The Bureau proposed to interpret FDCPA section 805(d)'s definition of the term consumer to include confirmed successors in interest, as defined in Regulation X, 12 CFR 1024.31, and Regulation Z, 12 CFR 1026.2(a)(27)(ii).[165] As the Bureau has previously explained, while many mortgage servicers are not subject to the FDCPA, mortgage servicers that acquired a mortgage loan at the time that it was in default may be subject to the FDCPA with respect to that mortgage loan.[166] As discussed in the proposal,[167] a successor in interest under those regulations is, in general, a person to whom an ownership interest either in a property securing a mortgage loan subject to subpart C of Regulation X, or in a dwelling securing a closed-end consumer credit transaction under Regulation Z is transferred under specified circumstances including, for example, after a consumer's death or as part of a divorce.[168] A confirmed successor in interest, in turn, means a successor in interest once a mortgage servicer has confirmed the successor in interest's identity and ownership interest in the property that secures the mortgage loan [169] or in the dwelling.[170] The Bureau proposed to include such persons in the definition of consumer under § 1006.6 because, given their relationship to the individual who owes or allegedly owes the debt, confirmed successors in interest are—like the narrow categories of persons enumerated in FDCPA section 805(d)—the type of individuals with whom a debt collector needs to communicate about the debt.[171]

One industry commenter stated that the Bureau cannot include a confirmed successor in interest in implementing FDCPA section 805(d)'s definition of consumer because the Bureau lacks authority to include persons not contemplated by Congress. The commenter also questioned how the Bureau expects a debt collector to become aware of the confirmed successor in interest. One trade group commenter identified both benefits and risks to the proposal, including the risk presented by failing to have adequate policies and procedures in place to confirm the successor in interest.

Another industry commenter stated that it identified no risk to permitting communications between a debt collector and a confirmed successor in interest, and that it supported the Bureau's proposal to include a confirmed successor in interest in § 1006.6(a)'s definition of consumer on the basis that an individual with an ownership interest in a particular asset will desire open communication regarding the debt. A group of consumer advocates also supported proposed § 1006.6(a)(5) as ensuring consistent communications with surviving relatives regarding a mortgage on a home under Regulations X and Z. The commenter requested that, to avoid expanding communications unnecessarily to include the collection of other unrelated debt that the successor in interest may not have authority to manage, the Bureau clarify that an individual who qualifies as a confirmed successor in interest for one debt (*e.g.,* a home mortgage) is not a confirmed successor in interest for other types of debt (*e.g.,* a credit card debt) and that communications with such an individual must be limited to the mortgage loan that qualified the individual to be confirmed as a successor in interest.

The Bureau disagrees that it lacks authority to include a confirmed successor in interest in implementing FDCPA section 805(d)'s definition of consumer because, as the Bureau explained in the Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (2016 Servicing Final Rule),[172] and the concurrently issued FDCPA interpretive rule (2016 FDCPA Interpretive Rule),[173] the word ''includes'' in FDCPA section 805(d) indicates that section 805(d) is an exemplary, rather than an exhaustive, list of the categories of persons who are consumers for purposes of FDCPA section 805. The Bureau explained that FDCPA section 805 recognizes the importance of permitting debt collectors to communicate with a narrow category of persons other than the individual who owes or allegedly owes the debt who, by virtue of their relationship to that individual, may need to communicate with the debt collector in connection with the collection of the debt. The Bureau further explained that, given their relationship to the person who owes or allegedly owes the debt, confirmed successors in interest are—like the narrow categories of persons enumerated in FDCPA section 805(d)—the type of persons with whom a debt collector needs to communicate about the debt. The Bureau therefore interpreted the term consumer for purposes of FDCPA section 805 to include a confirmed successor in interest as that term is defined in Regulation X, 12 CFR 1024.31, and Regulation Z, 12 CFR 1026.2(a)(27)(ii).[174]

In response to the industry commenter's question regarding how the Bureau expects a debt collector to become aware of a successor in interest, the Bureau notes that Regulation X § 1024.38(b)(1)(vi) and comment 38(b)(1)(vi)–1 clarify that a mortgage servicer is not required to conduct a search for potential successors in interest if the mortgage servicer has not received actual notice of their existence.[175] Comment 38(b)(1)(vi)–1 further explains that a mortgage servicer may be notified of the existence of a potential successor in interest in a variety of ways. The comment provides a non-exclusive list of examples of ways in which a mortgage servicer could be notified of the existence of a potential successor in interest, including that a person could indicate that there has been a transfer of ownership or of an ownership interest in the property or that a borrower has been divorced, legally separated, or died, or a person other than a borrower could submit a loss mitigation application. The comment also explains that a mortgage servicer must maintain policies and procedures reasonably designed to ensure that the mortgage servicer can retain this information and promptly facilitate communication with potential successors in interest when a mortgage servicer is notified of their existence.[176] Nothing in this final rule is intended to

[165] 12 CFR 1024.31, 1026.2(a)(27)(ii).

[166] 81 FR 71977, 71978 (Oct. 19, 2016).

[167] 84 FR 23274, 23294–95 (May 21, 2019).

[168] *See* 12 CFR 1024.31; 1026.2(a)(27)(i).

[169] 12 CFR 1024.31.

[170] 12 CFR 1026.2(a)(27)(ii).

[171] 84 FR 23274, 23295 (May 21, 2019).

[172] 81 FR 72160 (Oct. 19, 2016).

[173] 81 FR 71977 (Oct. 19, 2016).

[174] *Id.* at 71979; 81 FR 72160, 72181 (Oct. 19, 2016).

[175] 12 CFR 1024.38(b)(1)(vi); comment 38(b)(1)(vi)–1.

[176] 81 FR 72160, 72211 (Oct. 19, 2016).

alter the successor in interest provisions in Regulations X and Z or to impose additional requirements.

In response to the request from a group of consumer advocates for further clarification, the Bureau determines that the text of proposed § 1006.6(a)(5) was sufficiently clear that a person who meets the definition of a confirmed successor in interest under § 1006.6(a)(5) is a confirmed successor in interest with respect to a property securing a mortgage loan or a dwelling securing a closed-end consumer credit transaction as described above, and that such person is not also a confirmed successor in interest for other purposes. As indicated by § 1006.6(a)(5)'s specific citations to Regulations X and Z, a successor in interest is a person to whom an ownership interest either in a property securing a mortgage loan subject to subpart C of Regulation X, or in a dwelling securing a closed-end consumer credit transaction under Regulation Z, is transferred, provided that the transfer meets one of several enumerated conditions.[177] The Bureau therefore declines to revise the proposed regulation text as requested.

For these reasons, and consistent with the 2016 Servicing Final Rule and FDCPA Interpretive Rule, the Bureau is finalizing § 1006.6(a)(5) as proposed with technical revisions as an interpretation of FDCPA section 805(d). Final § 1006.6(a)(5) provides that, for purposes of § 1006.6, the term consumer includes a confirmed successor in interest, as defined in Regulation X, 12 CFR 1024.31, or Regulation Z, 12 CFR 1026.2(a)(27)(ii).

6(b) Communications With a Consumer—In General

FDCPA section 805(a) restricts how a debt collector may communicate with a consumer in connection with the collection of any debt and provides certain exceptions to these prohibitions.[178] The Bureau proposed § 1006.6(b) to implement and interpret FDCPA section 805(a) to specify circumstances in which a debt collector is prohibited from communicating with a consumer in connection with the collection of any debt, and to interpret FDCPA sections 806 and 808 to prohibit a debt collector from attempting to communicate with a consumer if FDCPA section 805(a) would prohibit the debt collector from communicating with the consumer.[179] For the reasons discussed below, the Bureau is adopting § 1006.6(b) generally as proposed but with certain revisions designed principally to address commenters' requests for clarification in the commentary to proposed § 1006.6(b).[180]

Attempts To Communicate

The Bureau proposed to clarify in § 1006.6(b) that a debt collector is prohibited from attempting to communicate with a consumer in the same circumstances in which FDCPA section 805(a) prohibits the debt collector from communicating with the consumer. The phrase attempt to communicate[181] thus appeared throughout proposed § 1006.6(b)(1) through (4).[182] One consumer commenter supported the Bureau's proposal to include attempts to communicate within the prohibitions proposed in § 1006.6(b) on the basis that the attempt to communicate at the inconvenient place and time is, in fact, a concrete harm. A group of consumer advocates supported the addition as necessary if the Bureau were to finalize proposed § 1006.2(j) to allow limited-content messages, and as especially important to prevent debt collectors from sending limited-content messages after a cease communication request or refusal to pay from a consumer pursuant to proposed § 1006.6(c). One industry commenter did not oppose the Bureau's proposal to include attempts to communicate within the prohibitions under § 1006.6(b) but questioned the Bureau's reliance on FDCPA sections 806 and 808 to achieve that result on the basis that the Bureau would be adding to the conduct that is a violation of section 808. Instead, this commenter suggested the Bureau rely only on interpretations of FDCPA sections 805(a) and 806.

After considering the comments, the Bureau is finalizing § 1006.6(b) as proposed to limit attempts to communicate as well as communications based on interpretations of FDCPA sections 806 and 808. FDCPA section 806 prohibits a debt collector from engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.[183] Specifically, FDCPA section 806(5) provides that causing a telephone to ring repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number is an example of conduct the natural consequence of which is to harass, oppress, or abuse. FDCPA section 806(5) thus recognizes that telephone calls may have the natural consequence of harassment, oppression, or abuse if the consumer answers the telephone call or even if no conversation ensues. A consumer who hears a telephone ringing at an inconvenient time or place but who does not answer it may experience the natural consequence of harassment from the telephone ringing in much the same way as a consumer who answers and speaks to the debt collector on the telephone. For this reason, the Bureau adopts its interpretation of FDCPA section 806 as prohibiting a debt collector from attempting to communicate at times when and places where a communication would be prohibited as inconvenient.

FDCPA section 808 prohibits a debt collector from using unfair or unconscionable means to collect or attempt to collect any debt.[184] A debt collector who places a telephone call without any legitimate purpose may injure persons at the called number even if the call goes unanswered (and, therefore, is not a communication), and thus may be engaging in a prohibited unfair or unconscionable act under FDCPA section 808. Additionally, section 808 targets practices that pressure a consumer to pay debts the consumer might not otherwise have paid. A debt collector's attempts to communicate at a time when or a place where a communication would be prohibited could pressure the consumer to pay the debt to avoid further intrusions on the consumer's privacy, and the Bureau interprets such conduct as unfair or unconscionable under FDCPA section 808. In response to the industry commenter's suggestion that the Bureau's interpretation to include attempts to communicate within the prohibitions under § 1006.6(b) not rely on FDCPA section 808, the Bureau

[177] *See* 12 CFR 1024.31; 1026.2(a)(27)(i).

[178] 15 U.S.C. 1692c(a). Specifically, FDCPA section 805(a)(1) prohibits certain communications at unusual or inconvenient times and places, section 805(a)(2) prohibits certain communications with a consumer represented by an attorney, and section 805(a)(3) prohibits certain communications at a consumer's place of employment.

[179] 84 FR 23274, 23295–98 (May 21, 2019).

[180] The Bureau proposed introductory language to § 1006.6(b). The Bureau received no comments on that language and considers it largely repetitive of the provisions that follow in § 1006.6(b)(1) through (3). The Bureau therefore is not adopting that language in the final rule.

[181] As discussed in the section-by-section analysis of § 1006.2(b), the final rule defines an attempt to communicate as any act to initiate a communication or other contact about a debt with any person through any medium, including by soliciting a response from such person. For example, a debt collector who places a telephone call to discuss a consumer's debt that goes unanswered by the consumer has attempted to communicate with the consumer.

[182] The phrase attempt to communicate also appears in § 1006.14(h), as discussed below. *See* the section-by-section analysis of § 1006.14(h).

[183] 15 U.S.C. 1692d.

[184] 15 U.S.C. 1692f.

concludes that its interpretation is wholly consistent with FDCPA section 808's prohibition on a debt collector using unfair or unconscionable means to collect or attempt to collect a debt. The section itself states, ''without limiting the general application of the foregoing, the following conduct is a violation of this section,'' meaning that the general principles of unfairness and unconscionability under the FDCPA are not limited by the specific examples listed in FDCPA section 808(1) through (8). Consistent with that interpretation, and pursuant to its authority under FDCPA section 814(d) to write rules with respect to the collection of debts by debt collectors, the Bureau adopts its interpretation of FDCPA section 808 as prohibiting a debt collector from attempting to communicate at times when and places where a communication would be prohibited as inconvenient.

6(b)(1) Prohibitions Regarding Unusual or Inconvenient Times or Places

FDCPA section 805(a)(1) prohibits a debt collector from, among other things, communicating with a consumer in connection with the collection of any debt at any unusual time or place, or at a time or place that the debt collector knows or should know is inconvenient to the consumer, subject to certain exceptions. And, as discussed further in the section-by-section analysis of § 1006.6(b)(1)(i), FDCPA section 805(a)(1) establishes certain times that, in the absence of knowledge to the contrary, a debt collector shall assume are convenient for debt collection communications. The Bureau proposed § 1006.6(b)(1) and comment 6(b)(1)–1 to generally implement and interpret FDCPA section 805(a)(1)'s time and place restrictions, with proposed comment 6(b)(1)–1 clarifying how a debt collector knows or should know that a time or place is inconvenient based on information received from the consumer, *i.e.,* based on a consumer's designation of that time or place as inconvenient. Proposed § 1006.6(b)(1)(i) and its commentary specifically addressed time restrictions. Proposed § 1006.6(b)(1)(ii) specifically addressed place restrictions.[185]

A number of industry commenters supported the proposed prohibitions on contacting a consumer at an inconvenient time or place as consistent with the statutory prohibitions under FDCPA section 805(a), and one industry commenter stated that consumer requests must be respected when it comes to inconvenient times to communicate. Some industry commenters requested that the Bureau generally provide further clarity regarding inconvenience. For example, one industry commenter stated that FDCPA section 805(a) and proposed § 1006.6(b)(1) are very broad and leave too much room for interpretation and requested that the Bureau make § 1006.6(b)(1) more specific.

Other industry commenters went further to suggest that the Bureau not incorporate certain language from FDCPA section 805(a) in § 1006.6(b)(1) regarding inconvenient time and place. Some such commenters took issue with the Bureau's incorporation of the statutory language in FDCPA section 805(a) regarding a time or place ''which should be known to be inconvenient to the consumer,'' [186] with some commenters stating that ''should be known'' is too high a standard, creates unreasonable expectations, is unnecessary, and should be removed from the rule. One trade group commented specifically on the ''should know'' standard for times and suggested that the rule should omit any reference to consumer-designated inconvenient times and rely only on statutorily presumptive convenient times. Similarly, one industry commenter suggested that, because FDCPA section 805(a)(1) provides presumptively convenient hours of contact (*i.e.,* after 8:00 a.m. and before 9:00 p.m.), further limiting this timeframe by adopting a rule that would permit a consumer to also designate inconvenient times that a debt collector ''should know'' are inconvenient would unduly limit the ability of a debt collector to reach a consumer to discuss the account. Another industry commenter stated that the requirement to keep track of what times are inconvenient to a consumer will increase costs to debt collectors. With respect to place, one industry commenter stated that, given the difficulties presented by mobile technology, the Bureau should remove the reference to inconvenient place from the rule altogether.[187]

The Bureau recognizes that the statutory language under FDCPA section 805(a) is broad and, to implement the flexibility afforded under the statute, proposed to incorporate various examples through commentary to facilitate debt collector compliance. FDCPA section 805(a) specifically states that a debt collector may not communicate with a consumer in connection with the collection of any debt at any unusual time or place or a time or place ''known or which should be known'' to be inconvenient to the consumer.[188] Given this statutory provision, the Bureau declines commenters' requests to omit the ''should be known'' standard from § 1006.6(b)(1). The Bureau also notes that any costs of coming into compliance to record and respect a consumer's designations of inconvenient times (or places) are not a result of the Bureau's adopting § 1006.6(b)(1), but rather arise from compliance with FDCPA section 805(a). For the same reason, the Bureau declines to rely only on the statutorily prescribed presumptively convenient times, as suggested by one commenter. Just as the presumptively convenient times are statutorily prescribed, so is the ability for a consumer to designate additional convenient (or inconvenient) times for debt collection communications.[189] Nevertheless, as explained in detail below, the Bureau is finalizing comments 6(b)(1)–1 and –2 to include various additional illustrations in response to commenters' requests for clarity. Accordingly, the Bureau adopts a flexible approach while clarifying the contours of permissible and prohibited debt collector communications with a consumer to assist debt collectors in complying with the final rule.

One trade group commenter suggested that the statutory prohibition against communicating during inconvenient times and places shift altogether from a one-size-fits-all paradigm suited for 1977 when the FDCPA was enacted to a presumption that consumers can control when they would like to be contacted. And another trade group commenter encouraged the Bureau to adopt a reasonableness standard to prevent consumers from designating all, or almost all, times as inconvenient, or to require consumers to answer certain questions to trigger the protections on

[185] In this section-by-section analysis, the Bureau addresses feedback regarding inconvenience and the ''know or should know'' standard generally, or that focused on proposed comment 6(b)(1)–1 regarding a consumer's designation of time or place as inconvenient. To the extent that comments focused on specific aspects of either the proposed time restrictions or the proposed place restrictions, those comments are addressed in the section-by-section analysis of § 1006.6(b)(1)(i) or (ii), respectively.

[186] 15 U.S.C. 1692c(a)(1).

[187] For further discussion of communications or attempts to communicate at unusual or inconvenient places, see the section-by-section analysis of § 1006.6(b)(1)(ii).

[188] 15 U.S.C. 1692c(a)(1).

[189] Therefore, unless an exception in FDCPA section 805(a) or final § 1006.6(b)(4) applies, a debt collector is required to abide by a consumer's designation of inconvenient times, even if those times are presumptively convenient according to the statute.

communications at inconvenient times or places.

The statutory standard under FDCPA section 805(a)(1) is one of inconvenience. Additionally, the statute does not limit a consumer's ability to invoke the protections afforded under FDCPA section 805(a)(1) based on a reasonableness standard, and therefore it would not be appropriate for this rule to do so. Nor would such a limitation comport with the protections afforded a consumer under FDCPA section 805(c), which requires a debt collector to cease further communications with the consumer upon the consumer's written notification, or under FDCPA section 806, which prohibits a debt collector from engaging in conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.

For all of these reasons, the Bureau is finalizing the general standard in § 1006.6(b)(1) as proposed to implement and interpret FDCPA section 805(a)(1).

Consumer Designation of Inconvenient Times or Places

The Bureau proposed comment 6(b)(1)–1 to provide general interpretations and illustrations of the time and place restrictions in § 1006.6(b)(1), including how a debt collector knows or should know that a time or place is inconvenient to a consumer. The Bureau proposed this comment to clarify one aspect of the knowledge standard for time and place, that is, that a debt collector knows or should know that a time or place is inconvenient if the consumer designates it as such. Proposed comment 6(b)(1)–1 provided general interpretations and illustrations regarding consumer designation, including that a debt collector knows or should know that a time or place is inconvenient even if the consumer does not use the word ''inconvenient.'' For the reasons discussed below, the Bureau is finalizing comment 6(b)(1)–1 with revisions to address feedback.[190]

Information transfer. One trade group commenter read the proposal as imposing a substantial information transfer requirement on a debt collector and worried that it would require debt collectors to rely upon the previous holder of the debt for details that can be excessively subjective. Some industry commenters expressed concerns regarding the difficulty associated with a creditor transferring information about a consumer's inconvenience designations to a debt collector. Another industry commenter stated that proposed comment 6(b)(1)–1 neglected to account for the significant amounts of information that may be available to a debt collector and whether the debt collector is bound to some duty of inquiry with respect to such information.

The proposal would not have required any transfer of information regarding a consumer's inconvenience designations from a creditor or previous debt collector to the current debt collector, and nor does this final rule. However, to illustrate a situation in which a debt collector knows or should know that specific times are inconvenient to a consumer based on recent notes in a file from the creditor placing the debt for collection, the Bureau includes a new example in final comment 6(b)(1)–1.i.

Specificity of designation. As noted above, the Bureau proposed that, even if a consumer does not use the word ''inconvenient'' to notify the debt collector, the debt collector may nevertheless know, or should know, based on the facts and circumstances, that a time or place is inconvenient to the consumer. Some industry commenters suggested shifting the onus to the consumer to utter specific words or undertake certain actions to trigger the FDCPA's communication protections. Two industry commenters suggested that it would be reasonable to require a consumer to use some specific language to put a debt collector on notice that contact at a certain time or place is inconvenient. One trade group commenter stated that the rule should require, as a trigger to compliance, consumers to use words that reasonably identify for a debt collector the inconvenient times during which the debt collector should refrain from contact.

One consumer commenter supported the proposal not to require that the consumer utter specific words to invoke the protections under FDCPA section 805(a) on the basis that how a consumer expresses what is convenient or inconvenient should not be restricted to approved words as an excuse for a debt collector's noncompliance.

The Bureau declines to restrict how a consumer may designate a time or place as inconvenient. The statute does not prescribe any specific actions or require precise responses or utterances on behalf of the consumer to invoke these communications protections, and nor does this final rule impose such requirements. The Bureau determines that a flexible approach is necessary when it comes to communications, which by their very nature are dynamic, depend upon the specific circumstances, and differ from consumer to consumer. Such fluid communications cannot be scripted, nor can every permutation be anticipated. The Bureau therefore is finalizing its proposed interpretation of FDCPA section 805(a)(1), which refers to what is ''inconvenient to the consumer,'' without specifying that a consumer must designate communications as inconvenient using the word ''inconvenient.''

One industry commenter stated the word ''inconvenient'' should not be a tool for a consumer to prevent communication with a debt collector. However, FDCPA section 805(a)(1) explicitly recognizes that communications must not occur at a time or place known or which should be known to be inconvenient to the consumer. The Bureau notes that a consumer also has the option under FDCPA section 805(c) to notify a debt collector to cease communications with the consumer altogether. Therefore, it serves not only consumers but also debt collectors for communications to occur at times and places that are convenient to the consumer, and to avoid requiring consumers to perform specific actions or require precise responses or utterances to achieve the protections under FDCPA section 805(a), lest consumers more simply resort to notifying debt collectors under FDCPA section 805(c) to cease further communication.

Some industry commenters asked the Bureau to clarify how debt collectors may appropriately determine a time or place is inconvenient if a consumer gives unclear, vague, or ambiguous instructions, or insufficient information for the debt collector to identify when or where the consumer does not want to be contacted. Some trade group commenters suggested that a debt collector be permitted to ask a consumer follow-up questions to obtain more specific information to honor the consumer's request. Two trade group commenters suggested that, unless a consumer provides readily understandable instructions as to the scope of any identified inconvenient time or place, a debt collector should be permitted to continue contacting the consumer as if no designation had been made.

The Bureau understands that a consumer's articulation of inconvenience sometimes may require further clarification. Because the standard in FDCPA section 805(a)(1) is

[190] While proposed comments 6(b)(1)–1.ii and .iv also addressed consumer-initiated communications at times previously designated as inconvenient, for organizational purposes, the Bureau is finalizing those examples under new comment 6(b)(1)–2.i and .ii and accordingly discusses feedback about those comments in the section-by-section analysis of comment 6(b)(1)–2 below.

based on what is ''inconvenient to the consumer,'' [191] the consumer is the best source of information for the debt collector to learn when is an inconvenient time or where is an inconvenient place. To clarify this point and to provide debt collectors guidance in circumstances in which the debt collector needs additional clarity or information from the consumer, the Bureau is revising comment 6(b)(1)–1 to specifically state that the debt collector may ask follow-up questions regarding whether a time or place is convenient to clarify statements by the consumer. The Bureau determines that this approach will allow consumers to exercise their right to limit communications at inconvenient times and places while decreasing uncertainty for debt collectors. Accordingly, the Bureau revises the example proposed as comment 6(b)(1)–1.i, now finalized as comment 6(b)(1)–1.ii, to illustrate such an exchange between a debt collector and a consumer.

Other industry commenters requested that the Bureau clarify how the rule applies if a consumer answers a telephone call from a debt collector, states that the consumer is ''busy right now'' or ''cannot talk right now,'' and immediately hangs up the telephone. If a debt collector does not have an opportunity to ask a consumer follow-up questions because the consumer has, for example, abruptly ended a telephone call, the standards regarding telephone call frequencies in § 1006.14(b)(2) may be instructive in assisting a debt collector in determining when the debt collector may call the consumer again.[192] Although § 1006.6(b)(1) would not require a debt collector to construe a consumer's statement that the consumer is ''busy right now'' or ''cannot talk right now'' without anything further to mean that the consumer is generally designating that time or place as inconvenient for future communications, the statement does indicate that the time or place is inconvenient for current communications.

Inconvenient places. As part of proposed comment 6(b)(1)–1, the Bureau included an example in proposed comment 6(b)(1)–1.iii to illustrate when a debt collector knows or should know that a place is inconvenient to a consumer. Proposed comment 6(b)(1)–1.iii assumed that a consumer tells a debt collector not to communicate with the consumer at school. Based on these facts, proposed comment 6(b)(1)–1.iii explained, the debt collector knows or should know that communications to the consumer at school are inconvenient and, thereafter, the debt collector must not communicate or attempt to communicate with the consumer at that place. The Bureau received many comments from industry asking how, in light of technology such as mobile telephones, which consumers can take with them everywhere, a debt collector could be sure to avoid contacting a consumer at an inconvenient place. Industry commenters requested that the Bureau either remove the example or revise it to include specific times or other information from the consumer that would enable the debt collector to know when the consumer is at the inconvenient place, suggesting that, without such information, the debt collector would have to make assumptions about the consumer's whereabouts.

To address these concerns, the Bureau is revising the example in comment 6(b)(1)–1.iii. Final comment 6(b)(1)–1.iii illustrates that once a debt collector knows or should know that communications to a place are inconvenient to a consumer, unless the consumer otherwise informs the debt collector that the place is no longer inconvenient, § 1006.6(b)(1)(ii) prohibits the debt collector from communicating or attempting to communicate with the consumer at that place, including by sending mail to the address associated with that place and by placing calls to the landline telephone number at that place. And in response to commenters' request for further clarification regarding when a consumer is at an inconvenient place, consistent with the addition to comment 6(b)(1)–1 discussed above that a debt collector may ask follow-up questions regarding whether a time or place is convenient to clarify statements by a consumer, a debt collector may ask a consumer to identify times associated with an inconvenient place. For further discussion regarding communications or attempts to communicate at an inconvenient place, see the section-by-section analysis of § 1006.6(b)(1)(ii).

Duty To Inquire

The Bureau did not propose to require, but requested comment on whether to require, a debt collector to ask a consumer at the outset of all debt collection communications whether the time or place is convenient to the consumer. An academic commenter as well as a group of consumer advocates supported such a requirement, with the group of consumer advocates stating that asking a consumer whether the time or place is convenient is a best practice for telephone calls or in-person communications and requesting the Bureau adopt that approach. A number of industry commenters disagreed, stating that such a requirement would be impractical and cumbersome as part of a lengthy telephone call introduction that already requires verifying the consumer's identity and providing various disclosures. One trade group commenter suggested that such a long introduction would annoy the consumer, and another stated that the natural reaction to receiving a call from an unknown individual who inquires whether the call is convenient would be to respond that the call is inconvenient.

The Bureau agrees that it would be impractical to require debt collectors to ask consumers at the outset of every debt collection communication whether the time or place is convenient. A debt collector, of course, is free to ask this question and may find that it is a natural question that arises as part of a communication with a consumer. However, the Bureau does not believe that such a requirement is necessary or warranted to implement FDCPA section 805(a)(1).

For the reasons discussed above, the Bureau is finalizing comment 6(b)(1)–1 regarding a consumer's designation of an inconvenient time or place to provide that a debt collector knows or should know that a time or place is inconvenient to a consumer if the consumer uses the word ''inconvenient'' to notify the debt collector. In addition, depending on the facts and circumstances, the debt collector knows or should know that a time or place is inconvenient even if the consumer does not specifically state to the debt collector that a time or place is ''inconvenient.'' Final comment 6(b)(1)–1 also provides that a debt collector may ask follow-up questions regarding whether a time or place is convenient to clarify statements by the consumer and, as discussed above, includes three illustrative examples.

Consumer-Initiated Communications at Previously Designated Inconvenient Times or Places

As part of proposed comment 6(b)(1)–1, the Bureau proposed to clarify that, if a consumer initiates a communication with a debt collector at a time or from a place that the consumer previously designated as inconvenient, the debt

[191] 15 U.S.C. 1692c(a)(1).

[192] See the section-by-section analysis of § 1006.14(b)(2) presuming compliance with § 1006.14(b)(1) if a debt collector places a telephone call to a particular person in connection with the collection of a particular debt not within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt.

collector may respond once; but thereafter, the debt collector must not communicate or attempt to communicate further with the consumer at that time or place until the consumer conveys that the time or place is no longer inconvenient. The Bureau also proposed two illustrative examples. The Bureau is finalizing this aspect of proposed comment 6(b)(1)–1 as comment 6(b)(1)–2, with revisions and additional examples in response to feedback as discussed below.

One consumer commenter supported the proposal's approach to permit one reply as protective of consumers and a fair compromise to debt collectors. A number of industry commenters requested clarification regarding the scope of a debt collector's one permitted reply if a consumer initiates a communication with a debt collector at a time or from a place that the consumer previously designated as inconvenient. Industry commenters suggested that, if a consumer contacts a debt collector during a time that the consumer previously designated as inconvenient, the debt collector either should be able to ask if the consumer has revoked the inconvenience designation or should be able to assume that the consumer has done so. One trade group commenter requested that the Bureau clarify whether a debt collector's unanswered call to a consumer would constitute the debt collector's one reply.

In response to commenters' suggestions, the Bureau notes that a debt collector is not prohibited from inquiring in the one permitted reply whether the consumer is revoking the inconvenient time or place designation. However, the consumer's act of simply initiating a communication does not revoke the inconvenient time or place designation. As comment 6(b)(1)–2 explains, after a debt collector's one permitted response, § 1006.6(b)(1) prohibits the debt collector from communicating or attempting to communicate further with the consumer at that time or place until the consumer conveys that the time or place is no longer inconvenient, unless an exception in § 1006.6(b)(4) applies. Additionally, in response to the trade group commenter's request for further clarity, the Bureau determines that a debt collector's unanswered call does constitute the debt collector's one permitted reply as described under comment 6(b)(1)–1. However, nothing prohibits the debt collector from communicating or attempting to communicate at times or places that are not inconvenient to the consumer, including to ask the consumer if the time or place previously designated by the consumer remains inconvenient.

The final rule further clarifies the scope of a debt collector's one permitted reply by specifying in final comment 6(b)(1)–2 that the debt collector's one reply must be through the same medium of communication used by the consumer to initiate the communication. For example, if a consumer sends a debt collector a text message at a time the consumer previously designated as inconvenient, the debt collector may reply once by text message; but unless the consumer provided prior consent to receive a telephone call, for example, the debt collector may not reply once by placing a telephone call to the consumer. The Bureau finds that a consumer-initiated communication is, by its nature, not inconvenient to the consumer, and that includes the medium of communication used by the consumer to initiate that communication. Because the consumer initiated the communication, the debt collector neither knows nor should know that responding to that communication through the same medium of communication is inconvenient to the consumer.[193] Additionally, if a consumer designates a period of time as inconvenient and subsequently initiates a communication with a debt collector during that time, although the debt collector may wait for the inconvenient time period to expire before contacting the consumer, final comment 6(b)(1)–2.i and .ii, discussed below, illustrate that the debt collector may respond once during the inconvenient time period on that day.

Accordingly, final comment 6(b)(1)–2 states that, if a consumer initiates a communication with a debt collector at a time or from a place that the consumer previously designated as inconvenient, the debt collector may respond once at that time or place through the same medium of communication used by the consumer.[194] After that response, § 1006.6(b)(1) prohibits the debt collector from communicating or attempting to communicate further with the consumer at that time or place until the consumer conveys that the time or place is no longer inconvenient, unless an exception in § 1006.6(b)(4) applies. Comment 6(b)(1)–2 also includes four examples illustrating how a debt collector may comply with § 1006.6(b)(1) if a consumer initiates a communication with a debt collector at a time or from a place that the consumer previously designated as inconvenient, with the third example focused on websites and mobile applications, and the fourth example focused on automated replies.

The first two examples under comment 6(b)(1)–2 were proposed as comments 6(b)(1)–1.ii and .iv, respectively. The Bureau is revising these examples consistent with the discussion above that a debt collector's one permitted reply must be through the same medium of communication used by the consumer in initiating the communication, and is finalizing them as comments 6(b)(1)–2.i and .ii. These two examples illustrate a debt collector responding once through the same medium of communication used by the consumer before the expiration of the consumer's otherwise inconvenient time or place designation.

The third example under comment 6(b)(1)–2.iii relates to websites and mobile applications. As discussed in the section-by-section analysis of final § 1006.2(b) and (d), some industry commenters asserted that the proposed definitions of attempt to communicate and communicate or communication would include information provided to consumers who visit or navigate a debt collector's website or online portal.[195] Such information may constitute an attempt to communicate or a communication depending on its content. However, as the example in comment 6(b)(1)–2.iii illustrates, when a consumer initiates a communication by navigating a debt collector's website or using a debt collector's mobile application at a time or from a place that the consumer previously designated as inconvenient, § 1006.6(b)(1) does not prohibit the debt collector from conveying information to the consumer about the debt through the website or mobile application. Accordingly, comment 6(b)(1)–2.iii provides clarity regarding websites and mobile applications.

The final example under comment 6(b)(1)–2.iv is focused on automated replies. The Bureau received a number of comments requesting that the Bureau clarify how § 1006.6(b)(1) applies to such replies. Specifically, several

[193] The Bureau notes, however, that some automated processes that would occur through different communication media, such as two-factor authentication, may be permissible because they are not attempts to communicate or communications if they are not about the debt. Alternatively, a consumer may provide prior consent to receive such communications, including, for example, providing prior consent to receive confirmation of payment by email or text message when making a payment on a debt collector's website at a time or from a place that the consumer previously designated as inconvenient.

[194] For more on medium of communication, see § 1006.14(h) and its associated commentary.

[195] Those comments are summarized in the section-by-section analyses of § 1006.2(b) and (d).

industry commenters expressed concern regarding the circumstance in which a consumer initiates an electronic communication, such as an email or text message, with a debt collector at a time or from a place that the consumer previously designated as inconvenient, and the debt collector's system generates an automated reply to confirm receipt of the consumer's message and inform the consumer when a response from the debt collector might be expected. Some industry commenters also expressed concern over an automated reply generated in response to a consumer-initiated communication received during the presumptively inconvenient times between 9:00 p.m. and 8:00 a.m., local time at the consumer's location. One trade group commenter suggested model language for an automated reply that would not meet the definitions of attempt to communicate or communication under § 1006.2(b) and (d).[196]

As discussed above, the Bureau finds that a consumer-initiated communication is, by its nature, not inconvenient to the consumer and that the debt collector may respond once, including by automated reply, through the same medium of communication used by the consumer. The Bureau is adopting comment 6(b)(1)–2.iv to clarify that, if a consumer initiates a communication by sending an email message at a time or from a place that the consumer previously designated as inconvenient or that is presumptively inconvenient, the debt collector is not prohibited from responding once, such as by sending a system-generated automated email reply.[197]

6(b)(1)(i)

FDCPA section 805(a)(1) provides, in relevant part, that a debt collector may not communicate with a consumer in connection with the collection of any debt at any unusual time, or at a time that the debt collector knows or should know is inconvenient to the consumer.[198] FDCPA section 805(a)(1) specifies that, in the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8:00 a.m. and before 9:00 p.m., local time at the consumer's location.

The Bureau proposed § 1006.6(b)(1)(i) to implement and interpret FDCPA section 805(a)(1)'s prohibition regarding unusual or inconvenient times.[199] The Bureau interpreted the language in FDCPA section 805(a)(1) that a debt collector shall assume that the convenient time for communicating with a consumer is after 8:00 a.m. and before 9:00 p.m. to mean that a time before 8:00 a.m. and after 9:00 p.m. local time at the consumer's location is inconvenient, unless the debt collector has knowledge of circumstances to the contrary. Comments regarding proposed § 1006.6(b)(1)(i) fell into three main categories, as discussed below.

Existing Violations of FDCPA Section 805(a)(1)

Several individual consumers noted that, notwithstanding the prohibition in FDCPA section 805(a)(1), they have received hateful and threatening debt collection calls before 8:00 a.m., after 9:00 p.m., and during all hours of the night. The Bureau notes that the FDCPA imposes a specific presumption against communicating with a consumer before 8:00 a.m. and after 9:00 p.m., local time at the consumer's location regardless of the content of the communication.[200] In the absence of knowledge of circumstances to the contrary, a debt collector's communications with a consumer before 8:00 a.m. and after 9:00 p.m. are inconvenient to the consumer and are prohibited under FDCPA section 805(a)(1) and final § 1006.6(b)(1)(i). Depending on the facts and circumstances, communications made at prohibited times in violation of § 1006.6(b)(1)(i) may also violate other provisions of the FDCPA or this final rule.

Inconvenient Times and Electronic Communications

The Bureau received several comments on the general application of § 1006.6(b)(1)(i)'s inconvenient time prohibition to electronic communications. A group of State Attorneys General supported applying § 1006.6(b)(1)(i) to electronic communications and agreed with the proposal to extend the FDCPA's limitation on permissible hours of communications to newer communication media including, but not limited to, email, text messaging, and social media. Many industry commenters, in contrast, expressed concern about the proposed approach. One industry commenter supported permitting debt collector communications by telephone call or text message during the presumptively convenient hours between 8:00 a.m. and 9:00 p.m., local time, as fair and reasonable, but requested that the Bureau exempt email and text messages from consumer-designated inconvenient time and place restrictions. Several industry commenters stated that, although a debt collector's telephone calls to a consumer should adhere to the inconvenient time restrictions, the Bureau should except email or text messages or both from any time restrictions, thereby permitting electronic messages to be sent by a debt collector to a consumer at any time. A number of these commenters suggested that electronic communications such as email messages are distinct in nature from other media of communication, as are the ways in which a consumer may determine whether to engage with such communications. One industry commenter suggested that requiring electronic messages to adhere to inconvenient time restrictions puts debt collectors at a competitive disadvantage because no other industry has such a restriction, while another industry commenter suggested that, because internet service providers limit the frequency of outgoing email messages, such communications should not be subject to any further restrictions, including the inconvenient time restrictions under proposed § 1006.6(b)(1)(i). This same industry commenter also suggested that the Bureau exclude email messages from the definition of ''communication'' in proposed § 1006.6(b)(1)(i). One trade group commenter suggested that the unsubscribe instructions in proposed § 1006.6(e) would sufficiently protect consumers, such that subjecting electronic communications to inconvenient time restrictions was unnecessary. Some industry commenters stated that the difficulty lies with technology and the inability of their software to time-stamp and track electronic communications, and with the associated costs of having to do so.

[196] As discussed in the section-by-section analyses of § 1006.2(b) and (d), other commenters suggested that the Bureau exclude automated replies from the definitions of attempt to communicate and communication. Those comments are addressed in the section-by-section analyses of § 1006.2(b) and (d).

[197] In response to comments concerned with an automated reply generated in response to a consumer-initiated communication received during the presumptively inconvenient times between 9:00 p.m. and 8:00 a.m., local time at the consumer's location, the Bureau believes that the consumer initiating a communication between those times may constitute the debt collector's ''knowledge of circumstances to the contrary'' under § 1006.6(b)(1)(i). *See* the section-by-section analysis of § 1006.6(b)(1)(i).

[198] 15 U.S.C. 1692c(a)(1).

[199] As discussed in the section-by-section analysis of § 1006.6(b), § 1006.6(b)(1)(i) also interprets FDCPA sections 806 and 808 to prohibit a debt collector from attempting to communicate with a consumer at a time when FDCPA section 805(a)(1) would prohibit the debt collector from communicating with the consumer.

[200] *See* 15 U.S.C. 1692c(a)(1).

The statutory requirement under FDCPA section 805(a)(1) broadly applies to all debt collection communications with a consumer, without distinguishing between communication media.[201] Consistent with the statute, the Bureau interprets FDCPA section 805(a)(1) to apply § 1006.6(b)(1)(i)'s inconvenient time prohibition to electronic communications and not just to telephone calls, for example, with the consumer.

In response to industry comments suggesting that the costs associated with compliance will be burdensome, although this final rule does not require electronic communications by debt collectors, it provides clarity for a debt collector who elects to send electronic communications to a consumer.

Decedent Debt Waiting Period

Although the Bureau did not propose to define a period after a consumer's death as an inconvenient time for communicating about the deceased consumer's debt with surviving spouses or parents (in the case of deceased minor consumers) or persons acting as executors, administrators, or personal representatives of a deceased consumer's estate, the Bureau requested comment on this topic.[202] The FTC declined to adopt such a waiting period in its Policy Statement on Decedent Debt because it did not have a sufficient record to establish the necessity of a waiting period or the optimal length of such a period. While the Bureau received some comments on this issue, it likewise does not have a sufficient basis to determine whether to impose such a waiting period or the proper duration of such a waiting period. Therefore, the Bureau declines to include a waiting period in the final rule.

For the reasons discussed above, the Bureau is finalizing § 1006.6(b)(1)(i) as proposed to provide that, except as provided in § 1006.6(b)(4), a debt collector must not communicate or attempt to communicate with a consumer in connection with the collection of any debt at any unusual time, or at a time that the debt collector knows or should know is inconvenient to the consumer. In the absence of the debt collector's knowledge of circumstances to the contrary, a time before 8:00 a.m. and after 9:00 p.m. local time at the consumer's location is inconvenient.

The Bureau proposed comment 6(b)(1)(i)–1 to clarify that, for purposes of determining the time of an electronic communication under § 1006.6(b)(1)(i), an electronic communication occurs when the debt collector sends it, not, for example, when the consumer receives or views it. Two trade group commenters agreed with the proposed interpretation. One consumer commenter also supported it but suggested that the time of receipt by the consumer should control instead. And a group of consumer advocates supported the proposed interpretation but requested that the Bureau further clarify that ''sending'' does not include scheduling a message for later delivery.

The Bureau proposed the clarification in comment 6(b)(1)(i)–1 to assist debt collectors who elect to send consumers electronic communications in complying with § 1006.6(b)(1)(i). As the Bureau stated in the proposal, ambiguity exists about whether, for purposes of FDCPA section 805(a)(1), an electronic communication occurs at the time of sending by the debt collector or at the time of receipt or viewing by the consumer. A debt collector can control the time at which it chooses to send communications, whereas it often would be impossible for a debt collector to determine when a consumer receives or views an electronic communication. The Bureau determines that a bright-line rule that clarifies that an electronic communication occurs when the debt collector sends it makes it possible for a debt collector to comply with the final rule. The Bureau also clarifies that sending for purposes of comment 6(b)(1)(i)–1 does not include scheduling a message at one time for delivery at a later time. For these reasons, the Bureau is finalizing comment 6(b)(1)(i)–1 as proposed, with minor revisions.

The Bureau also proposed comment 6(b)(1)(i)–2 to provide a safe harbor and illustrate how a debt collector could comply with proposed § 1006.6(b)(1)(i) and FDCPA section 805(a)(1) if the debt collector has conflicting or ambiguous information regarding a consumer's location, such as telephone numbers with area codes located in different time zones or a telephone number with an area code and a physical address that are inconsistent. The Bureau is finalizing comment 6(b)(1)(i)–2 largely as proposed, with certain clarifications in response to comments, as discussed below.

A group of consumer advocates supported proposed comment 6(b)(1)(i)–2 as a commonsense interpretation that will protect consumers and give helpful guidance to debt collectors. One consumer advocate suggested that the better course is to require debt collectors to determine whether a telephone number is a cellular or landline telephone. One trade group commenter supported the idea of a safe harbor but suggested revising it to protect debt collectors when they use the time period during which communications would be convenient in both locations as indicated by the zip code of the residence and the area code of the telephone.

One industry commenter stated that debt collectors have no practical way of knowing the local time for a consumer at any particular point in time, and that a debt collector would be required to keep track of the consumer's whereabouts to avoid communicating at inconvenient times. One industry commenter suggested that the Bureau amend the proposed commentary to permit a debt collector to communicate with a consumer at times that are convenient in any location in which the consumer might be located, or alternatively, that the debt collector should be responsible only for the area code, address of record, and locations explicitly communicated by the consumer. Several industry commenters stated that a debt collector should be permitted to rely on the address of record or last known physical address because, as one commenter explained, telephones are portable and the area code is no longer a reliable source of the consumer's location. Specifically, one trade group commenter requested that mortgage servicers be allowed to determine call times based on the single, established billing address.

The Bureau is adopting this safe harbor to facilitate a debt collector's compliance with § 1006.6(b)(1)(i) when the debt collector has conflicting or ambiguous information regarding a consumer's location. As proposed, comment 6(b)(1)(i)–2 stated that the safe harbor would apply if the debt collector is unable to determine the consumer's location. In response to the commenter that a debt collector would be required to keep track of a consumer's whereabouts, the Bureau revises this language to clarify that the safe harbor would apply if the debt collector has conflicting or ambiguous information

[201] While commenters raised questions regarding new communication media and § 1006.6(b)(1)(i)'s prohibition on communicating or attempting to communicate with a consumer at an inconvenient time, none requested clarification regarding mailed communications. The Bureau understands that a consumer's designation of a time as inconvenient under FDCPA section 805(a)(1) has not prevented debt collectors from sending communications by mail through the United States Postal Service. Unlike mail, the time at which an electronic communication, such as an email or text message, is sent generally correlates with the time of receipt. Therefore, § 1006.6(b)(1)(i)'s prohibition on communicating or attempting to communicate with a consumer at an inconvenient time generally does not apply to mail in the same manner as it does to electronic communications.

[202] *See* 84 FR 23274, 23296 (May 21, 2019).

regarding the consumer's location. A debt collector is not required to determine where the consumer actually is located when communicating or attempting to communicate with the consumer and knowledge that a telephone number is associated with a mobile telephone does not, without more, create conflicting or ambiguous information. A debt collector with conflicting information may know or should know that it is inconvenient to communicate or attempt to communicate with a consumer at a time outside of the presumptively convenient times (8:00 a.m. to 9:00 p.m.) in any of the time zones in which the consumer might be located. As the Bureau explained in the proposal, some debt collectors already have adopted this approach for determining convenient times to contact a consumer if the debt collector has conflicting location information for the consumer.

This safe harbor would apply in circumstances in which the debt collector does not have knowledge of the consumer's location and can rely only on information indicating where the consumer might be located. For example, this may arise in a debt collector's initial communication with a consumer. One consumer commenter reported continually receiving calls as early as 5:00 a.m. (local time at the consumer's location) because the debt collector relied only on the consumer's telephone number area code, while ignoring information from the consumer that the consumer was in fact in a different time zone. However, once the debt collector has information about the consumer's location, for example by asking the consumer in an initial communication or being told by the consumer in a subsequent communication, the debt collector would no longer have conflicting or ambiguous information regarding the consumer's location and would not need to rely on the safe harbor provided in comment 6(b)(1)(i)–2.

As finalized, comment 6(b)(1)(i)–2 states that, under § 1006.6(b)(1)(i), in the absence of a debt collector's knowledge of circumstances to the contrary, an inconvenient time for communicating with a consumer is before 8:00 a.m. and after 9:00 p.m. local time at the consumer's location. If a debt collector has conflicting or ambiguous information regarding a consumer's location, then, in the absence of knowledge of circumstances to the contrary, the debt collector complies with § 1006.6(b)(1)(i) if the debt collector communicates or attempts to communicate with the consumer at a time that would be convenient in all of the locations at which the debt collector's information indicates the consumer might be located. Comment 6(b)(1)(i)–2 also provides two examples of how a debt collector complies with § 1006.6(b)(1)(i).

6(b)(1)(ii)

FDCPA section 805(a)(1) provides, in relevant part, that a debt collector may not communicate with a consumer in connection with the collection of any debt at any unusual place, or at a place that the debt collector knows or should know is inconvenient to the consumer.[203] As proposed, § 1006.6(b)(1)(ii) would have implemented this prohibition and generally restated the statute, with only minor changes for clarity. The Bureau is finalizing § 1006.6(b)(1)(ii) as proposed.[204] Accordingly, § 1006.6(b)(1)(ii) states that except as provided in § 1006.6(b)(4), a debt collector must not communicate or attempt to communicate with a consumer in connection with the collection of any debt at any unusual place, or at a place that the debt collector knows or should know is inconvenient to the consumer.

Communications or Attempts To Communicate at Unusual and Inconvenient Places

The Bureau received many comments discussing the proposed approach to inconvenient places in response to proposed comment 6(b)(1)–1.iii asking how, in light of technology such as mobile telephones, which are not affixed to a particular place, a debt collector could be sure to avoid contacting a consumer at an inconvenient place.[205] With respect to unusual place, one industry commenter noted that, while the Bureau's proposal provided examples illustrating what may be considered ''inconvenient'' under the rule, the proposal did not provide examples illustrating what would constitute an ''unusual'' time or place under FDCPA section 805(a)(1). The commenter therefore requested the Bureau clarify what would be considered ''unusual,'' considering the extensive consumer use of mobile telephones and the mobile nature of consumers themselves. Another industry commenter suggested that the statutory language ''at any unusual . . . place'' be removed from § 1006.6(b)(1) based on the difficulties presented when a consumer could be at an ''unusual place'' (*e.g.,* a funeral), but without knowing where the consumer is, the debt collector calls the consumer's mobile telephone.

The Bureau recognizes that mobile technology has shifted how and where communications occur and may make it more difficult for a debt collector to know where a consumer is at the precise moment when the debt collector is communicating or attempting to communicate with the consumer. In this regard, the Bureau notes that the FDCPA does not require a debt collector to track a consumer's whereabouts; it prohibits communications with a consumer at any unusual place, or a place that the debt collector knows or should know is inconvenient to the consumer.

To further clarify how the FDCPA's prohibition regarding unusual and inconvenient places applies in the context of mobile technology, the Bureau is adopting new comment 6(b)(1)(ii)–1 to explain that some communication media, such as mailing addresses and landline telephone numbers, are associated with a place, whereas other communication media, such as email addresses and mobile telephone numbers, are not. Comment 6(b)(1)(ii)–1 provides that pursuant to § 1006.6(b)(1)(ii), a debt collector must not communicate or attempt to communicate with a consumer through media associated with an unusual place, or with a place that the debt collector knows or should know is inconvenient to the consumer. Unless the debt collector knows that the consumer is at an unusual place, or a place that the debt collector knows or should know is inconvenient to the consumer, comment 6(b)(1)(ii)–1 continues, § 1006.6(b)(1)(ii) does not prohibit a debt collector from communicating or attempting to communicate with a consumer through communication media not associated with the unusual or inconvenient place. The Bureau is also adopting an example in new comment 6(b)(1)(ii)–1.i. The Bureau believes this approach addresses the complexities presented by mobile technology, clarifies how debt collectors may comply with FDCPA section 805(a)(1)'s prohibitions on communications with a consumer at unusual and inconvenient places, and maintains the consumer protections under FDCPA section 805(a)(1). The Bureau also reiterates that, in addition to an inconvenient place designation under § 1006.6(b)(1)(ii), a consumer may invoke an inconvenient time

[203] 15 U.S.C. 1692c(a)(1).

[204] As discussed in the section-by-section analysis of § 1006.6(b), § 1006.6(b)(1)(ii) also interprets FDCPA sections 806 and 808 to prohibit a debt collector from attempting to communicate with a consumer at a place at which FDCPA section 805(a)(1) prohibits the debt collector from communicating with the consumer.

[205] For a discussion of and response to those comments, see the section-by-section analysis of final comment 6(b)(1)–1.iii above.

designation under § 1006.6(b)(1)(i) or a medium of communication restriction under § 1006.14(h)(1) to further control when or whether a debt collector can communicate or attempt to communicate with the consumer using mobile technology.

Additionally, as the Bureau noted in the proposal, in response to feedback received during the SBREFA process, the Bureau declined to propose an intervention under consideration that would have designated four categories of places as presumptively inconvenient.[206] Accordingly, this final rule does not designate categories of places as presumptively inconvenient. The Bureau is also not aware of confusion or concerns regarding places that are considered unusual under FDCPA section 805(a)(1). This final rule therefore implements the statutory language ''at any unusual time or place'' as part of final § 1006.6(b)(1) consistent with the statute and without further commentary or interpretation. To address commenter concerns, however, the Bureau is adding new comment 6(b)(1)(ii)–1 as discussed above to clarify how a debt collector may communicate through media that rely on mobile technology when a consumer may be at an unusual or inconvenient place.

6(b)(2) Prohibitions Regarding Consumer Represented by an Attorney

FDCPA section 805(a)(2) prohibits a debt collector from communicating with a consumer in connection with the collection of any debt if the debt collector knows the consumer is represented by an attorney with respect to the debt and has knowledge of, or can readily ascertain, the attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer.[207] The Bureau proposed § 1006.6(b)(2) to implement this prohibition and generally restate the statute.[208] For the reasons discussed below, the Bureau is finalizing § 1006.6(b)(2) as proposed, with minor revisions and with one clarification in response to comments, as discussed below.

The Bureau received comments requesting four specific clarifications. First, several industry commenters requested the Bureau define what constitutes ''a reasonable period of time'' by, for example, specifying a certain number of days. A number of industry commenters suggested the Bureau adopt 10, 21, or 30 days as a reasonable period of time, and some commenters drew parallels to existing State debt collection laws. One such industry commenter suggested the Bureau go further and clarify that, upon expiration of a 30-day period, a debt collector may assume the attorney is not representing the consumer. Two trade group commenters suggested that attempts to contact a consumer's attorney often go unanswered by the attorney to create an FDCPA violation.

One consumer advocate suggested that the reasonable period of time depends on the circumstances and on whether the communication from the debt collector is the type of communication that requires a response from the consumer's attorney, such as a settlement offer or a request for clarification pursuant to a verification request. However, the commenter suggested that, for debt collection communications seeking simply to persuade the consumer to pay the alleged debt, the attorney would not be obliged to respond and therefore no corresponding reasonable time exists.

The Bureau declines to adopt a specific time period under § 1006.6(b)(2). As explained in the section-by-section analysis of § 1006.10, the Bureau concludes that reasonableness generally depends upon the facts and circumstances surrounding a debt collector's communications with a consumer's attorney. Accordingly, the Bureau declines to specify a period of time in which a consumer's attorney must respond before a debt collector is permitted to communicate or attempt to communicate with a consumer.

Second, some trade group commenters suggested the Bureau adopt a requirement that the consumer's attorney, the consumer, or both, undertake specific steps to confirm the attorney's representation of the consumer. These suggestions included that the consumer's attorney respond to a debt collector's request for confirmation of representation, with one trade group commenter specifying that the attorney's response must be between five and seven days of the request and that the attorney must enter an appearance on behalf of the consumer. Additionally, this commenter suggested the consumer also be required to provide the attorney's full contact information, name, address, telephone number and, if applicable, email address, in order to confirm the consumer is in fact represented by an attorney. Similarly, another trade group commenter suggested the Bureau adopt an approach similar under the laws of one State where a notice of attorney representation must contain certain information to be effective,[209] and that the Bureau further require that the notice list the account(s) for which the attorney is representing the consumer.

In response to these comments, the Bureau notes that FDCPA section 805(a)(2) requires only that a debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address. This statutory provision does not require any further action on behalf of either the consumer's attorney or the consumer to confirm the representation and trigger the statutory protections afforded, namely that the debt collector may not communicate with the consumer in connection with the collection of any debt. The Bureau therefore declines to adopt the commenters' suggested approaches.

Third, some industry commenters requested that the Bureau clarify the effect of a consumer-initiated communication once the debt collector knows the consumer is represented by an attorney. One such commenter stated that, under such circumstances, the debt collector should be permitted to answer the consumer's questions and return the consumer's telephone call for the sole purpose of responding to that consumer-initiated communication and to also clarify whether the consumer is still represented by counsel. One industry commenter requested the Bureau clarify that a consumer can inform a debt collector that the consumer is no longer being represented by an attorney, while another industry commenter suggested that the debt collector must await a response from the attorney before communicating with the consumer.

The introductory paragraph of FDCPA section 805(a) contains exceptions for the prior consent of the consumer given directly to the debt collector and the express permission of a court of competent jurisdiction, which are implemented by the Bureau in § 1006.6(b)(4) and further discussed in that section's analysis below. In addition to the exceptions specific to FDCPA section 805(a)(2) (*e.g.,* unless the attorney fails to respond within a reasonable period of time to a

[206] 84 FR 23274, 23297 n.211 (May 21, 2019).

[207] 15 U.S.C. 1692c(a)(2).

[208] 84 FR 23274, 23297 (May 21, 2019). As discussed in the section-by-section analysis of § 1006.6(b), § 1006.6(b)(2) also interprets FDCPA sections 806 and 808 to prohibit a debt collector from attempting to communicate with a consumer who is represented by an attorney if FDCPA section 805(a)(2) prohibits the debt collector from communicating with that consumer.

[209] *See* W. Va. Code 46A–2–128(e).

communication from the debt collector or unless the attorney consents to direct communication with the consumer), the general exceptions contained in FDCPA section 805(b) also function as exceptions to FDCPA section 805(a)(2). Therefore, under the FDCPA, a consumer's prior consent given directly to a debt collector permits a debt collector to communicate with a consumer that the debt collector knows is represented by an attorney. Accordingly, the Bureau is adopting new comment 6(b)(2)–1 to clarify that a consumer-initiated communication from a represented consumer constitutes the consumer's prior consent to that communication under § 1006.6(b)(4)(i), and that therefore the debt collector may respond to that consumer-initiated communication. A debt collector is not prohibited from inquiring in that response whether the consumer is still represented by an attorney; however, as comment 6(b)(2)–1 explains, the consumer's act of initiating a communication does not negate the debt collector's knowledge that the consumer is represented by an attorney and does not revoke the protections afforded the consumer under § 1006.6(b)(2). Comment 6(b)(2)–1 further provides that after the debt collector's response, the debt collector must not communicate or attempt to communicate further with the consumer unless the debt collector knows the consumer is not represented by an attorney with respect to the debt, either based on information from the consumer or the consumer's attorney, or an exception under § 1006.6(b)(2)(i) or (ii) or § 1006.6(b)(4) applies.

Fourth, one industry commenter requested that the Bureau clarify whether a debt collector should assume that, if an attorney represents a consumer with respect to one debt, the attorney represents the consumer with respect to future debts; in particular, the commenter expressed concern about privacy and medical debts. FDCPA section 805(a)(2) states in relevant part that ''if the debt collector knows the consumer is represented by an attorney with respect to such debt.'' [210] The Bureau interprets the protections afforded a consumer under FDCPA section 805(a)(2) to apply to a particular debt allegedly owed by the consumer, but not to future or other debts allegedly owed by the consumer, unless the debt collector knows that an attorney represents the consumer with respect to those debts and has knowledge of, or can readily ascertain, the attorney's name and address. Accordingly, the Bureau revises § 1006.6(b)(2) to more closely mirror the statutory language and clarify that the protections under FDCPA section 805(a)(2) apply ''with respect to such debt.''

For the reasons discussed above, the Bureau is finalizing § 1006.6(b)(2) as proposed, with one revision to clarify that § 1006.6(b)(2) applies per debt. Accordingly, § 1006.6(b)(2) states that, except as provided in § 1006.6(b)(4), a debt collector must not communicate or attempt to communicate with a consumer in connection with the collection of any debt if the debt collector knows the consumer is represented by an attorney with respect to such debt and knows, or can readily ascertain, the attorney's name and address, unless the attorney: (i) Fails to respond within a reasonable period of time to a communication from the debt collector; or (ii) consents to the debt collector's direct communication with the consumer.

6(b)(3) Prohibitions Regarding Consumer's Place of Employment

FDCPA section 805(a)(3) prohibits a debt collector from communicating with a consumer in connection with the collection of any debt at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.[211] The Bureau proposed § 1006.6(b)(3) to implement this prohibition and generally restate the statute.[212] For the reasons discussed below, the Bureau is finalizing § 1006.6(b)(3) as proposed.

Many consumers commented on the disruptive effects of debt collection calls to the workplace. Many commenters described these calls as harassing and disruptive, while many more consumers stated that frequent debt collection calls to the workplace have threatened their employment or led to them being fired, thus making repayment of the allegedly owed debt more unlikely. Some consumer and consumer advocate commenters explained that these calls are an unwelcome distraction that could jeopardize a consumer's ability to pay the debt and that interrupt the work not only of the consumer who allegedly owes the debt, but of others, including co-workers who may be responsible for answering incoming telephone calls to the workplace and employers. Other consumer commenters particularly objected to debt collectors calling and leaving messages with employers as placing undue pressure on employees because of the risk of being penalized by the employer.[213]

Consistent with these consumer comments, many consumer advocate commenters requested that the Bureau ban debt collectors from communicating or attempting to communicate with consumers at the workplace altogether. Alternatively, they recommended that the Bureau prohibit debt collectors from calling or leaving messages with employers at the workplace. One group of consumer advocates requested that the Bureau clarify that, under FDCPA section 805(a)(3) and § 1006.6(b)(3), a debt collector knows or has reason to know that an employer prohibits a consumer from receiving communications in connection with the collection of any debt at the workplace if the consumer asks the debt collector not to contact the consumer at work. And a group of State Attorneys General recommended that the Bureau prohibit a debt collector from calling a consumer's place of employment if the debt collector reliably learns, in any way, that the consumer's employer prohibits debt collection calls.

A number of industry commenters agreed that a debt collector should be expected to honor a consumer's request to stop contacting the consumer at the workplace, while generally requesting that the Bureau further clarify when a debt collector knows or has reason to know that a consumer's employer prohibits the consumer from receiving debt collection communications at the workplace. Many industry commenters suggested that a debt collector should not be responsible for having to proactively track and record, for all present and future consumers, which employers do or do not prohibit such communications, and that such a requirement for debt collectors to cross-reference their files would be unreasonable. One industry commenter explained that a communication from one consumer suggesting that the employer prohibits communication at work does not necessarily apply to all employees, as certain managers or supervisors may restrict such calls while the employer, as a matter of policy, may not. Accordingly, one industry commenter requested the

[210] 15 U.S.C. 1692c(a)(2).

[211] 15 U.S.C. 1692c(a)(3).

[212] 84 FR 23274, 23297 (May 21, 2019). As discussed in the section-by-section analysis of § 1006.6(b), § 1006.6(b)(3) also interprets FDCPA sections 806 and 808 to prohibit a debt collector from attempting to communicate with a consumer at the consumer's place of employment if FDCPA section 805(a)(3) prohibits the debt collector from communicating with the consumer there.

[213] As explained in the section-by-section analysis of final § 1006.2(j), the definition of limited-content message adopted under this final rule does not include third-party limited-content messages, either in live conversations or as voicemail messages knowingly left for a third party.

Bureau to clarify that an instruction from a consumer or employer to a debt collector to cease contacting a consumer through an employer-provided email address or telephone number is effective only as to that specific consumer and would not be imputed to the entirety of the employer's workforce.

Recognizing that a debt collection communication may cause problems for a consumer in the workplace, two industry commenters suggested that it would be reasonable to require a consumer to use specific language to put a debt collector on notice. One industry commenter explained that, because FDCPA section 805(a)(3)'s knowledge standard is difficult to fulfill, all a consumer needs to do is give notice to a debt collector that the consumer does not want telephone calls or email messages at a physical place of work or on a physical telephone owned and managed by the company.

In addition to the unusual and inconvenient time and place protections delineated under FDCPA section 805(a)(1), Congress separately provided consumers with the workplace protections afforded under FDCPA section 805(a)(3). Accordingly, the Bureau implements this prohibition and generally restates the statute in final § 1006.6(b)(3). This provision states that, except as provided in § 1006.6(b)(4), a debt collector must not communicate or attempt to communicate with a consumer in connection with the collection of any debt at the consumer's place of employment, if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

As described by many consumer commenters, the Bureau recognizes the unique consumer harm presented by debt collection communications at a consumer's place of employment, including possible or actual termination of employment. Although some consumer group commenters requested that the Bureau ban all workplace telephone calls or all workplace communications generally, the Bureau declines to do so because FDCPA section 805(a)(3) prohibits a debt collector from communicating with a consumer at the consumer's place of employment only if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.[214]

In addition, consistent with the Bureau's interpretation regarding a consumer's designation of a time or place as inconvenient, as explained above,[215] the Bureau concludes that a consumer need not undertake specific actions or utter specific words to be afforded the statutory protections provided under FDCPA section 805(a)(3). The statute does not prescribe any specific actions or require precise responses or utterances on behalf of the consumer to invoke the workplace communications protections, and nor does this final rule impose such requirements. Even if a consumer does not precisely state that the employer prohibits the consumer from receiving debt collection communications at the workplace, the debt collector nevertheless may know or have reason to know, based on the facts and circumstances, that the employer prohibits such communications. Accordingly, the Bureau is finalizing revised comment 6(b)(3)–1 to provide that a debt collector knows or has reason to know that a consumer's employer prohibits the consumer from receiving such communication if, for example, the consumer tells the debt collector that the consumer cannot take personal calls at work. The debt collector may ask follow-up questions regarding the employer's prohibitions or limitations on contacting the consumer at the place of employment to clarify statements by the consumer.[216]

Once the debt collector knows or has reason to know of this limitation, the debt collector is prohibited from communicating or attempting to communicate with the consumer at the workplace by, for example, by mailing a letter to the consumer's workplace address or calling the consumer's work landline.

In response to those commenters suggesting that a debt collector would be required to track which employers prohibit their employees from receiving debt collection communications at the workplace, this final rule imposes no such requirement. The Bureau is adopting § 1006.6(b)(3) to implement the prohibition contained in FDCPA section 805(a)(3) and to restate the statute.

The Bureau also requested comment on whether additional clarification would be useful with respect to a debt collector's communications or attempts to communicate with a consumer while at work, for example, on a consumer's personal mobile telephone or portable electronic device. One consumer commented that, because many people use their mobile telephones for work and personal use, it would be extremely disruptive for a debt collector to send text messages during work hours while a consumer is using that mobile telephone for work purposes. Another consumer commented that the Bureau should clarify under § 1006.6(b)(3) that communications at the workplace include communications through a device or channel owned by an employer and through a personal device during a consumer's known work hours. A consumer advocate that suggested the Bureau adopt a bright-line rule against all debt collection communications through any medium with a consumer at the workplace also suggested that such a rule should extend to the use of mobile telephones, as long as the debt collector knows or has reason to know that the consumer is at work. The commenter explained that the debt collector may ask the consumer to inform the debt collector which hours the consumer is at work so the debt collector may avoid those times, and if the consumer states specific hours and times, the debt collector must respect those instructions. A group of consumer advocates suggested that the prohibition under proposed § 1006.6(b)(3) should also prohibit a debt collector from directing communications, including by voice or text message, to any personal mobile device during any known working hours. One local government commenter suggested that, consistent with proposed § 1006.22(f)(3), a debt collector should not be permitted to send mail to a consumer's place of employment or call, text, or leave voicemails on a consumer's work telephone without the consumer's prior consent.

Industry commenters generally requested clarity regarding debt collection communications with a consumer to a personal mobile

[214] Recognizing that the risk of third-party disclosure is particularly high for communications sent to employer-provided email addresses, the Bureau is finalizing § 1006.22(f)(3) to prohibit debt collectors from communicating or attempting to communicate using an email address that the debt collector knows is provided by the consumer's employer. See the section-by-section analysis of § 1006.22(f)(3). For clarity, the Bureau is finalizing comment 6(b)(3)–2 to cross-reference this prohibition regarding employer-provided email addresses.

[215] *See* the section-by-section analysis of § 1006.6(b)(1).

[216] The Bureau nevertheless notes that a debt collector who does not know or have reason to know that the consumer's employer prohibits the consumer from receiving such communication and who elects to communicate or attempt to communicate with a consumer in connection with the collection of any debt at the consumer's place of employment should carefully manage any such communications or attempts so as to not risk a third-party disclosure as prohibited under FDCPA section 805(b) and implemented under final § 1006.6(d). For additional discussion of prohibited third-party communications and exceptions, respectively, see the section-by-section analysis of § 1006.d(1) and (2).

telephone or device while the consumer is at work. One industry commenter suggested that, because it is within the consumer's discretion whether to answer the call, telephone calls to a consumer's personal mobile telephone number should not be considered a communication at the consumer's place of employment. One trade group commenter suggested that the Bureau adopt a safe harbor to exempt from liability, absent a consumer's designation of a specified time as inconvenient or medium of communication restriction, a debt collector who unknowingly reaches a consumer at the place of employment if attempting to communicate with the consumer through a mobile telephone or other permissible communication media, for example, an email message to the consumer's personal email account. Alternatively, one trade group commenter suggested that a consumer may prefer to communicate privately during work hours through a personal device instead of during non-work hours when the consumer may prefer to focus on family or other pursuits.

As discussed above with respect to unusual and inconvenient places under FDCPA section 805(a)(1) and final comment 6(b)(1)(ii)–1,[217] the Bureau similarly recognizes here the complexities presented by mobile technology while debt collectors aim to comply with the statutory requirement under FDCPA section 805(a)(3) that a debt collector not communicate with a consumer at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

Final comment 6(b)(3)–1, discussed above, provides that a debt collector may ask follow-up questions regarding the employer's prohibitions or limitations on contacting the consumer at the place of employment to clarify statements by the consumer. For example, a debt collector may ask a consumer to identify times when the consumer is at the place of employment. As explained in the section-by-section analysis of § 1006.6(b)(1)(ii), some communication media are associated with a place.[218] At the consumer's place of employment, such media may include, for example, mail to the consumer's place of employment and calls to the consumer's work landline or employer-provided mobile telephone number. Consistent with the Bureau's approach in comment 6(b)(1)(ii)–1, a debt collector must not communicate or attempt to communicate with a consumer through media associated with the consumer's place of employment if, pursuant to § 1006.6(b)(3), the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication. For other communication media not associated with the consumer's place of employment, such as a personal email address or personal mobile telephone number, § 1006.6(b)(3) does not prohibit a debt collector from communicating or attempting to communicate with a consumer through such media unless the debt collector knows that the consumer is at the place of employment. Therefore, absent information regarding when the consumer is at the place of employment or other communication restriction,[219] the debt collector does not violate § 1006.6(b)(3) by placing a telephone call or sending an electronic communication to the consumer's personal mobile telephone number or portable electronic device, even if the consumer receives or views the communication while at the place of employment.

6(b)(4) Exceptions

FDCPA section 805(a) provides certain exceptions to its limitations on a debt collector's communications with a consumer. The Bureau proposed § 1006.6(b)(4) to implement and interpret the exceptions in FDCPA section 805(a).[220] For the reasons discussed below, the Bureau is finalizing § 1006.6(b)(4) as proposed.

6(b)(4)(i)

The Bureau proposed § 1006.6(b)(4)(i) to implement the introductory language in FDCPA section 805(a) that, in relevant part, sets forth the exception for the prior consent of the consumer given directly to the debt collector. Proposed § 1006.6(b)(4)(i) generally mirrored the statute, except that proposed § 1006.6(b)(4)(i) interpreted FDCPA section 805(a) to require that the consumer's prior consent must be given during a communication that would not violate proposed § 1006.6(b)(1) through (3), *i.e.,* the prohibitions on communications with a consumer at unusual or inconvenient times or places, communications with a consumer represented by an attorney, and communications at the consumer's place of employment. For the reasons discussed below, the Bureau is finalizing § 1006.6(b)(4)(i) as proposed.

A group of consumer advocates supported the Bureau's proposed interpretation of FDCPA section 805(a) to require that a consumer's prior consent must be given during a communication that would not violate proposed § 1006.6(b)(1) through (3) as an important additional protection for consumers.

The Bureau is adopting its interpretation of FDCPA section 805(a) to require that the consumer's prior consent must be given during a communication that would not violate § 1006.6(b)(1) through (3). For example, ordinarily a debt collector could not place a telephone call to a consumer at midnight and obtain the consumer's prior consent for future debt collection communications at that time. The Bureau interprets a consumer's prior consent to be consent obtained in the absence of conduct that would compromise or eliminate a consumer's ability to freely choose whether to consent. A communication that would violate § 1006.6(b)(1) through (3) (*e.g.,* consent obtained from a consumer at an unusual or inconvenient time or place) is likely to compromise or eliminate a consumer's ability to freely choose whether to consent. By prohibiting prior consent purported to be obtained during a communication that would violate § 1006.6(b)(1) through (3), the Bureau does not intend to suggest that prior consent obtained in other unlawful ways would comply with FDCPA section 805(a). Accordingly, the Bureau is adopting § 1006.6(b)(4)(i) as proposed to provide that the prohibitions in § 1006.6(b)(1) through (3) do not apply when a debt collector communicates or attempts to communicate with a consumer in connection with the collection of any debt with the prior consent of the consumer, given directly to the debt collector during a communication that does not violate § 1006.6(b)(1) through (3).

The Bureau also proposed comment 6(b)(4)(i)–1 to clarify the meaning of prior consent. Proposed comment 6(b)(4)(i)–1 explained that, if a debt collector learns during a communication that the debt collector is communicating with a consumer at an inconvenient time or place, the debt collector cannot during that communication ask the consumer to consent to the continuation of that debt collection communication. The Bureau proposed this comment as an interpretation of the language in FDCPA section 805(a) that consent must be ''prior'' and therefore given in

[217] *See* the section-by-section analysis of § 1006.6(b)(1)(ii).

[218] *See id.*

[219] Such a restriction could include, for example, an inconvenient time designation under § 1006.6(b)(1)(i) or a medium of communication restriction under § 1006.14(h)(1).

[220] 84 FR 23274, 23297–98 (May 21, 2019).

advance of a communication that otherwise would violate proposed § 1006.6(b)(1) through (3). For the reasons stated below, the Bureau is finalizing comment 6(b)(4)(i)–1 largely as proposed, with minor revisions.

One industry commenter opposed this proposed interpretation on the basis that it takes away a consumer's ability to freely choose to continue the communication and requested that the Bureau instead prohibit a debt collector from continuing or forcing the consumer to communicate if the time or place is considered inconvenient. Another industry commenter requested that the Bureau clarify whether a debt collector could ask the consumer whether the time or communication medium is inconvenient, and if so, whether the consumer prefers another time or communication medium.

The Bureau is finalizing comment 6(b)(4)(i)–1 largely as proposed, with minor revisions. The Bureau is adopting its proposed interpretation that prior consent must be given in advance of a communication that otherwise would violate § 1006.6(b)(1) through (3), because consent that satisfies FDCPA section 805(a) must be ''prior.'' Additionally, permitting a debt collector to ask a consumer to consent to a communication once the debt collector knows or should know the communication is occurring, for example, at an inconvenient time or place, would undermine the very protection guaranteed to the consumer under FDCPA section 805(a)(1). Therefore, final comment 6(b)(4)(i)–1 clarifies that the debt collector would be prohibited from asking the consumer to consent to the continuation of that inconvenient communication. The comment clarifies, however, that a debt collector may ask the consumer during that communication what time or place would be convenient. Accordingly, final comment 6(b)(4)(i)–1 states that § 1006.6(b)(4)(i) provides, in part, that the prohibitions in § 1006.6(b)(1) through (3) on a debt collector communicating or attempting to communicate with a consumer in connection with the collection of any debt do not apply if the debt collector communicates or attempts to communicate with the prior consent of the consumer. If the debt collector learns during a communication that the debt collector is communicating with the consumer at an inconvenient time or place, for example, the debt collector may ask the consumer during that communication what time or place would be convenient. However, § 1006.6(b)(4)(i) prohibits the debt collector from asking the consumer to consent to the continuation of that inconvenient communication.

Additionally, consistent with the introductory language in FDCPA section 805(a), the Bureau proposed comment 6(b)(4)(i)–2 to restate the rule that the prior consent of the consumer must be given directly to the debt collector, and to explain that a debt collector cannot rely on the prior consent of the consumer given to the original creditor or to a previous debt collector. The Bureau proposed this comment to implement the statutory requirement in FDCPA section 805(a) that the prior consent of the consumer be given directly to the debt collector. For the reasons discussed below, the Bureau is finalizing comment 6(b)(4)(i)–2 largely as proposed.

A consumer commenter supported the proposal and stated that prior consent should not be transferred along with an account, while one trade group commenter suggested that consumer consent given to the creditor should be passed to a debt collector hired by that creditor.

The Bureau is adopting comment 6(b)(4)(i)–2 as proposed, with minor revisions. A debt collector cannot rely on the prior consent of the consumer given to a creditor or to a previous debt collector because such prior consent is not given ''directly'' to the debt collector, as FDCPA section 805(a) expressly requires. This interpretation is also consistent with the FDCPA's legislative history.[221] Accordingly, comment 6(b)(4)(i)–2 states that § 1006.6(b)(4)(i) requires the prior consent of the consumer to be given directly to the debt collector. For example, a debt collector cannot rely on the prior consent of the consumer given to a creditor or to a previous debt collector.

6(b)(4)(ii)

The Bureau proposed § 1006.6(b)(4)(ii) to implement the introductory language in FDCPA section 805(a) that, in relevant part, sets forth the exception for the express permission of a court of competent jurisdiction. As proposed, § 1006.6(b)(4)(ii) generally restated the statute, with only minor wording and organizational changes for clarity. The Bureau received no comments on proposed § 1006.6(b)(4)(ii) and is finalizing it as proposed. Accordingly, final § 1006.6(b)(4)(ii) provides that the prohibitions in § 1006.6(b)(1) through (3) do not apply when a debt collector communicates or attempts to communicate with a consumer in connection with the collection of any debt with the express permission of a court of competent jurisdiction.

6(c) Communications With a Consumer—After Refusal To Pay or Cease Communication Notice

FDCPA section 805(c) provides that, subject to certain exceptions, if a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt.[222] The Bureau proposed § 1006.6(c) to implement and interpret FDCPA section 805(c) and pursuant to the Bureau's authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors. For the reasons discussed below, the Bureau is finalizing § 1006.6(c) largely as proposed.

6(c)(1) Prohibition

The Bureau proposed § 1006.6(c)(1) to implement FDCPA section 805(c)'s cease communication provision and generally restate the statute, with only minor changes for clarity. Proposed § 1006.6(c)(1) stated that, except as provided in proposed § 1006.6(c)(2), a debt collector must not communicate or attempt to communicate further with a consumer with respect to a debt if the consumer notifies the debt collector in writing that: (i) The consumer refuses to pay the debt; or (ii) the consumer wants the debt collector to cease further communication with the consumer.[223] For the reasons discussed below, the Bureau is finalizing § 1006.6(c)(1) largely as proposed, with non-

[221] *See* H. Rep. No. 95–131, at 5 (1977) (''The committee intends that in section [805] the 'prior consent' be meaningful, *i.e.,* that any prior consent by a consumer is to be a voluntary consent and shall be expressed by the consumer directly to the debt collector. Consequently, the committee intends that any term in a contract which requires a consumer to consent in advance to debt collection communication would not constitute 'prior consent' by such consumer.'').

[222] 15 U.S.C. 1692c(c). For ease of reference, through this section-by-section analysis, the Bureau refers to this as the FDCPA's ''cease communication'' provision, and to a consumer's notification that the consumer refuses to pay a debt or wishes the debt collector to cease further communication with the consumer as a consumer's ''cease communication request.''

[223] 84 FR 23274, 23298 (May 21, 2019). For the same reasons that § 1006.6(b) prohibits debt collectors from attempting to communicate with consumers if FDCPA section 805(a) prohibits communications with consumers, § 1006.6(c) interprets FDCPA sections 806 and 808 to prohibit a debt collector from attempting to communicate with a consumer if FDCPA section 805(c) prohibits the debt collector from communicating with the consumer.

substantive revisions to more closely mirror the statutory language.

Many consumers commented that a debt collector should be required to obey a consumer's oral request that the debt collector stop calling. Consistent with these consumer comments, one commenter that represents consumers cited a survey by a consumer advocate suggesting that the majority of consumers that asked a debt collector to stop calling were subsequently contacted by the debt collector. This commenter also suggested that the Bureau should require debt collectors to obey consumers' oral requests to stop calling.

A group of consumer advocates generally agreed that a debt collector should be required to stop contacting a consumer upon the consumer's oral request at any time. Other groups of consumer advocates requested that the Bureau clarify that ''stop calling'' requests can be made orally and should apply to all calls from a debt collector, unless a consumer asks to stop calls to one telephone number only. Some consumer advocates suggested that a consumer's oral request that the debt collector simply ''stop calling'' or a text message to the debt collector to ''stop'' should require the debt collector to discontinue contact with the consumer. One consumer advocate explained that, particularly for vulnerable consumers who may have limited literacy or language proficiency, making a request in writing can be burdensome.

FDCPA section 805(c) states that, if a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt unless certain exceptions apply. Because the writing requirement proposed in § 1006.6(c)(1) was intended to implement the language in FDCPA section 805(c) that a consumer notify a debt collector in writing, the Bureau is finalizing it as proposed.

As part of this final rule, however, the Bureau also is finalizing § 1006.14(h)(1), which prohibits a debt collector from communicating or attempting to communicate with a person through a medium of communication if the person has requested that the debt collector not use that medium to communicate with the person.[224] Therefore, even if a consumer does not notify a debt collector in writing that the consumer refuses to pay a debt or wishes the debt collector to cease further communication with the consumer as required under § 1006.6(c)(1), the consumer's oral request that the debt collector ''stop calling,'' for example, would constitute a request that the debt collector not use that medium of communication (*e.g.,* telephone calls) to communicate with the consumer, and, consistent with § 1006.14(h)(1), the debt collector would thereafter be prohibited from placing telephone calls to the consumer.

The Bureau proposed comment 6(c)(1)–1 to implement FDCPA section 805(c)'s provision that, if the consumer's cease communication request is made by mail, the notification is complete upon receipt by the debt collector.[225] The Bureau proposed to apply this standard to all written or electronic forms of a consumer's cease communication request. Proposed comment 6(c)(1)–1 thus provided that if, pursuant to § 1006.6(c)(1), a consumer notifies a debt collector in writing or electronically using a medium of electronic communication through which a debt collector accepts electronic communications from consumers that the consumer either refuses to pay a debt or wants the debt collector to cease further communication with the consumer, notification is complete upon the debt collector's receipt of that information.[226]

The Bureau requested comment on whether a debt collector should be afforded a certain period of time to update its systems to reflect a consumer's cease communication request even after the notification is received, and, if so, how long. One academic commenter opposed, without explanation, the creation of any grace period for a debt collector to update records when a consumer sends a cease communication request.

Industry commenters generally supported affording a debt collector a certain period of time to update its systems to reflect a consumer's cease communication request, though they differed in their specific recommendations. One trade group commenter suggested no less than two business days, because the immediacy of electronic communications makes it commercially impractical for debt collectors to update their records and comply with a consumer's cease communication request in real time. One industry commenter suggested that, for notification by letter, email, or text message, a timeframe of 72 hours from the next business day that the notification was received should be given, while another industry commenter suggested three business days from the date of receipt. Similarly, one trade group commenter suggested that a debt collector is deemed to have notice three days after receipt of the request. One trade group commenter suggested that, because electronic communications may be filtered and quarantined before actually being released into the debt collector's virtual environment, a certain amount of time, for example, a three-to-five-day grace period, should be afforded a debt collector to ''receive'' the electronic cease communication request and update its internal reporting systems to reflect it. Two industry commenters suggested that debt collectors should be required to send an acknowledgement and acceptance correspondence to the consumer within five days of receipt of a cease communication request. Another industry commenter suggested that, consistent with the CAN–SPAM Act of 2003,[227] the Bureau should adopt a ten-business day safe harbor given debt collectors' legitimate business and operational reasons. One industry commenter suggested that cease communication requests should be treated as received upon processing, as long as the debt collector has reasonable procedures for processing them.

The Bureau recognizes that any maximum period of time afforded a debt collector to update its systems to reflect a cease communication request must be short enough to protect consumers from unwanted communications, but long enough for compliance to be practical. Given the disparate periods of time suggested by commenters and the different methods by which a written or electronic cease communication request may be made by a consumer, this final rule does not specify the period of time afforded a debt collector to update its systems to reflect a cease communication request. However, depending upon the circumstances, FDCPA section 813(c)'s bona fide error defense to civil liability may apply if, notwithstanding the maintenance of procedures reasonably adapted to avoid any such error, a debt collector communicates or attempts to communicate with a consumer after

[224] This prohibition and its exceptions are explained in detail in the section-by-section analysis of § 1006.14(h).

[225] 15 U.S.C. 1692c(c).

[226] The Bureau proposed this clarification on the basis that FDCPA section 805(c) does not state that *only* mail notifications are complete upon receipt, but rather leaves ambiguous when other forms of notification are complete and, regardless of the medium, it may not be reasonable to consider a debt collector to have been notified before the debt collector has received a consumer's cease communication request. 84 FR 23274, 23298 (May 21, 2019).

[227] 15 U.S.C. 7701 *et seq.*

receiving, but before processing, a cease communication request. For example, if a debt collector who schedules an email message to be sent to a consumer subsequently receives a cease communication request by email but sends the previously scheduled email message to the consumer before the request can be processed (notwithstanding the maintenance of procedures to avoid such an error), the debt collector may be entitled to a bona fide error defense to civil liability under FDCPA section 813(c).[228]

For the reasons discussed above, the Bureau is finalizing comment 6(c)(1)–1 as proposed, and including a new example in comment 6(c)(1)–1.i to illustrate a consumer's cease communication request made by mail being complete upon receipt by a debt collector.

The Bureau proposed comment 6(c)(1)–2 to codify its interpretation of the E–SIGN Act enabling a consumer to satisfy, through an electronic request, FDCPA section 805(c)'s requirement that the consumer's notification be in writing. The Bureau proposed to interpret the applicability of the E–SIGN Act to a consumer electronically notifying a debt collector that the consumer refuses to pay a debt or wants the debt collector to cease further communication with the consumer.[229] For the reasons stated below, the Bureau is finalizing comment 6(c)(1)–2 as proposed.

A group of consumer advocates supported proposed comment 6(c)(1)–2 as entirely consistent with the E–SIGN Act and stated that the Bureau's interpretation will make it easier for consumers to access the protections of § 1006.6(c). One local government commenter supported the Bureau's proposal to interpret the writing requirement in FDCPA section 805(c) to include email messages but expressed concern with the proposed approach that a debt collector would be required to give legal effect to a consumer's notification submitted electronically only if the debt collector generally chose to accept electronic communications from consumers. The commenter suggested that the Bureau require a debt collector to accept email communications from a consumer regarding communication preferences. Another local government commenter requested that the Bureau mandate that consumers be permitted to make cease communication requests using any communication medium that the debt collector either has used to communicate with the consumer or has invited the consumer to use to communicate with the debt collector. This commenter stated that a cease communication request submitted by email, text message, or through a debt collector's website should be treated as a written communication for purposes of § 1006.6(c)(1).

The E–SIGN Act could affect whether a consumer satisfies the requirement in FDCPA section 805(c) that a cease communication request be ''in writing.'' Section 101(a)(1) of the E–SIGN Act generally provides that a record relating to a transaction in or affecting interstate or foreign commerce may not be denied legal effect, validity, or enforceability solely because it is in electronic form.[230] However, section 101(b)(2) of the E–SIGN Act does not require any person to agree to use or accept electronic records or electronic signatures, other than a governmental agency with respect to a record other than a contract to which it is a party.[231] Section 104(b)(1)(A) of the E–SIGN Act provides authority for a Federal agency with rulemaking authority under a statute to interpret by regulation the application of E–SIGN Act section 101 to that statute.[232]

The Bureau interprets the applicability of the E–SIGN Act as it relates to FDCPA section 805(c)'s requirement that a cease communication request be in writing. Specifically, the Bureau interprets FDCPA section 805(c)'s writing requirement as being satisfied when a consumer makes a cease communication request using a medium of electronic communication through which a debt collector accepts electronic communications from consumers, such as email messages or a website portal.[233] Thus, consistent with the Bureau's interpretation of the E–SIGN Act, pursuant to § 1006.6(c)(1), a debt collector is required to give legal effect to a consumer's electronic cease communication request if the debt collector generally accepts electronic communications from consumers. The Bureau adopts this interpretation to harmonize FDCPA section 805(c)'s writing requirement with the E–SIGN Act. Additionally, because the consumer may only use a medium of electronic communication through which a debt collector accepts electronic communications from consumers, section 101(b) of the E–SIGN Act is not contravened.

One trade group commenter suggested that the Bureau permit a debt collector to require a consumer to send an electronic cease communication request only to portals and email addresses designated by the debt collector. A group of consumer advocates requested the Bureau to clarify that a debt collector should be deemed to accept electronic cease communication requests from consumers through any non-public-facing medium listed on the debt collector's website or listed in any of the debt collector's outgoing communications to consumers.

Nothing in § 1006.6(c)(1) prohibits a debt collector from requesting a consumer to send an electronic cease communication request through online portals or to email addresses designated by the debt collector. As debt collectors likely already do for cease communication requests received by mail, debt collectors should maintain procedures reasonably adapted to avoid any errors in receiving such requests electronically. The final rule's prohibitions on harassing, deceptive, and unfair practices in §§ 1006.14, 1006.18, and 1006.22 may address many of the harms that commenters may have been concerned with, such as a debt collector intentionally ignoring a consumer's cease communication request received through an online portal or to an email address not designated by the debt collector for receiving such notifications.

[228] A number of courts have considered a debt collector's assertion of a bona fide error defense under such circumstances. *See, e.g., Webster* v. *ACB Receivables Mgmt., Inc.,* 15 F. Supp. 3d 619, 629 (D. Md. 2014) (holding debt collector not entitled to bona fide error defense where employees' communications with consumer after cease communication notification constituted good-faith human errors, but where debt collector failed to present any evidence of redundancy or safeguards in its policies and procedures to prevent such human errors); *Smith* v. *Transworld Sys., Inc.,* 953 F.2d 1025, 1036 (6th Cir. 1992) (holding debt collector's letter mailed shortly after receiving consumer's cease communication notification constituted bona fide error given debt collector's procedures, including a five-page instruction manual describing collection procedures, were reasonably adapted to avoid any such error); *Carrigan* v. *Cent. Adjustment Bureau, Inc.,* 494 F. Supp. 824, 827 (N.D. Ga. 1980) (assuming debt collector's violation of FDCPA section 805(c) was unintentional, denying debt collector bona fide error defense where debt collector failed to provide any evidence it maintained proper procedures governing handling mail and where error of being unaware of consumer's cease communication letter led to calling consumer).

[229] Section 104(b)(1)(A) of the E–SIGN Act provides authority for a Federal regulatory agency with rulemaking authority under a statute to interpret section 101 of the E–SIGN Act with respect to that statute by regulation. 15 U.S.C. 7004(b)(1)(A).

[230] 15 U.S.C. 7001(a)(1).

[231] 15 U.S.C. 7001(b)(2).

[232] 15 U.S.C. 7004(b)(1)(A).

[233] This interpretation is responsive to comments recommending that, if a debt collector makes an electronic means of communication available to consumers, electronic communications received from consumers through that channel should trigger the debt collector's obligations under FDCPA section 809(b).

One commenter asked what a debt collector should do if the debt collector receives a cease communication request after communicating with a consumer but before providing the consumer a validation notice pursuant to FDCPA section 809(a).[234] As the commenter explained, FDCPA section 809(a) generally requires a debt collector to send a consumer a validation notice within five days after the initial communication with the consumer (unless the validation was provided in the initial communication), and it is unclear what the debt collector should do if the consumer asks to cease communication before the validation notice is sent. To the extent any conflict exists between FDCPA sections 805(c) and 809(a), the Bureau notes that the conflict is statutory and not a result of this final rule. Nevertheless, the Bureau believes that such circumstances may be rare in practice because many debt collectors provide the validation notice in the initial communication as permitted under FDCPA section 809(a). And, to the extent that the validation notice is not provided in the initial communication, many validation notices will have been prepared for sending or sent before a debt collector receives and processes any such cease communication request.[235] The Bureau is not aware of any such conflict causing significant issues or consumer harms at this time. Accordingly, the Bureau will monitor this issue for any potential consumer harm or compliance concerns and revisit at a later time if needed.

6(c)(2) Exceptions

FDCPA section 805(c) provides exceptions to the cease communication provision. The exceptions allow a debt collector to communicate with a consumer even after a cease communication request: (1) To advise the consumer that the debt collector's further efforts are being terminated; (2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or (3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.[236] The Bureau proposed § 1006.6(c)(2) to implement these exceptions and generally restate the statute, with only minor changes for clarity. The Bureau proposed comment 6(c)(2)–1 to clarify that, consistent with the 2016 Servicing Final Rule[237] and the concurrently issued 2016 FDCPA Interpretive Rule,[238] the Bureau interprets the written early intervention notice required under Regulation X[239] as falling within the cease communication exceptions in FDCPA section 805(c)(2) and (3) (proposed as § 1006.6(c)(2)(ii) and (iii)).[240]

The Bureau received no comments on proposed § 1006.6(c)(2) or on proposed comment 6(c)(2)–1 and therefore is finalizing them as proposed, with minor non-substantive edits. Relatedly, one industry commenter requested that the Bureau clarify whether periodic statements for residential mortgage loans required under Regulation Z, 12 CFR 1026.41(a) are exempt under FDCPA section 805(c)(2) and (3). The Bureau previously addressed this question in its 2013 bulletin providing implementation guidance for certain mortgage servicing rules,[241] in which the Bureau determined that, notwithstanding a consumer's cease communication request, a mortgage servicer who is subject to the FDCPA with respect to a mortgage loan would not be liable under the FDCPA for complying with certain servicing rule provisions, including requirements to provide a borrower with disclosures regarding the forced placement of hazard insurance,[242] a disclosure regarding an adjustable-rate mortgage's initial interest rate adjustment,[243] and a periodic statement for each billing cycle.[244] The Bureau explained that these disclosures are specifically mandated by the Dodd-Frank Act,[245] which makes no mention of their potential cessation under the FDCPA and presents a more recent and specific statement of legislative intent regarding these disclosures than does the FDCPA. The Bureau also explained that these notices provide useful information to consumers regardless of their collection status. The Bureau is adopting this relevant guidance in new comment 6(c)(2)–2 for mortgage servicers subject to the FDCPA with respect to a mortgage loan.

6(d) Communications With Third Parties

FDCPA section 805(b) prohibits a debt collector from communicating, in connection with the collection of any debt, with any person other than the consumer[246] or certain other persons.[247] FDCPA section 805(b) also identifies certain exceptions to this prohibition. The Bureau proposed § 1006.6(d)(1) and (2), respectively, to implement FDCPA section 805(b)'s general prohibition against communicating with third parties and the exceptions to that prohibition. Additionally, the Bureau proposed § 1006.6(d)(3) to specify, for purposes of FDCPA section 813(c), procedures that are reasonably adapted to avoid an error in sending an email or text message that would result in a violation of FDCPA section 805(b). The Bureau proposed § 1006.6(d) pursuant to its authority under FDCPA section 814(d) to write rules with respect to the collection of debts by debt collectors.

6(d)(1) Prohibitions

With limited exceptions, FDCPA section 805(b) prohibits a debt collector from communicating, in connection with the collection of any debt, with any person other than the consumer (as defined in FDCPA section 805(d)) or certain other persons. The Bureau proposed § 1006.6(d)(1) to implement FDCPA section 805(b) and generally restate the statute, with minor wording and organizational changes for clarity.[248] For the reasons discussed below, the Bureau is finalizing § 1006.6(d)(1) as proposed.

One consumer advocate requested that, to protect consumers' privacy across all forms of communication, the Bureau ban debt collectors from communicating with third parties without the consumer's written consent. The Bureau declines to adopt such an approach. FDCPA section 805(b) contemplates a debt collector communicating with third parties subject to the prior consent of the consumer given directly to the debt

[234] The Bureau proposed to implement FDCPA section 809(a) in § 1006.34. As discussed in the section-by-section analysis of § 1006.34, the Bureau intends to finalize that section in a disclosure-focused final rule addressing the validation notice.

[235] As discussed above, a debt collector who, notwithstanding the maintenance of procedures reasonably adapted to avoid any such error, communicates or attempts to communicate with a consumer after receiving, but before processing, a consumer's cease communication request pursuant to § 1006.6(c)(1) may have a bona fide error defense to civil liability under FDCPA section 813(c).

[236] 15 U.S.C. 1692c(c)(1)–(3).

[237] 81 FR 72160 (Oct. 19, 2016).

[238] 81 FR 71977, 72233–38 (Oct. 19, 2016).

[239] 12 CFR 1024.39(d)(3).

[240] 84 FR 23274, 23298–99 (May 21, 2019).

[241] CFPB Bulletin 2013–12, at 7 (Oct. 15, 2013), *https://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_bulletin.pdf.*

[242] 12 CFR 1024.37.

[243] 12 CFR 1026.20(d).

[244] 12 CFR 1026.41.

[245] Dodd-Frank Act sections 1418 (ARM initial interest rate adjustment), 1420 (periodic statements), and 1463 (force-placed insurance).

[246] The Bureau implements the term consumer as used in section 805(b) in § 1006.6(a).

[247] 15 U.S.C. 1692c(b). Specifically, FDCPA section 805(b) prohibits communicating with any person other than the consumer, the consumer's attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the creditor's attorney, or the debt collector's attorney.

[248] 84 FR 23274, 23299 (May 21, 2019).

collector but does not require that the consumer effectuate that prior consent in writing.

One industry commenter requested the Bureau clarify what constitutes a third party. This commenter explained that a debt collector frequently must speak with a consumer's insurance company or a State victim assistance program to verify enrollment, and that such a third-party communication is intended to benefit the consumer and should therefore be considered permissible by the Bureau.

FDCPA section 805(b) specifically delineates the following persons with whom a debt collector may communicate without violating the prohibition on communication with third parties: The consumer, the consumer's attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector. If a debt collector needs to communicate with any other person in connection with the collection of any debt, FDCPA section 805(b) provides an exception, as discussed below,[249] permitting the debt collector to do so with the prior consent of the consumer given directly to the debt collector. Therefore, to the extent a debt collector needs to speak with persons other than those listed in FDCPA section 805(b) and implemented in § 1006.6(d)(1) of this final rule, certain exceptions may apply permitting the debt collector to do so.

One industry commenter suggested that the Bureau adopt a safe harbor for inadvertent communications with a third party, such as if a third party hears a debt collector's voicemail message left on an answering machine. This commenter suggested that, if the debt collector discloses the third-party communication to the consumer and stops future communications with that third party, the debt collector should not be liable for the disclosure.

Federal government agency staff and some courts have found that debt collectors do not violate the FDCPA's prohibition on third-party disclosures unless they have reason to anticipate that the communication may be heard or read by third parties.[250] As the FTC previously explained, ''[a] debt collector does not violate [FDCPA section 805(b)] when an eavesdropper overhears a conversation with the consumer, unless the debt collector has reason to anticipate the conversation will be overheard.'' [251] As discussed in detail below, the Bureau is finalizing procedures in § 1006.6(d)(3) through (5) that are designed to ensure that a debt collector who uses a specific email address or telephone number to communicate with a consumer by email or text message does not have a reason to anticipate that an unauthorized third-party disclosure may occur.[252] In other situations, unless the debt collector has reason to anticipate that the communication may be heard or read by third parties, a debt collector who unintentionally communicates with a third party may be able to raise a bona fide error defense to civil liability under FDCPA section 813.

One State government commenter suggested that, for active service members, debt collectors often call the member's commanding officer to inform the supervisor about the outstanding debt. The commenter requested that the rule be revised to prohibit such violations of consumer privacy and job security. Unless the consumer has provided consent for such communications directly to the debt collector or another exception in § 1006.6(d)(2) applies, such conduct already is prohibited by FDCPA section 805(b) and will be prohibited by § 1006.6(d)(1).

For the reasons stated above, the Bureau is finalizing § 1006.6(d)(1) as proposed to provide that, except as provided in § 1006.6(d)(2), a debt collector must not communicate, in connection with the collection of any debt, with any person other than: The consumer (as defined in § 1006.6(a)); the consumer's attorney; a consumer reporting agency, if otherwise permitted by law; the creditor; the creditor's attorney; or the debt collector's attorney.

Proposed comment 6(d)(1)–1 explained that, because a limited-content message is not a communication, a debt collector does not violate § 1006.6(d)(1) if the debt collector leaves a limited-content message for a consumer orally with a third party who answers the consumer's home or mobile telephone. As discussed in the section-by-section analysis of § 1006.2(j), the Bureau is declining to finalize a definition of limited-content message that allows for such third-party limited-content messages. Accordingly, the Bureau is not adopting proposed comment 6(d)(1)–1.

6(d)(2) Exceptions

FDCPA section 805(b) specifies exceptions to the general prohibition against a debt collector communicating with third parties, including that a debt collector may engage in an otherwise prohibited communication with the prior consent of the consumer given directly to the debt collector. The Bureau proposed § 1006.6(d)(2) to implement the exceptions in FDCPA section 805(b) and generally restate the statute, with minor wording and organizational changes for clarity.[253] In relevant part, proposed § 1006.6(d)(2)(ii) would have implemented the statutory exception permitting third-party communications with a person when the debt collector has received prior consent directly from the consumer for such communications.

One industry commenter suggested that the Bureau clarify that prior consent under proposed § 1006.6(d)(2)(ii) includes consent the consumer gives to a third party to discuss debts with a debt collector. This commenter explained that, in some cases, a debt collector may receive from a debt settlement company an authorization signed by a consumer permitting the debt collector to communicate about a debt with the debt settlement company.

The Bureau declines to clarify the prior consent exception as requested because the scenario posed by the commenter will depend upon the specific facts and circumstances as to whether the consent provided satisfies § 1006.6(d)(2)(ii). The Bureau therefore is finalizing § 1006.6(d)(2) as proposed to provide that the prohibition in § 1006.6(d)(1) does not apply when a debt collector communicates, in connection with the collection of any debt, with a person: (i) For the purpose of acquiring location information, as provided in § 1006.10; (ii) with the prior consent of the consumer given directly to the debt collector; (iii) with the express permission of a court of competent jurisdiction; or (iv) as reasonably necessary to effectuate a postjudgment judicial remedy.

The Bureau proposed comment 6(d)(2)–1 to refer to the commentary to proposed § 1006.6(b)(4)(i) for guidance concerning a consumer giving prior consent directly to a debt collector. The Bureau received no comments on

[249] This exception is implemented in § 1006.6(d)(2) as discussed further in the section-by-section analysis below. *See* the section-by-section analysis of § 1006.6(d)(2).

[250] *See, e.g., Berg* v. *Merchants Ass'n Collection Div., Inc.,* 586 F. Supp. 2d 1336, 1342, 1345 (S.D. Fla. 2008); *Peak* v. *Prof'l Credit Serv.,* No. 6:14–cv–01856–AA, 2015 WL 7862774, at *5–6 (D. Or. Dec. 2, 2015); *Chlanda* v. *Wymard,* No. C–3–93–321, 1995 WL 17917574, at *2 (S.D. Ohio Sept. 5, 1995).

[251] *Statements of General Policy or Interpretation: Staff Commentary on the FDCPA,* 53 FR 50097, 50104 (Dec. 13, 1988).

[252] *See* the section-by-section analysis of § 1006.6(d)(3).

[253] 84 FR 23274, 23299 (May 21, 2019).

comment 6(d)(2)–1 and is finalizing it as proposed.

6(d)(3) Reasonable Procedures for Email and Text Message Communications

Proposed § 1006.6(d)(3) identified procedures reasonably adapted to avoid a violation of FDCPA section 805(b)'s prohibition on third-party disclosures when communicating by email or text message.[254] A debt collector who sent an email or text message in accordance with the proposed procedures would have been entitled to a bona fide error defense to civil liability under FDCPA section 813(c) in the event of an unintentional third-party disclosure.[255]

Specifically, the Bureau proposed § 1006.6(d)(3) to provide a debt collector with a safe harbor from civil liability[256] for an unintentional third-party disclosure if, when communicating with a consumer using an email address or, in the case of a text message, a telephone number, the debt collector's procedures included steps to reasonably confirm and document that the debt collector: (1) Obtained and used the email address or telephone number in accordance with one of the methods described in proposed § 1006.6(d)(3)(i); and (2) took additional steps, in accordance with proposed § 1006.6(d)(3)(ii), to prevent communications using an email address or telephone number that the debt collector knew had led to an unauthorized third-party disclosure. Proposed § 1006.6(d)(3)(i)(A) through (C) described three methods of obtaining and using an email address or telephone number for text messages, none of which would have required a debt collector to obtain a consumer's direct prior consent (or ''opt in'') before communicating by email or text message. As discussed throughout the section-by-section analysis of § 1006.6(d)(3) through (5), and pursuant to its authority under FDCPA section 814(d) to implement and interpret FDCPA sections 805(b) and 813(c), the Bureau is finalizing some portions of proposed § 1006.6(d)(3), and reorganizing and modifying others, as final § 1006.6(d)(3) through (5).

The Bureau received a large number of comments in response to proposed § 1006.6(d)(3), including thousands of comments from individual consumers, as well as comments from consumer advocates, creditors, debt collectors, trade associations, some members of Congress, State Attorneys General, local governments, and academics. Many commenters addressed specific aspects of proposed § 1006.6(d)(3); these comments are addressed where relevant in the section-by-section analysis of final § 1006.6(d)(3) through (5). Immediately below, the Bureau addresses the large number of comments that it received regarding the general operation of proposed § 1006.6(d)(3).

Risk of Consumer Harm Posed by Third-Party Disclosures

The Bureau received multiple comments regarding the general risks to consumers of third-party disclosures from electronic communications. Consumer and consumer advocate commenters argued that the reassignment of telephone numbers,[257] and the sharing of email accounts and telephone numbers between family members, increase the risk that a debt collector who sends an email or text message will disclose sensitive debt collection information to a third party not authorized to receive it. Moreover, some commenters noted, emails and text messages may be viewable by a consumer's email or telephone provider or appear on a publicly visible screen, such as when a consumer accesses email at the library. Several consumer advocate commenters stated that third-party disclosures could cause consumers to suffer reputational damage; increased risk of identity theft; and shame and other emotional pain, particularly when the third party to whom the disclosure is made is an employer, family member, or friend.

One industry commenter characterized email and text message communications as posing no more third-party disclosure risk than traditional mail and telephone communications. This commenter asserted that there is little third-party disclosure risk when a debt collector emails a consumer's current or former personal email address because, unlike telephone numbers, email addresses are rarely reassigned. Although the commenter conceded that the reassignment of telephone numbers increases the risk of third-party disclosure when debt collectors send text messages, the commenter asserted that, because consumers regularly change home addresses, the same degree of risk is present when a debt collector mails information to a consumer's last known address. Further, the commenter argued, any third-party disclosure risk that exists when a third party accesses a consumer's email account or sees an email or text message on a publicly visible screen is entirely within the consumer's control.

The Bureau recognizes that electronic communications in debt collection offer benefits to consumers and debt collectors. The Bureau also recognizes that electronic communications pose a risk of third-party disclosure, such as when a debt collector sends a text message to a telephone number that no longer belongs to the consumer, and, for some consumers, such a disclosure may cause harm. However, the Bureau emphasizes that there is no empirical data in the rulemaking record demonstrating whether and to what extent the privacy risks from electronic communications in debt collection are greater than, the same as, or less than those associated with non-electronic communications in debt collection. In finalizing the procedures in § 1006.6(d)(3) through (5), the Bureau has considered the benefits and risks of electronic communications based on the information in the rulemaking record.[258]

Reason-To-Anticipate Standard

A few commenters addressed the Bureau's proposal to design the procedures in proposed § 1006.6(d)(3) so that a debt collector who uses them does not have reason to anticipate a third-party disclosure.[259] A consumer advocate commenter opposed the reason-to-anticipate standard, noting that consumers can be harmed even by

[254] *See* 15 U.S.C. 1692c(b); 84 FR 23274, 23299–04 (May 21, 2019).

[255] 15 U.S.C. 1692k(c) (providing that a debt collector may not be held liable in any action brought under the FDCPA if the debt collector shows by a preponderance of the evidence that the violation was not intentional, that it resulted from a bona fide error, and that it occurred even though the debt collector maintained procedures reasonably adapted to avoid the error). As explained in the proposal, the Bureau reasoned that a debt collector who communicated by email or text message in compliance with the proposed procedures would not have reason to anticipate a prohibited third-party disclosure. *See* 84 FR 23274, 23300 (May 21, 2019).

[256] See note 6, *supra,* explaining the Bureau's use of the phrase ''safe harbor from civil liability'' throughout this Notice when discussing the effect of following the procedures in § 1006.6(d)(3) through (5).

[257] According to a 2018 FCC notice of proposed rulemaking, nearly 35 million telephone numbers are disconnected and made available for reassignment each year. *Advanced Methods to Target and Eliminate Unlawful Robocalls,* 83 FR 17631, 17632 (Apr. 23, 2018) (''Consumers disconnect their old numbers and change to new telephone numbers for a variety of reasons, including switching wireless providers without porting numbers and getting new wireline telephone numbers when they move.'').

[258] Section 1006.6(d)(3) through (5) addresses the risk of third-party disclosure posed by electronic communications. Other risks posed by electronic communications, such as the potential that debt collectors may use them in harassing ways, are addressed in other provisions of the final rule, including § 1006.6(e) and § 1006.14(a).

[259] *See* 84 FR 23274, 23300 n.238 (May 21, 2019) (citing FTC staff and court opinions finding that debt collectors do not violate FDCPA section 805(b) unless they have reason to anticipate that a disclosure may be heard or read by third parties).

unforeseeable disclosures. An industry commenter supported the standard, arguing that debt collectors should not be penalized for third-party disclosures they had no reason to anticipate, particularly when the circumstances giving rise to a disclosure, such as a third party's access to the consumer's email account or telephone, are out of the debt collector's control.

As in the proposal, the Bureau has designed the procedures in the final rule around the reason-to-anticipate standard. The reason-to-anticipate standard recognizes that it is generally not possible for a debt collector to eliminate entirely the risk that a third party will see or hear a debt collection communication. The standard is therefore consistent with FDCPA section 813(c), which protects debt collectors who unintentionally violate the statute notwithstanding the use of reasonable procedures. FDCPA section 813(c), like the reason-to-anticipate standard, generally recognizes that a debt collector acting in good faith pursuant to reasonable procedures should not be liable for errors (in this context, a third-party disclosure) that the debt collector did not intend and could not have foreseen.

Reasonably Confirm and Document

An industry commenter asked the Bureau to clarify the proposed requirement that a debt collector's procedures include steps to reasonably confirm and document that the debt collector acted in accordance with proposed § 1006.6(d)(3).[260] Another industry commenter suggested that procedures to reasonably confirm and document compliance should include an audit component and asked the Bureau to publish sample procedures. Consumer and consumer advocate commenters generally did not address the proposed requirement to reasonably confirm and document compliance.

The final rule retains the requirement that a debt collector's procedures include steps to reasonably confirm and document that the debt collector acted in accordance with § 1006.6(d)(3). Depending on their size, the scope of their operations, and other business-specific facts, different debt collectors may take different approaches to reasonably confirming and documenting compliance with § 1006.6(d)(3). The Bureau declines to specify by rule a single set of steps or elements that all procedures must or should include under § 1006.6(d)(3). As the Bureau noted in the preamble to the proposal, however, procedures permitting a debt collector to use obviously incorrect email addresses merely because the addresses were obtained consistent with § 1006.6(d)(3) would not satisfy the requirement to reasonably confirm and document compliance.[261] In this circumstance, any purported confirmation of the debt collector's compliance with § 1006.6(d)(3) would not be reasonable.

Scope of Procedures

The procedures in proposed § 1006.6(d)(3) would have applied only to a debt collector's email and text message communications.[262] Two industry commenters requested that the Bureau clarify the term email. One did not propose a definition, while the other asked the Bureau to adopt an expansive definition that would include private communication tools offered by social media platforms. This commenter asserted that social media accounts, like email accounts, are password protected and generally not reassigned, and, as a result, direct messaging communications on social media should be treated the same as email communications. The commenter also stated that the definition of email should include mobile application or web-based technologies that allow consumers to initiate a live written conversation with a business through a ''chat box.''

A group of consumer advocate commenters asked the Bureau to clarify that the term email does not include direct messages, whether sent through social media platforms or free-standing messaging platforms. These commenters asserted that, on some direct messaging platforms, users search for each other by first and last name rather than by a distinct and individual user name, which increases the likelihood of misdirected messages, particularly among consumers with common names.

In light of the apparent variations in direct messaging technology, the Bureau is unable to assess how well the procedures in final § 1006.6(d)(3) through (5) would address the risk of third-party disclosures in the direct messaging context. Therefore, for purposes of § 1006.6(d)(3) through (5), the Bureau declines to define the term email to include direct messaging technology in mobile applications or on social media. Debt collectors may use these communication media, subject to the requirements and prohibitions of the FDCPA and the final rule.

Multiple industry commenters advocated expanding the procedures in proposed § 1006.6(d)(3), or developing new procedures, to cover additional communication technologies, such as smart phone notifications, ringless voicemails, and traditional telephone calls and voicemails. Each of these contexts may pose third-party disclosure risks that differ, in varying degrees, from the third-party disclosure risks posed by email and text message communications. Because the Bureau did not propose procedures related to other communications technologies, it lacks the benefit of public comment about what such procedures might look like.[263] Developing procedures to cover such technologies is outside the scope of this rulemaking.

The Bureau reiterates, however, that the final rule identifies neither the only circumstances in which a debt collector may communicate with a consumer electronically nor the only technologies a debt collector may use to do so. Nor does it identify the only procedures that may be reasonably adapted to avoid a violation of the prohibition on third-party disclosures. Thus, a debt collector would not necessarily violate § 1006.6(d)(1) or FDCPA section 805(b) by communicating with a consumer electronically other than by email or text message, or by email or text message without using the procedures in § 1006.6(d)(3) through (5). Moreover, depending on the facts, a debt collector might be able to show by a preponderance of the evidence that any third-party disclosures were unintentional and that the debt collector employed procedures reasonably adapted to avoid them.

First-Party Debt Collectors

Two credit union commenters asked the Bureau to clarify the rules for creditors' use of email and text messages. The procedures in § 1006.6(d)(3) through (5) apply to FDCPA debt collectors only. Creditors who are not FDCPA debt collectors are not subject to the FDCPA's prohibition on third-party disclosures, although they are covered by other consumer financial laws. To the extent commenters were requesting that the Bureau develop and finalize procedures applicable to creditors, such a request is outside the scope of this rulemaking.

[260] *See id.* at 23301.

[261] *See id.* at 23300.

[262] *See id.*

[263] *See* 84 FR 23274, 23300 (May 21, 2019) (''The procedures in proposed § 1006.6(d)(3) address email and text message communications only. At this time, the Bureau does not propose procedures related to the use of less-developed and less-widespread forms of electronic communications because consumers do not appear accustomed to using such technologies in their financial lives.'').

Telephone Consumer Protection Act

The Telephone Consumer Protection Act (TCPA) generally prohibits the use of automated dialing equipment to call a telephone number without a consumer's consent.[264] A group of consumer advocate commenters asked the Bureau to clarify how the Bureau's procedures interact with the TCPA. Congress has vested the FCC—not the Bureau—with authority to implement the TCPA.[265] The final rule does not interpret the TCPA; nor does anything in the final rule alter any FCC rule or any obligation imposed on debt collectors by such a rule.

For the reasons discussed above, the Bureau is finalizing § 1006.6(d)(3), which sets forth procedures that debt collectors may use to reduce their risk of civil liability for unintentional third-party disclosures when communicating with consumers by email or text message. In response to numerous comments regarding the details of the proposed procedures, and as discussed in detail below, the Bureau is finalizing procedures that differ substantively and organizationally from those that the Bureau proposed.[266]

6(d)(3)(i)

As proposed, § 1006.6(d)(3)(i) identified the first of two conditions that a debt collector would have had to satisfy to obtain a safe harbor from civil liability for an unintentional third-party disclosure when communicating by email or text message. Under proposed § 1006.6(d)(3)(i), the debt collector's procedures would have had to include steps to reasonably confirm and document that the debt collector communicated using an email address, or telephone number for text messages, in accordance with one of the three methods described in proposed § 1006.6(d)(3)(i)(A) through (C).

As proposed, § 1006.6(d)(3)(i)(A) through (C) provided a safe harbor if, among other things, the consumer had used the email address or telephone number to communicate with the debt collector (proposed § 1006.6(d)(3)(i)(A), the ''consumer-use'' method); the consumer received notice and an opportunity to opt out of the debt collector's use of the email address or telephone number for text messages (proposed § 1006.6(d)(3)(i)(B), the ''notice-and-opt-out'' method); or the creditor or a prior debt collector had obtained the email address or telephone number from the consumer and used it to communicate about the debt (proposed § 1006.6(d)(3)(i)(C), the ''creditor-or-prior-debt-collector-use'' method). As proposed, the methods in § 1006.6(d)(3)(i)(A) through (C) did not distinguish between communications sent by email and communications sent by text message.

Many commenters offered substantive feedback about the three methods of obtaining and using email addresses and telephone numbers described in proposed § 1006.6(d)(3)(i)(A) through (C). Those comments are addressed where relevant in the section-by-section analysis of § 1006.6(d)(4) and (5). Some commenters also highlighted the differences between email and text message communications, noting the unique third-party disclosure risks presented by the reassignment of mobile telephone numbers.

After considering the public comments, the Bureau is, as proposed, finalizing § 1006.6(d)(3)(i) to identify the first of two conditions that a debt collector must satisfy to obtain a safe harbor from civil liability for an unintentional third-party disclosure when communicating by email or text message. However, in light of comments highlighting the different third-party disclosure risks of email communications and text message communications, the final rule sets forth different procedures for email messages and text messages and also addresses them separately (email in § 1006.6(d)(4) and text messages in § 1006.6(d)(5)). To reflect this change, final § 1006.6(d)(3)(i) provides that, for a debt collector to obtain a safe harbor from civil liability for an unintentional third-party disclosure, a debt collector's procedures must include steps to reasonably confirm and document that the debt collector communicated with the consumer by sending an email to an email address described in § 1006.6(d)(4) or a text message to a telephone number described in § 1006.6(d)(5).

6(d)(3)(ii)

Proposed § 1006.6(d)(3)(ii) identified the second of two conditions a debt collector would have had to satisfy to obtain a safe harbor from civil liability for an unintentional third-party disclosure when communicating by email or text message. Specifically, under proposed § 1006.6(d)(3)(ii), the debt collector's procedures would have had to include steps to reasonably confirm and document that the debt collector took additional steps to prevent communications using an email address or telephone number that the debt collector knew had led to an unauthorized third-party disclosure. The Bureau proposed § 1006.6(d)(3)(ii) on the basis that a debt collector whose procedures are not designed to prevent recurrence of a known violation may intend to convey information related to the debt or its collection to a third party.

A group of consumer advocate commenters argued that proposed § 1006.6(d)(3)(ii) did not sufficiently address the risk of repeat third-party disclosures. According to these commenters, the Bureau should simply require debt collectors to stop using an email address or telephone number for text messages if the debt collector knows that using the address or telephone number has led to a third-party disclosure, unless the consumer has expressly consented. One industry commenter requested that the Bureau provide examples of additional steps a debt collector could take to prevent communications using an email address or telephone number that the debt collector knows has led to a third-party disclosure.

The Bureau is finalizing § 1006.6(d)(3)(ii) with modifications for clarity. Specifically, § 1006.6(d)(3)(ii) provides that, to obtain a safe harbor from civil liability, a debt collector's procedures must include steps to reasonably confirm and document that the debt collector did not communicate with the consumer by sending an email to an email address or a text message to a telephone number that the debt collector knows has led to a disclosure prohibited by § 1006.6(d)(1).

The Bureau is not adopting the suggestion to require debt collectors simply to stop using email addresses and telephone numbers that have led to third-party disclosures. As noted, the Bureau is finalizing § 1006.6(d)(3) through (5) as an interpretation of FDCPA section 813(c)'s bona fide error defense. A bona fide error defense is only available under FDCPA section 813(c) if a debt collector maintains procedures reasonably adapted to avoid an error. Accordingly, § 1006.6(d)(3)(ii) is framed in terms of a debt collector's procedures. The Bureau notes, however, that, if a debt collector sends repeated emails to an email address or text messages to a telephone number that the debt collector knows has led to a third-party disclosure, that conduct would likely show that the debt collector's procedures are not reasonable and that

[264] *See* 47 U.S.C. 227; *ACA Int'l* v. *Fed. Commc'ns Comm'n,* 885 F.3d 687 (D.C. Cir. 2018).

[265] *See* 47 U.S.C. 227(b)(2).

[266] The text of the introductory paragraph of final § 1006.6(d)(3) is largely the same as the text of the introductory paragraph of proposed § 1006.6(d)(3), with technical edits for clarity.

the debt collector is not entitled to a safe harbor from civil liability.[267]

In response to the industry commenter's request for examples, the Bureau is adopting new comment 6(d)(3)(ii)–1, which clarifies that, for purposes of § 1006.6(d)(3)(ii), a debt collector knows that sending an email to an email address or a text message to a telephone number has led to a disclosure prohibited by § 1006.6(d)(1) if any person has informed the debt collector of that fact. Thus, to comply with § 1006.6(d)(3)(ii), it is necessary (but not sufficient) for a debt collector to accept and track complaints.

6(d)(4) Procedures for Email Addresses

As noted above, the final rule reorganizes proposed § 1006.6(d)(3)(i) by separating email procedures and text message procedures, and final § 1006.6(d)(4) describes the three procedures that a debt collector may use to obtain a safe harbor from civil liability for an unintentional third-party disclosure when communicating by email. The final email procedures are discussed in detail in the section-by-section analysis of § 1006.6(d)(4)(i) through (iii).

The Bureau received one overarching comment regarding its proposed email procedures. One industry commenter stated that requiring debt collectors to encrypt email communications or protect them with passwords would reduce the risk of third-party disclosure. As proposed, the email procedures would not have required encryption or password protection, and the Bureau declines to require debt collectors to take these steps to obtain a safe harbor from civil liability for third-party disclosures. The Bureau notes, however, that a debt collector who encrypts its emails or protects them with a password would not thereby lose access to a safe harbor from civil liability under § 1006.6(d)(3) for which the debt collector otherwise qualified.

6(d)(4)(i) Procedures Based on Communication Between the Consumer and the Debt Collector

Proposed § 1006.6(d)(3)(i)(A) (the ''consumer-use'' method) for emails provided that a debt collector could obtain a safe harbor from civil liability for an unintentional third-party disclosure if, in addition to complying with § 1006.6(d)(3)(ii), the debt collector maintained procedures to reasonably confirm and document that the debt collector communicated with the consumer using an email address, including an employer-provided email address, that the consumer recently used to contact the debt collector for purposes other than opting out of electronic communications.[268] As discussed below, the Bureau is finalizing the email procedures in proposed § 1006.6(d)(3)(i)(A) as § 1006.6(d)(4)(i), with modifications and additions to address comments received, and with revisions for clarity.

The Bureau received numerous comments regarding its assumption that a debt collector may not have reason to anticipate a third-party disclosure when sending an email to an email address, including an employer-provided email address, that the consumer recently used to communicate with the debt collector. The Bureau reasoned that a consumer generally is better positioned than a debt collector to determine whether third parties have access to a specific email address, and a consumer's decision to communicate with a debt collector using a specific email address may suggest that the consumer assessed the risk of third-party disclosure to be low.[269]

In general, industry commenters supported the Bureau's reasoning, while several consumer advocate commenters rejected it. Consumer advocate commenters generally asserted that it is unlikely that consumers will have done a third-party disclosure risk analysis before using a particular email address to communicate with a debt collector, and that consumers who lack regular access to a computer or email address might use another person's email address to communicate with the debt collector. Consumer advocate commenters also asserted that a consumer may feel some urgency to contact a debt collector and may use a certain email address to do so without intending to establish that address as a regular means of contact. As to employer-provided email addresses specifically, consumer advocate commenters argued that employees may not be aware that employers can and do monitor emails sent or received on employer-provided accounts, and that even consumers who are aware of this possibility likely would be unaware that sending a carefully worded email to a debt collector could insulate the debt collector from third-party disclosure liability if the debt collector replied to that address.

The Bureau determines that consumers are generally better positioned than debt collectors to determine if third parties have access to a particular email account, whether personal or employer provided. A consumer who uses a particular email address to contact a debt collector about a debt likely expects the debt collector to respond using the same address. In addition, because a third party with access to a consumer's email account typically can read outgoing and incoming communications, an email message sent by a consumer to a debt collector may, like an email message received by a consumer from a debt collector, result in a third-party disclosure. For these reasons, the Bureau continues to believe that a consumer's willingness to use an email address to contact a debt collector without conditions suggests that the risk of third-party disclosure is low if the debt collector responds to that email. Therefore, a debt collector who uses such an email address generally would lack reason to anticipate a third-party disclosure, unless the consumer has asked the debt collector not to engage in such communications.[270]

The Bureau also received numerous comments regarding proposed § 1006.6(d)(3)(i)(A)'s recency requirement, *i.e.,* the requirement that the email address be one that the consumer recently used to contact the debt collector. While many commenters confirmed that telephone numbers are regularly reassigned, several industry commenters stated that email addresses typically are not reassigned and that the proposed recency requirement for email addresses therefore was unnecessary. Several industry commenters also objected on the ground that a recency requirement would impose a burden on debt collectors to track information, such as when a consumer last used an email address. A group of consumer advocate commenters acknowledged that email addresses are reassigned far

[267] Moreover, depending on the facts, a debt collector who repeatedly sends an email or a text message to an email address or telephone number that the debt collector knows has led to a third-party disclosure may violate FDCPA section 808's prohibition on unfairness.

[268] As noted, proposed § 1006.6(d)(3)(i)(A) would have applied to both email addresses and telephone numbers, but final § 1006.6(d)(4)(i) applies only to email addresses. This section-by-section analysis therefore addresses proposed § 1006.6(d)(3)(i)(A) only with respect to comments that specifically discussed email addresses, or that did not distinguish between email addresses and telephone numbers. Comments received in response to proposed § 1006.6(d)(3)(i)(A) that discussed telephone numbers are addressed in the section-by-section analysis of § 1006.6(d)(5)(i).

[269] *See* 84 FR 23274, 23301 (May 21, 2019) (discussing the Bureau's rationale for including both employer-provided and personal email addresses in the proposed § 1006.6(d)(3)(i)(A) safe harbor).

[270] The Bureau notes that § 1006.14(h) prohibits a debt collector from communicating or attempting to communicate with a person through a medium of communication if the person has requested that the debt collector not use that medium to communicate with the person.

less frequently than telephone numbers but nevertheless supported the recency requirement for email addresses.

The Bureau has decided not to include a recency requirement as part of the email procedures in final § 1006.6(d)(4)(i).[271] The Bureau proposed the recency requirement principally to address the risk that a telephone number might be reassigned from one consumer to another, and would have applied the requirement to email addresses largely for consistency and ease of administration.[272] In light of comments asserting that a recency requirement imposes some burden on creditors and debt collectors to track and transfer information, and comments indicating that emails are reassigned infrequently if at all, the Bureau concludes that a recency requirement should not apply to email addresses.[273]

Several industry commenters requested that the Bureau expand the procedures in proposed § 1006.6(d)(3)(i)(A), or create new procedures, to protect a debt collector who communicates with a consumer by email after receiving the consumer's permission to use the email address for debt collection communications, such as if the consumer provides the email address to the debt collector over the telephone or while using the debt collector's website, or provides the email address to a court for purposes of receiving electronic service of process.[274] The Bureau concludes that, if a consumer has directly consented to a debt collector's use of a particular email address and has not withdrawn that consent,[275] the debt collector generally does not have reason to anticipate that using the email address to communicate with the consumer will lead to a third-party disclosure. Accordingly, and as discussed below, the final rule includes a new provision, § 1006.6(d)(4)(i)(B), to account for the direct consent scenario.[276]

Many industry commenters also requested that the Bureau expand the procedures in proposed § 1006.6(d)(3)(i)(A), or create new procedures, to cover not only an email address that the consumer provided to the debt collector, but also an email address that the consumer provided to, or used to contact, the creditor. Some of these commenters argued that, if a consumer provided an email address when opening an account or communicating with a creditor, the consumer knew or should have known that the debt collector would use the email address to collect the debt, and there is no need to delay the collection process by requiring consumers to re-confirm their preferences. Similarly, an industry commenter argued that a consumer who has chosen to communicate with a creditor electronically should be assumed to prefer communicating with a debt collector electronically, and that an opt-in system burdens consumer choice and delays the collection process by imposing an additional requirement before debt collectors may begin electronic debt collection communications. Some commenters advocated for a safe harbor from civil liability as long as the creditor's account opening materials disclosed that an email address the consumer gives the creditor could be used for debt collection purposes. Other commenters, recognizing that a consumer's communication preferences may change over time and that years may elapse between when a consumer provides a creditor with electronic contact information and when a creditor transfers the consumer's debt to a debt collector, suggested a safe harbor for email addresses provided by the consumer to the creditor within a particular timeframe, such as within the 270 days preceding the debt collector's use. Another industry commenter suggested a safe harbor for a debt collector who sends an email to an email address used by the creditor to send the consumer delinquency communications in the months before an account is placed for collection.

As the Bureau noted in the proposal, a consumer might agree to receive electronic communications from a creditor without considering the risk that a third party might read those communications, but a consumer who is indifferent to the disclosure of creditor communications may not be indifferent to the disclosure of debt collection communications.[277] Thus, a consumer's decision to communicate electronically with a creditor does not, without more, suggest that the risk of third-party disclosure is particularly low. Nor does a disclosure in account opening materials, without more, suggest that the risk of third-party disclosure is particularly low. Years may pass, and a consumer's circumstances may change, between the time a consumer opens an account and the time the account is transferred to a debt collector. The Bureau therefore declines to add the procedures requested by these commenters. The Bureau notes, however, that nothing in § 1006.6(d)(4)(i) prohibits a debt collector from sending an email to an email address provided by the consumer to the creditor. Depending on the facts, a debt collector may be able to do so without violating FDCPA section 805(b).[278]

For the reasons discussed above, the Bureau is finalizing proposed § 1006.6(d)(3)(i)(A) as § 1006.6(d)(4)(i). Section 1006.6(d)(4)(i)(A) provides that a debt collector may obtain a safe harbor from civil liability for an unintentional third-party disclosure when sending an email to an email address if the consumer used the email address to communicate with the debt collector about the debt and the consumer has not since opted out of communications to that email address.[279] Section

[271] As discussed in the section-by-section analysis of § 1006.6(d)(5), the Bureau is finalizing a recency requirement as part of the text message procedures.

[272] *See* 84 FR 23274, 23301 (May 21, 2019) (discussing that emails are not regularly reassigned but proposing to apply the recency requirement to emails as well as to telephone numbers for consistency and ease of administration of the regulation). Although it appears that at least one email provider does allow email addresses to be reassigned, it is unclear how often this occurs and commenters generally agreed that, to the extent it happens, email reassignment is far less common that telephone number reassignment. *See* AJ Dellinger, *Yahoo Hack: Why You Shouldn't Delete Your Email Address, Account,* Int'l Bus. Times (Oct. 5, 2017).

[273] To the extent that commenters addressed specific elements of the proposed recency requirement for emails, such as how to define ''recent,'' those comments are moot because the Bureau is not finalizing a recency requirement for emails. The Bureau therefore does not discuss them.

[274] Relatedly, a group of academic commenters requested that the Bureau prohibit debt collectors from using embedded cookies, which can track a user's browsing history, on their websites. The Bureau does not further address this comment, as it is outside the scope of the rulemaking.

[275] As explained in the section-by-section analysis of § 1006.6(e), a debt collector who communicates electronically must provide consumers with a reasonable and simple way to opt out of such communications.

[276] As discussed in the section-by-section analysis of § 1006.6(d)(5)(ii), the final rule similarly includes a new provision covering a debt collector who communicates with a consumer by text message after receiving the consumer's unwithdrawn direct consent to do so.

[277] *See* 84 FR 23274, 23304 (May 21, 2019).

[278] For example, in some circumstances, a consumer's willingness to receive delinquency communications from a creditor electronically may better suggest that the risk of third-party disclosure is low than a consumer's willingness to receive routine account communications from a creditor electronically. Similarly, in some circumstances, a debt collector's use of an email address or telephone number recently provided by the consumer to the creditor may pose lower third-party disclosure risk than a debt collector's use of an email address or telephone number provided by the consumer to the creditor at account opening.

[279] Proposed § 1006.6(d)(3)(i)(A) specified that a debt collector could not use an email address used by the consumer to opt out of electronic communications. As finalized, § 1006.6(d)(4)(i)(A) retains this prohibition: A debt collector is not covered by § 1006.6(d)(4)(i)(A) if the debt collector communicates using an email address the consumer used to opt out of electronic communications.

1006.6(d)(4)(i)(B) provides that a debt collector may obtain a safe harbor from civil liability for an unintentional third-party disclosure when sending an email to an email address if the debt collector has received directly from the consumer prior consent to use the email address to communicate with the consumer about the debt and the consumer has not withdrawn that consent.

The Bureau also is adopting new comments 6(d)(4)(i)(B)–1 and –2 to clarify the meaning of direct prior consent for purposes of § 1006.6(d)(4)(i)(B). Comment 6(d)(4)(i)(B)–1 clarifies that a consumer may provide direct consent orally, in writing, or electronically. Comment 6(d)(4)(i)(B)–2 clarifies that, if a consumer provides an email address to a debt collector (including on the debt collector's website or online portal), the debt collector may treat the consumer as having consented directly to the debt collector's use of the email address to communicate with the consumer about the debt for purposes of § 1006.6(d)(4)(i)(B) if the debt collector discloses clearly and conspicuously that the debt collector may use the email address to communicate with the consumer about the debt.[280]

6(d)(4)(ii) Procedures Based on Communication by the Creditor

Proposed § 1006.6(d)(3)(i)(B) (the ''notice-and-opt-out'' method) generally provided that a debt collector could obtain a safe harbor from civil liability for an unintentional third-party disclosure if, in addition to complying with § 1006.6(d)(3)(ii), the debt collector maintained procedures to reasonably confirm and document that: (1) The debt collector communicated with the consumer using a personal email address after the creditor or the debt collector provided the consumer with notice of such communications and a reasonable opportunity to opt out; and (2) the consumer did not opt out.[281]

The Bureau received a number of comments relating to the general concept of permitting a debt collector to use notice-and-opt-out procedures to obtain a safe harbor from civil liability for unintentional third-party disclosures when sending an email to a consumer.[282] Industry commenters generally supported the Bureau's reasoning that a consumer's failure to opt out after receiving notice that an email address could be used for debt collection communications may suggest that the consumer has assessed the risk of third-party disclosure to be low. Industry commenters also generally opposed any requirement that consumers opt into electronic communications, with several predicting that few consumers would opt in, and that, as a result, electronic communications would be unlikely to take place at all. These commenters noted that, in at least one State that requires consumers to opt into email communications, debt collectors generally do not use email to communicate with consumers.[283]

Consumer advocate commenters requested that the Bureau not adopt a notice-and-opt-out approach. These commenters argued that the Bureau should permit electronic communications only pursuant to an opt-in approach, which would enable consumers, before agreeing to electronic communications, to: (1) Weigh any risks due to irregular internet or cellphone access; (2) confirm the addresses and telephone numbers to which electronic communications may be directed, ensuring that, particularly for consumers who regularly change telephone numbers or abandon email addresses, communications are sent to the consumer rather than to a third party; (3) weigh the financial cost of electronic communications (for consumers with limited text message or data plans); (4) familiarize themselves with the sender and weigh any security risks, helping to ensure that consumers actually would open emails and minimizing the chance that emails would be blocked by spam filters and other screening devices;[284] and (5) weigh any privacy-related risks, including that emails and text messages could be viewed by a consumer's telephone or email provider, could appear on a publicly visible computer or telephone screen, or could be coming from a phony, rather than legitimate, debt collector.

The Bureau recognizes that, as consumer advocates observed, for an opt-out system to work the consumer must, among other things, actually receive the opt-out notice and have the opportunity to consider it. The Bureau also recognizes that a consumer who receives an opt-out notice may ignore it, fail to consider the risks of receiving emails (including the risk of third-party disclosure), or not take the steps necessary to opt out. However, the Bureau believes that the safeguards it has incorporated in the rule, which are discussed below, will mitigate these concerns.[285] For these reasons, the Bureau is finalizing the notice-and-opt-out method in proposed § 1006.6(d)(3)(i)(B) as § 1006.6(d)(4)(ii), with modifications as discussed in the section-by-section analysis of § 1006.6(d)(4)(ii)(A) through (E) to increase the likelihood that a consumer will have an opportunity to make an adequately informed choice whether to opt out of receiving emails.

6(d)(4)(ii)(A)

As proposed, the notice-and-opt-out method in § 1006.6(d)(3)(i)(B) generally would have provided a safe harbor from civil liability for debt collector communications sent to any personal email address other than the address to which the opt-out notice itself was sent, provided the other opt-out requirements were met. Under proposed § 1006.6(d)(3)(i)(B), then, a debt collector could have used the notice-and-opt-out method to obtain a safe harbor from civil liability for an unintentional third-party disclosure when sending an email to an email

[280] A consumer who consents to electronic service of process typically provides consent to the court rather than to the debt collector. Accordingly, a consumer's consent to electronic service of process generally is not covered by § 1006.6(d)(4)(i)(B). The Bureau believes, however, that a debt collector generally would lack reason to anticipate a third-party disclosure when sending an email to an email address if the consumer has agreed to receive litigation communications relating to the debt at that address.

[281] As noted, proposed § 1006.6(d)(3)(i)(B) would have applied to both email addresses and telephone numbers, but final § 1006.6(d)(4)(ii) applies only to email addresses. This section-by-section analysis therefore addresses proposed § 1006.6(d)(3)(i)(B) only with respect to comments that specifically discussed email addresses, or that did not distinguish between email addresses and telephone numbers. Comments received in response to proposed § 1006.6(d)(3)(i)(B) that discussed telephone numbers are addressed in the section-by-section analysis of § 1006.6(d)(5).

[282] Commenters also submitted numerous comments about particular aspects of proposed § 1006.6(d)(3)(i)(B); those comments are addressed where relevant in the section by section analysis of § 1006.6(d)(4)(ii)(A) through (E).

[283] *See* 23 CRR–NY 1.6 (permitting a debt collector to communicate with a consumer by email only if the consumer has ''(1) voluntarily provided an electronic mail account to the debt collector which the consumer has affirmed is not an electronic mail account furnished or owned by the consumer's employer; and (2) consented in writing to receive electronic mail correspondence from the debt collector in reference to a specific debt'').

[284] As the Bureau noted in the proposal, several Federal agencies advise consumers not to open emails from senders they do not recognize. *See* 84 FR 23274, 23363 n.578 (May 21, 2019).

[285] See in particular the section-by-section analysis of § 1006.6(d)(4)(ii)(C), which discusses that: (1) The opt-out notice must come from the creditor, be provided in written or electronic form, and describe the third-party disclosure considerations implicated by debt collection communications; and (2) the consumer must be provided a reasonable and simple method to opt out and at least 35 days to do so. See also the section-by-section analysis of § 1006.6(d)(4)(ii)(E), which clarifies that debt collectors proceeding under the opt-out method generally cannot obtain a safe harbor from civil liability when emailing a consumer at an employer-provided email address.

address obtained through skip tracing or any other method.

To increase the likelihood that the email address for which a debt collector using the notice-and-opt-out method obtains a safe harbor actually belongs to the consumer, and thereby minimize the risk of a third-party disclosure, the Bureau finds that it is important to limit the types of email addresses debt collectors may use on an opt-out basis. An email address obtained by the creditor directly from the consumer is highly likely to belong to the consumer; by contrast, an email address obtained through skip tracing generally lacks the same degree of reliability.[286] For these reasons, the Bureau is finalizing § 1006.6(d)(4)(ii)(A), which provides that, for purposes of the notice-and-opt-out method, the debt collector may send an email only to an email address that a creditor obtained from the consumer.

Final § 1006.6(d)(4)(ii)(A) is similar to an aspect of proposed § 1006.6(d)(3)(i)(C),[287] which, as discussed in the section-by-section analysis of final § 1006.6(d)(4)(iii), provided that a debt collector could satisfy the ''creditor-or-prior-debt-collector-use'' method of obtaining a safe harbor only if, among other things, the debt collector used an email address obtained from the consumer by the creditor or a prior debt collector.[288] In response to that proposed requirement, a group of consumer advocate commenters asked the Bureau to clarify how a creditor could obtain an email address from the consumer and how a debt collector would know that a creditor had done so. There are many ways for a creditor to obtain an email address from a consumer for purposes of the notice-and-opt-out procedures in § 1006.6(d)(4)(ii). For example, the creditor may request the email address at account opening,[289] or at a later stage of the parties' relationship, or the consumer might voluntarily provide the email address on a website or otherwise. The Bureau does not believe it is necessary to specify by rule precisely how a debt collector would know that the creditor had obtained an email address from the consumer. Different debt collectors may have different approaches to reasonably confirming and documenting this fact.

6(d)(4)(ii)(B)

As noted, the notice-and-opt-out method in proposed § 1006.6(d)(3)(i)(B) generally would have provided a safe harbor for debt collector communications sent to any personal email address other than the address to which the opt-out notice was sent, provided the other opt-out requirements were met. There was no requirement that the creditor (or any other person) previously had used the email address to communicate with the consumer.

To further reduce the risk of a third-party disclosure when debt collectors use the notice-and-opt-out method, the Bureau believes that it is important to incorporate such a requirement into § 1006.6(d)(4)(ii). While any requirement that the email address had been used by the creditor to communicate with the consumer (even if only for advertising or marketing) would help achieve this goal, the Bureau determines that requiring the creditor to have used the email address to communicate with the consumer about the account reduces the risk of third-party disclosure even further. Although the FDCPA recognizes that creditor communications are less sensitive than debt collector communications, some creditor communications, such as communications about the account, are more sensitive than others, such as advertising or marketing communications. The Bureau therefore believes that a consumer's willingness to communicate electronically with a creditor about an account says more about the risk of third-party disclosure should the account enter collections than a consumer's willingness to receive advertisements or marketing materials electronically. Conversely, if a consumer has asked a creditor to stop using an email address to communicate about an account, a debt collector may have reason to anticipate that using the address to communicate about the debt could lead to a third-party disclosure.

For these reasons, the Bureau is finalizing § 1006.6(d)(4)(ii)(B), which provides that, for purposes of the notice-and-opt-out method, a debt collector may send an email only to an email address used by the creditor to communicate with the consumer about the account, and only if the consumer did not ask the creditor to stop using it. The Bureau also is adopting new comment 6(d)(4)(ii)(B)–1 to clarify the types of communications that constitute communications about the account for purposes of § 1006.6(d)(4)(ii)(B).

Final § 1006.6(d)(4)(ii)(B) is similar to aspects of proposed § 1006.6(d)(3)(i)(C), which, as discussed in the section-by-section analysis of final § 1006.6(d)(4)(iii), provided that a debt collector could satisfy the ''creditor-or-prior-debt-collector-use'' method of obtaining a safe harbor only if, among other things, the debt collector used an email address to which the creditor or a prior debt collector sent communications about the debt, and the consumer did not ask the creditor or prior debt collector to stop. The Bureau received a number of comments regarding those aspects of proposed § 1006.6(d)(3)(i)(C), and those comments have informed final § 1006.6(d)(4)(ii)(B).[290]

An industry commenter objected to requiring the creditor to have communicated ''about the debt,'' arguing that the requirement should be eliminated or broadened to include communications ''about the account'' because a creditor's communications with a consumer typically involve the account rather than the debt. By contrast, a group of consumer advocate commenters argued the requirement would not sufficiently protect consumers because it would not have required that the consumer actually received or accessed the communications, or that the creditor or debt collector took any steps to confirm the consumer's receipt and access. In addition, the consumer advocate commenters noted, any requirements placed on creditors would not be enforceable against creditors who were not also FDCPA debt collectors. The commenters also argued that a

[286] An industry commenter urged the Bureau to create a safe harbor permitting the use of any email address that has been ''verified.'' The commenter did not define ''verify'' but noted that it is possible to obtain email addresses from commercially available databases. Because the Bureau currently lacks information to evaluate the completeness and accuracy of such databases, the Bureau declines the commenter's suggestion to provide a safe harbor to a debt collector who ''verifies'' a consumer's email address using such a database.

[287] As discussed in the section-by-section analysis of § 1006.6(d)(4)(iii), the Bureau is not finalizing § 1006.6(d)(3)(i)(C) as proposed but, as here, is incorporating aspects of that provision into the final notice-and-opt-out procedures. The Bureau therefore responds to certain comments made in response to § 1006.6(d)(3)(i)(C) in this section-by-section analysis.

[288] Unlike proposed § 1006.6(d)(3)(i)(C), final § 1006.6(d)(4)(ii) does not cover a debt collector's use of an email address obtained by a prior debt collector. Safe harbor procedures covering a debt collector's use of such an email address are found in final § 1006.6(d)(4)(iii).

[289] The Bureau notes that § 1006.6(d)(4)(ii) does not provide a safe harbor to a debt collector who simply sends an email to an email address obtained by the creditor at account opening. Instead, for a debt collector to obtain a safe harbor from civil liability under § 1006.6(d)(4)(ii), the other requirements of the notice-and-opt-out procedures must be satisfied.

[290] As discussed in the section-by-section analysis of § 1006.6(d)(4)(iii), the Bureau is not finalizing § 1006.6(d)(3)(i)(C) as proposed but, as here, is incorporating aspects of that provision into the final notice-and-opt-out procedures. The Bureau therefore responds to certain comments addressing § 1006.6(d)(3)(i)(C) in this section-by-section analysis.

consumer's failure to request that the creditor stop using a particular email address is just as likely to mean that messages to that address had gone to the consumer's spam folder or had reached the wrong person as to mean that the consumer had assessed third-party disclosure risk to be low. In addition, these commenters noted, a creditor is under no obligation to inform the consumer of the right or ability to opt out of communications, so a consumer's failure to opt out should not implicitly authorize a debt collector to send emails to that email address.

The Bureau determines that, given the multiple consumer protections built into the final notice-and-opt-out procedures to limit the likelihood of a third-party disclosure—including requirements relating to the form and content of the opt-out notice, as well as who may deliver it and in what manner—it is not necessary to require the creditor to have used the email address to communicate about the debt, as distinguished from the account. Nor does the Bureau believe it is necessary to require that the consumer actually received or was able to view the creditor's communications, or that the creditor took steps to confirm the consumer's receipt and access of those communications. Under § 1006.6(d)(4)(ii)(A), the email address must have been obtained by the creditor from the consumer and is therefore highly likely to belong to the consumer, particularly because email addresses generally are not reassigned. Moreover, a consumer who provides an email address to a creditor is likely to expect email communications about the account from the creditor and to follow up should any expected communications not arrive, diminishing the risk that a creditor's emails will be blocked by a spam filter.[291] In addition, to the extent that the email address is one for which the creditor has obtained consent under the E–SIGN Act, the creditor will already have confirmed the consumer's ability to access the communications.[292] Further, under § 1006.6(d)(4)(ii), a consumer's failure to opt out of a creditor's past use of an email address does not, without more, provide a safe harbor to a debt collector who uses that email address; the creditor must, among other things, provide the consumer with notice and a reasonable opportunity to opt out of debt collection communications to that address. Accordingly, the final rule does not treat a consumer's failure to exercise an undisclosed opt-out right as implicitly authorizing a debt collector to send emails to that email address.

Regarding the requirement that the consumer did not ask the creditor to stop using the address, one industry commenter suggested, without further explanation, that only a consumer's written request should suffice. The Bureau declines the commenter's suggestion; an oral request can suggest just as well as a written request that the risk of third-party disclosure is high.

For these reasons, the Bureau is finalizing § 1006.6(d)(4)(ii)(B) as described above.

6(d)(4)(ii)(C)

As proposed, § 1006.6(d)(3)(i)(B)(*1)* contained a number of requirements regarding the opt-out notice. The creditor or debt collector would have been required to notify the consumer clearly and conspicuously, no more than 30 days before the debt collector sent its first email communication, that the debt collector might use a particular personal email address for such communications. The creditor or debt collector also would have been required to provide the notice other than through the email address that the debt collector planned to use for debt collection communications, and to describe how to opt out. For the reasons discussed below, the Bureau is finalizing proposed § 1006.6(d)(3)(i)(B)(*1),* with modifications and additions, as final § 1006.6(d)(4)(ii)(C) to provide that, before a debt collector uses an email address to communicate with a consumer about a debt under § 1006.6(d)(4)(ii), the creditor must send the consumer a written or electronic notice that clearly and conspicuously discloses the information identified in § 1006.6(d)(4)(ii)(C)(*1*) through (*5*).[293]

Who May Provide the Opt-Out Notice

Proposed § 1006.6(d)(3)(i)(B)(*1*) would have permitted either the creditor or the debt collector to provide the opt-out notice. Several industry commenters observed that a creditor who provides the opt-out notice itself will incur costs to do so, while a group of consumer advocate commenters expressed concern about enforcing the law against creditors who provide the opt-out notice in a manner that violates the rule. As commenters also noted in discussing electronic communications generally, many consumers are suspicious of communications from entities they do not know or recognize, such as debt collectors. Consumers may ignore or delete such communications without opening them and may be reluctant to click on any links they contain, including links to opt out of further communications. Indeed, as the Bureau noted in the proposal, several Federal agencies have warned consumers against clicking on links from unknown senders.[294]

The Bureau recognizes, as industry commenters noted, that creditors will incur a cost to send the opt-out notice. Some creditors may absorb these costs while others may seek to require debt collectors to absorb them. The Bureau notes, however, that debt collectors are not required to follow the procedures in § 1006.6(d)(4)(ii). A debt collector who deems the procedures too expensive may use the other procedures in § 1006.6(d)(4) or operate outside of the safe harbor. As to the consumer advocate commenter's concern about enforceability, the Bureau reiterates that the final rule may be enforced against FDCPA debt collectors.[295]

The Bureau agrees that consumers may be reluctant to open emails from, or click on hyperlinks in emails from, unknown or untrusted sources. However, the Bureau determines that these concerns are less salient when a written or electronic communication comes from a recognized entity with which the consumer has an ongoing relationship, such as a creditor who has communicated with the consumer. For these reasons, the Bureau is finalizing § 1006.6(d)(4)(ii)(C) to provide that the

[291] The Bureau is not aware of evidence suggesting that creditor communications are especially likely to be blocked by spam filters. *Cf.* Gmail Help, *Prevent Mail to Gmail Users From Being Blocked or Sent to Spam, https://support.google.com/mail/answer/81126?hl=en* (last visited Oct. 1, 2020) (identifying factors that trigger Gmail's spam filter).

[292] *See* 15 U.S.C. 7001(c).

[293] For clarity, the Bureau is finalizing the notice content requirements as § 1006.6(d)(4)(ii)(C)(*1*) through (*5*) and addresses content-related comments in that section-by-section analysis.

[294] For example, the FTC advises consumers not to open links or attachments to emails they do not recognize, in order to prevent phishing and malware. *See* Fed. Trade Comm'n, *How to Recognize and Avoid Phishing Scams* (May 2019), *https://www.consumer.ftc.gov/articles/how-recognize-and-avoid-phishing-scams;* Fed. Trade Comm'n, *Malware* (Nov. 2015), *https://www.consumer.ftc.gov/articles/0011-malware.* The FDIC offers consumers similar guidance. *See* Fed. Deposit Ins. Corp., *Beware of Malware: Think Before You Click, https://www.fdic.gov/consumers/consumer/news/cnwin16/malware.html* (last updated Mar. 8, 2016).

[295] Thus, if a debt collector relies on a creditor to take an action that a creditor does not actually take, such as sending an opt-out notice in compliance with § 1006.6(d)(4)(ii), the creditor generally would not be liable under the rule. But the rule still may be enforced against the debt collector. For example, a consumer could allege that, to the extent the debt collector's procedures led it to rely on a creditor who did not send the opt-out notice, those procedures did not reasonably confirm and document that the debt collector communicated in accordance with § 1006.6(d)(4)(ii), and the debt collector is not entitled to a safe harbor from civil liability.

creditor, and only the creditor, may send the opt-out notice.

How the Opt-Out Notice May Be Provided

Proposed § 1006.6(d)(3)(i)(B)(*1*) would not have permitted the creditor or the debt collector to send the notice to the specific email address the debt collector intended to use for future communications. Consumer advocate commenters generally did not address this limitation. Several industry commenters opposed it, arguing that it effectively would require a debt collector to establish right-party contact before providing the opt-out notice, which could require multiple calls to the consumer. These commenters also argued that the limitation could be confusing to consumers, who are used to receiving emails and clicking on unsubscribe links to stop future emails to that email address, not to prevent future emails to a different email address.

The final rule does not include the requirement to send the opt-out notice other than to the email address the debt collector intends to use. The purpose of this requirement was to prevent a third-party disclosure of the opt-out notice itself. That concern was more salient under the proposal, which would have permitted debt collectors to send the opt-out notice. Because only creditors may provide the opt-out notice under the final rule and because the opt-out notice may be sent only to an email address the creditor used to communicate with the consumer about the account, the Bureau believes that the proposed requirement is unnecessary in the final rule. The final rule does, however, require the creditor to send the opt-out notice to an address the creditor obtained from the consumer and used to communicate with the consumer about the account. The purpose of this requirement is to help ensure that the consumer receives the opt-out notice.[296]

Form of Opt-Out Notice

Proposed § 1006.6(d)(3)(i)(B)(*1*) would have required the creditor or the debt collector to provide clearly and conspicuously the information in the opt-out notice. It also would have permitted the notice to be provided orally, in writing, or electronically.

Industry commenters generally did not address these delivery issues. A group of consumer advocate commenters appeared to support delivery of the opt-out notice by mail only. According to these commenters, telephone calls to consumers, particularly telephone calls from debt collectors, already involve multiple disclosures, and an opt-out notice related to electronic debt collection communications may be missed by consumers overwhelmed with other information. These commenters also asserted that consumers would be unlikely to listen to opt-out messages delivered by robocall, and they expressed concern that an opt-out notice delivered electronically might not be seen at all, particularly if blocked by a consumer's spam filter.

Final § 1006.6(d)(4)(ii)(C) retains the requirement that the information in the opt-out notice be clear and conspicuous. In addition, final § 1006.6(d)(4)(ii)(C) requires that the notice be delivered in writing or electronically, rather than orally (whether in a robocall or live conversation).[297] Requiring that the notice be delivered in writing or electronically helps ensure that consumers can review the contents of the notice while making their opt-out decisions. The Bureau declines, however, to require that the opt-out notice be provided only by mail. The Bureau believes that the risk that a spam filter might block an opt-out notice was of greater concern under the proposal, which would have permitted debt collectors to send the opt-out notice. Under the final rule, however, the opt-out notice can be provided only by the creditor, a known sender, to an email address the creditor used to communicate with the consumer about the account, which should reduce the risk that an electronic notice would be flagged as spam.[298]

Timing of Opt-Out Notice

To ensure that consumers could make their opt-out decisions at a time reasonably contemporaneous with potential electronic debt collection communications, proposed § 1006.6(d)(3)(i)(B)(*1*) would have required the opt-out notice to be provided no more than 30 days before the debt collector engaged in debt collection communications by email.

Consumer advocate commenters generally did not address this requirement. A few industry commenters supported the requirement as proposed; others asked that the period be lengthened or eliminated altogether. One industry commenter who called for eliminating the timing requirement argued that, once a debt is in collection, a consumer typically has ignored the creditor for 120 or 180 days. According to this commenter, such a consumer also is likely to ignore a notice sent from the creditor or the debt collector, so the timing requirement would serve no purpose. Another industry commenter argued that a timing requirement could interfere with the mortgage servicing practice of sending Real Estate Settlement Procedures Act of 1974 (RESPA)[299]-required transfer-of-servicing letters, also known as hello and goodbye letters, by email in some cases. This commenter suggested that, as long as a consumer has consented to receiving email communications from a prior servicer, the final rule should allow a new servicer to provide a hello letter by email if the email also includes the opt-out notice. Industry commenters who asked the Bureau to extend the 30-day period generally argued that 30 days is too little time for a creditor to send the consumer an opt-out notice and place the account with a debt collector, and for a debt collector to then process the file for collections and send an electronic communication. One such commenter asked the Bureau to adopt a 90-day period; another requested a 180-day period.

The Bureau determines that consumers should receive the opt-out notice at a time reasonably contemporaneous with potential debt collection communications. As discussed elsewhere, the Bureau believes that a notice provided by the creditor at account opening would generally not serve this goal because years may pass, and a consumer's circumstances may change, between the time the consumer opens an account and the time a debt enters collections.

[296] As noted above, nothing prohibits a creditor from sending the opt-out notice to the email address the debt collector intends to use, and the Bureau expects that, for convenience, most creditors who send the notice electronically will send it to that email address.

[297] Because § 1006.6(d)(4)(ii)(C), unlike proposed § 1006.6(d)(3)(i)(B)(*1*), permits a creditor to send the opt-out notice to the specific email address the debt collector intends to use for future communications, the Bureau believes that there is less need to permit creditors to deliver the opt-out notice orally.

[298] *See, e.g.,* Google, *Email Whitelists and Blacklists, https://support.google.com/a/answer/60752?hl=en*(last visited Oct. 4, 2020) (identifying how users can block unknown senders); Yahoo!, *Yahoo Mail Safety Guide, https://safety.yahoo.com/SafetyGuides/Mail/index.htm* (last visited Oct. 1, 2020) (same); AOL, *Manage Spam and Privacy in AOL Mail, https://help.aol.com/articles/aol-mail-spam-and-privacy* (last visited Oct. 1, 2020) (same); *Cf.* Cade Metz, *Google Says Its AI Catches 99.9 Percent of Gmail Spam,* Wired, *https://www.wired.com/2015/07/google-says-ai-catches-99-9-percent-gmail-spam/* (July 9, 2015) (noting that, in 2015, Google's false positive rate for spam—*i.e.,* legitimate email misidentified as spam—was .05 percent).

[299] Public Law 93–533, 88 Stat. 1274 (1974).

In light of industry commenters' concerns, however, final § 1006.6(d)(4)(ii)(C) does not contain a specific timing requirement. Instead, as discussed in the section-by-section analysis of § 1006.6(d)(4)(ii)(C)(*1*), the Bureau addresses the timing issue by requiring the opt-out notice to identify the debt collector to which the creditor has transferred or will transfer the debt. Creditors usually decide to whom they will transfer a debt close to the time they transfer it, which, in turn, is likely to be reasonably contemporaneous with the potential debt collection communication.[300]

For the reasons discussed above, the Bureau is finalizing § 1006.6(d)(4)(ii)(C), which provides that a debt collector may obtain a safe harbor from civil liability for an unintentional third-party disclosure if, among other things, before the debt collector used an email address to communicate with the consumer about the debt, the creditor sent a written or electronic notice, to an address the creditor obtained from the consumer and used to communicate with the consumer about the account, that clearly and conspicuously disclosed the information listed in § 1006.6(d)(4)(ii)(C)(*1*) through (*5*). The Bureau also is adopting new comments 6(d)(4)(ii)(C)–1 through –3 to clarify certain aspects of § 1006.6(d)(4)(ii)(C). Comment 6(d)(4)(ii)(C)–1 clarifies the requirement to provide the notice clearly and conspicuously.[301] Comment 6(d)(4)(ii)(C)–2 provides sample language that a creditor may use to comply with § 1006.6(d)(4)(ii)(C). Comment 6(d)(4)(ii)(C)–3 clarifies that the opt-out notice may be contained in a larger communication that conveys other information, as long as the notice is clear and conspicuous.[302]

6(d)(4)(ii)(C)(1)

Proposed § 1006.6(d)(3)(i)(B)(*1*) would have required the opt-out notice to contain the legal name of the debt collector to which the debt was being transferred. Commenters generally did not address this requirement.

To harmonize the proposed requirement with the final rule's approach that only the creditor may provide the opt-out notice, and to address the timing concerns discussed in the section-by-section analysis of § 1006.6(d)(4)(ii)(C), final § 1006.6(d)(4)(ii)(C)(*1*) retains the proposed requirement but modifies it to provide that the opt-out notice must disclose that the debt has been or will be transferred to the debt collector. Comment 6(d)(4)(ii)(C)(*1*)–1 clarifies that, to satisfy this requirement, the opt-out notice must identify the name of the specific debt collector to which the debt has been or will be transferred.

The Bureau understands that most creditors do not know the precise debt collector to which they will transfer a debt until relatively close in time to the transfer. Moreover, the Bureau believes that, even among creditors who use only a single debt collector to collect their debts, or who otherwise know the identity of a debt collector well in advance, many would not send the opt-out notice before the consumer has become delinquent, because doing so could undermine the creditor's relationship with the consumer. In addition, the Bureau anticipates that, to facilitate compliance with recordkeeping obligations imposed by other consumer protection statutes and regulations, many creditors will choose to send the opt-out notice close in time to the debt collector's communication. The Bureau therefore finds that § 1006.6(d)(4)(ii)(C)(*1*)'s requirement to identify a specific debt collector will adequately ensure that the consumer receives the opt-out notice at a time reasonably contemporaneous with the proposed electronic communications, reducing the likelihood that the consumer's circumstances will have changed by the time the debt collector communicates electronically.

In addition, although consumers generally do not have pre-existing relationships with particular debt collectors, it is possible that some consumers, particularly those with multiple debts in collection, may have interacted with a particular debt collector in the past. Requiring the creditor to identify the debt collector by name in the opt-out notice allows such a consumer to make a more informed choice about whether to opt out of electronic communications.

6(d)(4)(ii)(C)(2)

Proposed § 1006.6(d)(3)(i)(B)(*1*) would have required the opt-out notice to contain the email address that the debt collector proposed to use for debt collection communications. The Bureau received no comments regarding this requirement and is finalizing it as § 1006.6(d)(4)(ii)(C)(*2*), which provides that the opt-out notice must disclose the email address and the fact that the debt collector might use the email address to communicate with the consumer about the debt.

6(d)(4)(ii)(C)(3)

Proposed § 1006.6(d)(3)(i)(B)(*1*) would not have required the opt-out notice to disclose that others with access to the email address might see the debt collector's communications. The Bureau believes that such a requirement would focus the consumer's attention on the risk of third-party disclosure from debt collection communications and thereby help to address consumer advocates' concerns, discussed elsewhere, that a consumer's failure to opt out after receiving the opt-out notice might not reflect a consumer's assessment of the risk of a third-party disclosure. For this reason, the Bureau is finalizing § 1006.6(d)(4)(ii)(C)(*3*) to provide that the opt-out notice must disclose that, if others have access to the email address, then it is possible they may see the emails.

6(d)(4)(ii)(C)(4)

Proposed § 1006.6(d)(3)(i)(B)(*1*) would have required the opt-out notice to describe one or more methods that the consumer could use to opt out. As proposed, a debt collector could have employed any opt-out method—even a potentially inconvenient one—as long as it was disclosed in the notice. While commenters generally did not address this proposed requirement, the Bureau is finalizing it with modifications to ensure that the burden of opting out does not prevent or unduly hinder consumers who want to opt out from doing so.

Specifically, final § 1006.6(d)(4)(ii)(C)(*4*) requires the opt-out notice to disclose instructions for a reasonable and simple method by which the consumer can opt out of a debt collector's use of the email address identified in the opt-out notice. A reasonable-and-simple requirement, which is also used in the Bureau's Regulation V,[303] should help to ensure that a consumer who wishes to opt out is not deterred by the process of doing so. Comment 6(d)(4)(ii)(C)(4)–1 provides

[300] With respect to the industry commenter's concern about sending transfer-of-servicing letters by email, the Bureau notes that § 1006.6(d)(4)(iii) includes procedures that servicers can use in that situation. The Bureau is not adopting the commenter's suggested solution because, for the reasons discussed earlier in this section-by-section analysis, final § 1006.6(d)(4)(ii) requires the opt-out notice to come from the creditor.

[301] This comment resembles proposed comment 6(d)(3)(i)(B)(*1*)–1, with modifications to reflect the fact that the final rule does not permit a creditor to deliver the opt-out notice orally.

[302] Proposed comment 6(d)(3)(i)(B)(*1*)–3 would have clarified that a debt collector or a creditor may include the opt-out notice in the same communication as the opt-out notice described in proposed § 1006.42(d)(1) or (2), as applicable. As explained in the section-by-section analysis of final § 1006.42, the Bureau is not finalizing proposed § 1006.42(d). Accordingly, the Bureau is not adopting proposed comment 6(d)(3)(i)(B)(*1*)–3.

[303] 12 CFR 1022.25.

illustrative examples of opt-out methods that satisfy the reasonable-and-simple standard.

6(d)(4)(ii)(C)(5)

Proposed § 1006.6(d)(3)(i)(B)(*1*) would have required the opt-out notice to specify a reasonable period within which a consumer could opt out, but it did not define the term reasonable period.

Several industry commenters opposed an opt-out period, arguing that a consumer who provided electronic contact information to a creditor at account opening has decided to communicate electronically and, for these consumers, an opt-out period would only delay the use of electronic communications. Other industry commenters warned that failing to define the term reasonable period would create legal uncertainty and litigation risk, thereby discouraging use of the safe harbor and, in turn, electronic communications in debt collection. These commenters suggested opt-out periods ranging between five and 14 days, variously noting that almost all requests to opt out would be received within the first week, that the CAN–SPAM Act requires covered entities to process email opt-out requests within 10 days,[304] and that mortgage servicers must provide consumers at least 14 days to respond to an offer of loss mitigation in certain circumstances under the Bureau's mortgage servicing rules.[305] A group of consumer advocate commenters also urged the Bureau to define the term reasonable period, suggesting that an opt-out period of fewer than 30 days could result in consumer confusion given the 30-day validation period required by FDCPA section 809.[306]

The Bureau declines the suggestion to eliminate the opt-out period altogether. As explained in the section-by-section analysis of § 1006.6(d)(4)(i), a consumer's decision to communicate electronically with a creditor does not, without more, suggest that the risk of third-party disclosure is particularly low. However, the Bureau agrees with industry and consumer advocate commenters about the need to define the opt-out period more clearly. Leaving the period undefined, or relying on a reasonableness requirement, could create legal uncertainty that could hamper the use of electronic communications in debt collection and make it harder for consumers to enforce their rights.

Accordingly, the final rule specifies that the opt-out period must last at least 35 days from the date the opt-out notice is sent. In deciding to finalize a 35-day minimum opt-out period, the Bureau concluded that, consistent with FDCPA section 809, which affords consumers 30 days within which to exercise certain statutory rights, consumers should be afforded at least 30 days within which to inform the debt collector of a decision to opt out. The Bureau included an additional five days to account for the time it might take an opt-out notice to reach a consumer by mail.[307]

For the reasons discussed above, the Bureau is finalizing § 1006.6(d)(4)(ii)(C)(*5*), which requires the opt-out notice to disclose the date by which the debt collector or the creditor must receive the consumer's request to opt out, which must be at least 35 days after the date the notice is sent. The Bureau may consider changing the 35-day period in the future based on actual stakeholder experience with this provision.[308] The Bureau also is adopting new comment 6(d)(4)(ii)(C)(*5*)–1 to clarify that the opt-out notice may instruct the consumer to respond to the debt collector or to the creditor but not to both. The comment is meant to provide creditors and debt collectors with the flexibility to decide among themselves who will be responsible for receiving and processing opt-out requests, and to design the opt-out process accordingly.[309]

6(d)(4)(ii)(D)

Proposed § 1006.6(d)(3)(i)(B)(*2*) provided that, for a debt collector to obtain a safe harbor from civil liability under the notice-and-opt-out method, the opt-out period must have expired, and the consumer must not have opted out. Proposed comment 6(d)(3)(i)(B)(*2*)–1 clarified that, notwithstanding the expiration of the § 1006.6(d)(3)(i)(B)(*2*) opt-out period, a consumer would remain free to request that a debt collector not use a particular email address, or not communicate using email generally, under proposed § 1006.14(h). For the reasons discussed below, the Bureau is finalizing proposed § 1006.6(d)(3)(i)(B)(*2*) as § 1006.6(d)(4)(ii)(D), largely as proposed but with non-substantive changes to reflect the revised organization and terminology in the final rule. The Bureau also is adopting new commentary for clarity and in response to feedback.

First, an industry commenter raised a possible implementation issue regarding proposed § 1006.6(d)(3)(i)(B)(*2*), observing that, given the time necessary for an opt-out notice to reach a consumer and for the consumer to notify a debt collector of a decision to opt out, a debt collector acting in good faith may risk communicating with the consumer after the opt-out period ends but before receiving the consumer's request to opt out. The commenter urged the Bureau to address this issue by creating a bright-line rule allowing for communication up to 45 days after the opt-out period ends.

The Bureau believes that the commenter's proposed solution entails an unnecessarily prolonged risk of third-party disclosure. After the opt-out period ends, a debt collector who sends an email to an email address pursuant to the procedures in § 1006.6(d)(4)(ii) remains within the safe harbor unless and until the debt collector receives the consumer's request to opt out of emails to that email address. Once the debt collector receives such a request, future emails to that email address would not be protected by the safe harbor.[310]

Second, a group of consumer advocate commenters requested that the Bureau revise proposed comment 6(d)(3)(i)(B)(*2*)–1 to clarify that consumers can, even after the expiration

[304] 15 U.S.C. 7704(a)(4)(A); *see also* 84 FR 13115, 13118 (Apr. 4, 2019).

[305] 12 CFR 1024.41(e).

[306] 15 U.S.C. 1692g.

[307] The Bureau recognizes that, if a creditor sends the opt-out notice by email, a consumer might receive it instantaneously and read it soon thereafter. The Bureau notes, however, that some consumers, particularly those with limited internet access, do not check email regularly. Accordingly, a 35-day minimum period applies no matter how the opt-out notice is delivered.

[308] The Bureau recognizes that the information in a validation notice is more extensive than the information in the opt-out notice, and that a consumer's decision about how to engage with a debt collector in response to a validation notice may be more complex than a consumer's decision about whether to communicate with a debt collector using a particular email account.

[309] Proposed comment 6(d)(3)(i)(B)(*1*)–2 would have clarified that, if a creditor or a debt collector provides the opt-out notice orally, the creditor or the debt collector may require the consumer to make an opt-out decision during that same communication. Because final § 1006.6(d)(4)(ii) does not permit oral delivery of the opt-out notice, the Bureau is not finalizing proposed comment 6(d)(3)(i)(B)(*1*)–2.

[310] Moreover, future emails to that address would be covered by § 1006.14(h), which prohibits communicating or attempting to communicate with a person through a medium of communication if the person has requested that the debt collector not use that medium to communicate with the person. *See* the section-by-section analysis of § 1006.14(h) and comment 14(h)(1)–1. Section 1006.14(h) would apply regardless of when the debt collector receives the consumer's request to opt out, *i.e.,* whether before or after the opt-out period ends. A debt collector who sends an email to an email address after receiving a consumer's request to opt out under § 1006.6(d)(4)(ii) but before processing that request may have a bona fide error defense to civil liability under FDCPA section 813(c) with respect to unintentional violations of § 1006.14(h).

of the opt-out period: (1) opt out of the debt collector's use of an email address pursuant to § 1006.6(e);[311] and (2) cease communication under § 1006.6(c)(1).[312] The Bureau is finalizing proposed comment 6(d)(3)(i)(B)(*2*)–1 as comment 6(d)(4)(ii)(D)–1, with revisions to incorporate these suggestions.

Finally, industry commenters requested that the Bureau clarify whether a debt collector should treat a consumer's request to opt out as a request to cease communication under § 1006.6(c)(1). A consumer's request to opt out in response to an opt-out notice that identifies a particular email address to which debt collection communications may be sent is generally not a request to opt out of all communications. Accordingly, new comment 6(d)(4)(ii)(D)–2 clarifies that, in the absence of evidence that the consumer refuses to pay the debt or wants the debt collector to cease all communication with the consumer, a consumer's request to opt out under § 1006.6(d)(4)(ii)(D) is not a request to cease all communication with respect to the debt under § 1006.6(c)(1).

6(d)(4)(ii)(E)

The notice-and-opt-out procedures in proposed § 1006.6(d)(3)(i)(B) would not have covered a debt collector who knew or should have known that the email address to which the debt collector sent an email was provided by the consumer's employer. In support of this proposed limitation, the Bureau explained that employer-provided email addresses present a heightened risk of third-party disclosure because many employers have a legal right to read messages sent and received by employees on employer-provided email accounts, and some employers exercise that right. The Bureau expressed concern that, unlike a consumer's affirmative decision to contact a debt collector using an employer-provided email address, a consumer's failure to opt out of a debt collector's use of an employer-provided email address after receiving an opt-out notice may not indicate that the consumer has assessed the risk of third-party disclosure to be low.[313]

Consumer advocate commenters generally supported the Bureau's proposal to exclude employer-provided email addresses from the proposed notice-and-opt-out procedures, while industry commenters generally opposed it. Many industry commenters raised operational concerns, stating that there is generally no way to know whether an email address is employer provided. These commenters stated that no database of employer-provided email addresses exists, and that reviewing domain names is a labor-intensive and manual process, as well as insufficient to determine whether an address is employer provided. For example, an ''.edu'' domain name may indicate that a consumer is either a student or an employee of an educational institution. According to these commenters, because it is difficult to distinguish employer-provided email addresses from personal ones, excluding employer-provided email addresses from the notice-and-opt-out procedures would create an implementation problem that would discourage debt collectors from using the procedures, thus stifling electronic communications and harming consumers.

In addition to these operational concerns, industry commenters noted that consumers often disclose employer-provided email addresses to creditors, including on account-opening documents. According to these commenters, a consumer who has disclosed an employer-provided email address to a creditor has chosen to communicate about the account by email, and that choice should be honored even after the account is transferred to a debt collector. Conversely, these commenters argued, a consumer who does not want to receive debt collection communications on an employer-provided email account can decline to provide the creditor with such an email address.

In addition, several industry commenters argued that, although the Bureau based its proposal to exclude employer-provided email addresses from the safe harbor on its belief that many employers have the right to monitor emails received on employer-provided accounts, the Bureau presented no evidence justifying that belief. Relatedly, an industry commenter argued that the Bureau's concern about employer monitoring is misplaced because a personal email account may be monitored by a consumer's commercial email provider. Industry commenters also argued that other proposed rule provisions—such as the requirement in proposed § 1006.6(e) to include, in all electronic communications, instructions for opting out of such communications—would sufficiently protect consumers who receive unwanted emails on employer-provided accounts.

As the Bureau noted in the proposal, many employers have a legal right to read, and frequently do read, messages sent or received by employees on employer-provided email accounts.[314] The Bureau disagrees that a debt collector who sends an email to an employer-provided email address should be entitled to a safe harbor from civil liability as long as the consumer provided that address to the creditor. As discussed in the section-by-section analysis of § 1006.6(d)(4)(i), a consumer's decision to communicate by email with a creditor does not, without more, suggest that the risk of third-party disclosure is particularly low should a debt collector send an email to the same email address. Although the Bureau agrees that proposed § 1006.6(e)—which the Bureau is finalizing largely as proposed in final § 1006.6(e)—would help limit the risk of third-party disclosure by enabling consumers to opt

[311] Section 1006.6(e) requires a debt collector who communicates or attempts to communicate with a consumer electronically in connection with the collection of a debt using a specific email address, telephone number for text messages, or other electronic-medium address to include in such communication or attempt to communicate a clear and conspicuous statement describing a reasonable and simple method by which the consumer can opt out of further electronic communications or attempts to communicate by the debt collector to that address or telephone number.

[312] Section 1006.6(c)(1) prohibits a debt collector from communicating or attempting to communicate further with a consumer with respect to a debt if the consumer notifies the debt collector in writing that the consumer refuses to pay the debt or the consumer wants the debt collector to cease further communication with the consumer.

[313] Proposed § 1006.22(f)(3) would have prohibited a debt collector from communicating or attempting to communicate with a consumer using an email address that the debt collector knew or should have known was provided to the consumer by the consumer's employer, unless the debt collector received directly from the consumer either prior consent to use that email address or an email from that email address. As discussed in the section-by-section analysis of final § 1006.22(f)(3), the Bureau is finalizing that provision with modifications. A debt collector who sends an email in conformity with § 1006.6(d)(4)(ii) complies with § 1006.22(f)(3).

[314] *See* 84 FR 23274, 23324 n.357 (May 21, 2019) (citing Am. Mgmt. Ass'n & ePolicy Inst., *Electronic Monitoring and Surveillance 2007 Survey* (2008), *http://www.epolicyinstitute.com/2007-survey-results* (reporting that a survey of employers conducted in 2007 found that, among other things, 43 percent of employers monitored their employees' email accounts and 66 percent of employers monitored their employees' internet connection, with 45 percent of employers tracking the content, keystrokes, and time spent at the keyboard); *Bingham* v. *Baycare Health Sys.,* No. 8:14–CV–73–T–23JSS, 2016 WL 3917513, at *4 (M.D. Fla. July 20, 2016) (collecting cases and concluding that ''the majority of courts have found that an employee has no reasonable expectation of privacy in workplace emails when the employer's policy limits personal use or otherwise restricts employees' use of its system and notifies employees of its policy'')); *see generally* Andrew Milam Jones, *Employee Monitoring: An Overview of Technologies, Treatment, and Best Practices,* 83 Tx. B.J. 98 (2020); Shawn Marie Boyne, *Data Protection in the United States,* 66 Am. J. Comp. L. 299, 313–14 (2018).

out of electronic communications easily, the Bureau notes that the protection afforded by § 1006.6(e) is effective only after the debt collector has sent an email to the consumer and the consumer's privacy interest has already been compromised.

As for the observation that a personal email account may be monitored or scanned by a commercial email provider, the Bureau believes that monitoring by an employer is distinguishable from monitoring or scanning by a non-employer email provider. Congress and the courts have recognized that a consumer may suffer significant harm, including loss of employment, if an employer learns that the consumer has a debt in collection.[315] Although some commercial email providers monitor or scan consumer email accounts to deliver targeted advertisements or services through associated applications,[316] this type of activity generally does not threaten a consumer's employment or reputation in the same way.

The Bureau recognizes that distinguishing between employer-provided and personal email addresses presents a practical challenge for debt collectors. The Bureau is aware of no database of employer-provided email addresses that debt collectors can consult, and reviewing domain names will not always answer whether an email address is personal or employer provided. The Bureau finds, however, that most employer-provided email addresses have domain names that are not available to the general public and that it is relatively straightforward for a debt collector to distinguish domain names that are publicly available from those that are not. The Bureau also finds that, if employer-provided email addresses have domain names that are publicly available, it will be difficult (absent actual knowledge) for a debt collector to distinguish such an email address from a personal one.

For these reasons, the Bureau is finalizing § 1006.6(d)(4)(ii)(E) to maintain the exclusion of most employer-provided email addresses from the notice-and-opt-out safe harbor, but also to clarify how debt collectors can distinguish between employer-provided and personal email addresses for purposes of satisfying the safe harbor. Specifically, § 1006.6(d)(4)(ii)(E) provides that a debt collector may obtain a safe harbor from civil liability for an unintentional third-party disclosure if, among other things, the debt collector communicated by sending an email to an email address with a domain name that is available for use by the general public, unless the debt collector knows the address is provided by the consumer's employer. The Bureau believes that § 1006.6(d)(4)(ii)(E) effectively excludes most employer-provided email addresses from the notice-and-opt-out safe harbor, thereby largely avoiding the third-party disclosure risks associated with such addresses while imposing a manageable operational burden on debt collectors. To the extent a debt collector regards the limitation in § 1006.6(d)(4)(ii)(E) as overbroad—because, for example, it does not cover a debt collector who sends an email to an ''.edu'' address—the Bureau reiterates that a debt collector may communicate by email without following the procedures in § 1006.6(d)(4)(ii). Such a debt collector would, however, lose the protection of the safe harbor (unless the debt collector's use of the email address otherwise satisfies the requirements of § 1006.6(d)(3)).

The Bureau also is adopting new comments 6(d)(4)(ii)(E)–1 and –2 to clarify certain aspects of final § 1006.6(d)(4)(ii)(E). Comment 6(d)(4)(ii)(E)–1 clarifies that the domain name of an email address is available for use by the general public when multiple members of the general public are permitted to use the same domain name, whether for free or through a paid subscription. Such a name includes, for example, *john.doe@gmail.com* and *john.doe@yahoo.com.* Such a name does not include one that is reserved for use by specific registrants, such as a domain name branded for use by a particular commercial entity (*e.g., john.doe@springsidemortgage.com*) or reserved for particular types of institutions (*e.g., john.doe@agency.gov, john.doe@university.edu,* or *john.doe@nonprofit.org*). Comment 6(d)(4)(ii)(E)–2 clarifies that, for purposes of § 1006.6(d)(4)(ii)(E), a debt collector knows that an email address is provided by the consumer's employer if any person has informed the debt collector that the address is employer provided. Comment 6(d)(4)(ii)(E)–2 further clarifies that § 1006.6(d)(4)(ii)(E) does not require a debt collector to conduct a manual review of consumer email addresses to determine whether an email address might be employer provided.

6(d)(4)(iii) Procedures Based on Communication by the Prior Debt Collector

Proposed § 1006.6(d)(3)(i)(C) (the ''creditor-or-prior-debt-collector-use'' method) provided that a debt collector could obtain a safe harbor from civil liability for an unintentional third-party disclosure if, in addition to complying with § 1006.6(d)(3)(ii), the debt collector maintained procedures to reasonably confirm and document that: (1) The debt collector communicated with the consumer using a personal email address that the creditor or a prior debt collector obtained from the consumer to communicate about the debt; (2) the creditor or the prior debt collector recently sent communications about the debt to that email address; and (3) the consumer did not ask the creditor or the prior debt collector to stop such communications.[317]

Many consumer advocate commenters opposed proposed § 1006.6(d)(3)(i)(C) on the ground that, when consumers provide email addresses to creditors, they typically do not think about the

[315] S. Rep. No. 382, *supra* note 52, at 1699 (''[A] debt collector may not contact third persons such as a consumer's friends, neighbors, relatives, or employer. Such contacts are not legitimate collection practices and result in serious invasions of privacy, as well as the loss of jobs.''); *id.* at 1696 (''Collection abuse takes many forms, including . . . disclosing a consumer's personal affairs to friends, neighbors, or an employer.''); 122 Cong. Rec. H730707 (daily ed. July 19, 1976) (remarks of Rep. Annunzio on H. Rep. No. 13720) (Clearinghouse No. 31,059U) (''Communication with a consumer at work or with his employer may work a tremendous hardship for a consumer because such calls can embarrass a consumer and can result in his losing a deserved promotion'' and ''[i]f a consumer loses his job, he is in a worse, not better, position to pay the debt.''); *Am. Fin. Servs. Ass'n* v. *Fed. Trade Comm'n,* 767 F.2d 957, 974 (D.C. Cir. 1985) (upholding provision in the FTC's Credit Practices Rule that prohibited certain wage assignments because, among other things, the rulemaking record showed that ''employers tend to view the consumer's failure to repay the debt as a sign of irresponsibility. As a consequence, many lose their jobs after wage assignments are filed. Even if the consumer retains the job, promotions, raises, and job assignments may be adversely affected.'') (citing Credit Practices Rule, 49 FR 7740, 7758 (Mar. 1, 1984) (codified at 16 CFR 444)); *Fed. Trade Comm'n* v. *LoanPointe, LLC,* No. 2:10–CV–225DAK, 2011 WL 4348304, at *6–8 (D. Utah Sept. 16, 2011) (holding that ''Defendants' practice of disclosing debts and the amount of the debts to consumers' employers'' violated the FDCPA and ''qualifies as an unfair practice under the FTC Act''), *aff'd,* 525 F. App'x 696 (10th Cir. 2013).

[316] *See, e.g.,* Jack Schofield, *What's the Best Email Service That Doesn't Scan Emails for Ad Targeting,* The Guardian (Apr. 19, 2018), *https://www.theguardian.com/technology/askjack/2018/apr/19/whats-the-best-email-service-that-doesnt-scan-emails-for-ad-targeting; cf.* Daisuke Wakabayashi, *Google Will No Longer Scan Gmail for Ad Targeting,* N.Y. Times (June 23, 2017), *https://www.nytimes.com/2017/06/23/technology/gmail-ads.html.*

[317] As noted, proposed § 1006.6(d)(3)(i)(C) would have applied to both email addresses and telephone numbers, but final § 1006.6(d)(4)(iii) applies only to email addresses. This section-by-section analysis therefore addresses proposed § 1006.6(d)(3)(i)(C) only with respect to comments that specifically discussed email addresses, or that did not distinguish between email addresses and telephone numbers. Comments received in response to proposed § 1006.6(d)(3)(i)(C) that discussed telephone numbers are addressed in the section-by-section analysis of § 1006.6(d)(5).

possibilities that they will fail to make payments, that the account will be transferred to a debt collector, and that the debt collector will use the email address to communicate electronically. In addition, these commenters noted, years may pass, and a consumer's circumstances may change, between the time a consumer provides an email address to a creditor and the time a debt collector uses that email address to try to collect a debt. Thus, according to these commenters, a consumer's decision to provide an email address to a creditor says little about the risk of third-party disclosure if a debt collector uses that email address at some later date, and a debt collector who followed the procedures in proposed § 1006.6(d)(3)(i)(C) could not claim that it lacked reason to anticipate a third-party disclosure. The Bureau agrees with these concerns and notes that there are other reasons why a consumer might provide an email address to a creditor but not to a debt collector. For example, a consumer may conclude that the potential risk to a creditor's reputation and the potential risk of losing the consumer as a customer—risks that may not exist, or that may exist to a lesser extent, for debt collectors—constrain the creditor from misusing the email address. The Bureau therefore declines to finalize a safe harbor based solely on the creditor's prior use of an email address.[318] For the reasons discussed below, however, the Bureau is finalizing other aspects of proposed § 1006.6(d)(3)(i)(C), with revisions, as § 1006.6(d)(4)(iii).

First, like the proposal, the final rule provides a debt collector in certain circumstances with a safe harbor from civil liability for an unintentional third-party disclosure when sending an email to an email address obtained and used by a prior debt collector. However, unlike the proposal, a safe harbor is available under § 1006.6(d)(4)(iii) only if the debt collector uses an email address obtained by a prior debt collector in accordance with either § 1006.6(d)(4)(i) or (ii). As already discussed, the Bureau determines that an email address obtained by a debt collector pursuant to the procedures in § 1006.6(d)(4)(i) or (ii) presents a relatively low risk of unintentional third-party disclosure.[319] Second, like the proposal, the final rule requires that a prior debt collector actually have communicated with the consumer about the debt using the email address the current debt collector intends to use.[320] However, unlike the proposal, a safe harbor is available under § 1006.6(d)(4)(iii) only if the immediately prior debt collector—*i.e.,* the debt collector immediately preceding the current one—used the email address to communicate with the consumer about the debt. A consumer's personal circumstances may change over time, and limiting § 1006.6(d)(4)(iii) to email addresses used by the immediately prior debt collector decreases this risk in some circumstances. Third, the final rule requires that, for a debt collector to obtain a safe harbor from civil liability under § 1006.6(d)(4)(iii), the consumer must not have asked the immediately prior debt collector to stop using the email address for debt collection communications.

Accordingly, final § 1006.6(d)(4)(iii) provides that a debt collector may obtain a safe harbor from civil liability for an unintentional third-party disclosure when sending an email to an email address if: (1) Any prior debt collector obtained the email address in accordance with § 1006.6(d)(4)(i) or (ii); (2) the immediately prior debt collector used the email address to communicate with the consumer about the debt; and (3) the consumer did not opt out of such communications.[321] The Bureau is adopting new comment 6(d)(4)(iii)–1 to clarify that, for purposes of § 1006.6(d)(4)(iii), the immediately prior debt collector is the debt collector immediately preceding the current debt collector. The Bureau also is adopting new comment 6(d)(4)(iii)–2 to provide examples illustrating the rule.

6(d)(5) Procedures for Telephone Numbers for Text Messages

As noted above, the final rule reorganizes proposed § 1006.6(d)(3)(i) by separating email procedures and text message procedures. Final § 1006.6(d)(5) describes the procedures that a debt collector may use to obtain a safe harbor from civil liability for an unintentional third-party disclosure when communicating by text message. The final text message procedures are discussed in detail in the section-by-section analysis of § 1006.6(d)(5)(i) and (ii).

Proposed Provisions Not Finalized

The proposal identified opt-out procedures (proposed § 1006.6(d)(3)(i)(B)) and creditor-and-prior-debt-collector-use procedures (proposed § 1006.6(d)(3)(i)(C)) that a debt collector could use to reduce the risk of liability for an unintentional third-party disclosure when sending emails or text messages to a consumer. The Bureau is not finalizing either set of procedures as to text messages.

As discussed in the section-by-section analysis of § 1006.6(d)(5)(i), the practice of reassigning telephone numbers increases the risk of third-party disclosure when a debt collector sends a text message to a telephone number. The Bureau determines that the text message procedures it is finalizing in § 1006.6(d)(5)(i) and (ii)—which, as explained below, resemble an opt-in approach—address the risk posed by reassignment comprehensively. The Bureau will monitor debt collectors' use of the text message procedures in § 1006.6(d)(5) and may revisit at a later date whether additional procedures, including procedures similar to those in final § 1006.6(d)(4)(ii) and (iii), can be designed to address the risk of third-party disclosure. Although the Bureau is not finalizing notice-and-opt-out or prior-use safe harbor procedures for text messages, the Bureau notes that the final rule does not prohibit debt collectors from communicating with consumers by text message outside of the safe harbors.

6(d)(5)(i)

As proposed, § 1006.6(d)(3)(i)(A) (the ''consumer-use'' method) for text messages provided that a debt collector could obtain a safe harbor from civil

[318] As discussed in the section-by-section analysis of § 1006.6(d)(4)(ii), however, the Bureau is strengthening the final notice-and-opt-out procedures by incorporating aspects of proposed § 1006.6(d)(3)(i)(C) into them, including by requiring the creditor to send the notice to an email address obtained from the consumer and used to communicate about the account. The Bureau discusses those aspects of proposed § 1006.6(d)(3)(i)(C), and public comments related to them, where relevant in the section-by-section analysis of § 1006.6(d)(4)(ii).

[319] Section 1006.6(d)(4)(ii), as noted, does not protect a debt collector who uses an email address that a debt collector knows is provided by a consumer's employer. Section 1006.6(d)(4)(iii) does not include a similar prohibition. This is because a condition of § 1006.6(d)(4)(iii) is that the consumer not have opted out of the immediately prior debt collector's use of the particular email address, a factor that, when satisfied, suggests that the risk of third-party disclosure is low if the later debt collector uses the email address. Therefore, a later debt collector may obtain a safe harbor from civil liability under § 1006.6(d)(4)(iii) even if it knows that the consumer's email address is employer provided.

[320] The final rule eliminates the proposed recency requirement for the same reasons discussed in the section-by-section analysis of § 1006.6(d)(4)(i)(A).

[321] As noted in the section-by-section analysis of § 1006.6(d)(4)(ii)(C), an industry commenter expressed concern about how the procedures apply to the mortgage servicing practice of sending RESPA-required transfer-of-servicing letters, also known as hello and goodbye letters, by email. If a mortgage servicer who is an FDCPA debt collector sends such a hello letter, the debt collector may, under § 1006.6(d)(4)(iii), obtain a safe harbor from civil liability for an unintentional third-party disclosure if the debt collector sends the letter to an email address that any prior debt collector obtained in accordance with § 1006.6(d)(4)(i) or (ii), the immediately prior debt collector used the email address to communicate with the consumer, and the consumer did not opt out of such communications.

liability for an unintentional third-party disclosure if, in addition to complying with § 1006.6(d)(3)(ii), the debt collector maintained procedures to reasonably confirm and document that the debt collector sent a text message to the consumer using a telephone number that the consumer recently used to contact the debt collector for purposes other than opting out of electronic communications.[322] As discussed below, the Bureau is finalizing the proposed consumer-use method for text messages as § 1006.6(d)(5)(i), with modifications and additions to address comments received, and with revisions for clarity.

The Bureau based the proposed consumer-use procedures for text messages on the same assumption as the proposed consumer-use procedures for email addresses, *i.e.,* that a debt collector may not have a reason to anticipate a third-party disclosure when sending a text message to a telephone number that the consumer recently used to communicate with the debt collector. The Bureau reasoned that, as with email addresses, consumers generally are better positioned than debt collectors to determine if third parties have access to a particular telephone number for text messages.[323]

Feedback from industry and consumer advocate commenters regarding the Bureau's reasoning was similar to feedback regarding the consumer-use procedures for email addresses, with industry generally supporting the Bureau's reasoning and consumer advocates generally opposing it for the reasons discussed in the section-by-section analysis of § 1006.6(d)(4)(i). Also for the reasons discussed in that section-by-section analysis, the Bureau determines that a debt collector who sends a text message to a telephone number that the consumer has used to communicate with the debt collector by text message generally would lack reason to anticipate a third-party disclosure. However, for the reasons discussed in § 1006.14(h)(1), a debt collector could not continue to use a telephone number for text messages if the consumer asked the debt collector not to engage in such communications.

An industry commenter and a group of consumer advocate commenters asked whether the proposed consumer-use method—which would have provided a safe harbor for text messages sent to a telephone number that the consumer had used ''to contact'' the debt collector—would protect a debt collector who sent a text message to a telephone number that the consumer had used to call (but not to text) the debt collector. The group of consumer advocate commenters argued that a call from a telephone number does not invite a text message to that number, while the industry commenter simply asked for clarification. Because a consumer who places a telephone call to a debt collector generally can control who listens to the conversation by initiating or engaging in the call in private, the Bureau does not believe that a consumer's decision to call a debt collector, without more, generally suggests that the risk of third-party disclosure is low if the debt collector sends a text message to the same telephone number. Therefore, the text of § 1006.6(d)(5)(i), and new comment 6(d)(5)(i)–1, clarify that the consumer-use method for text messages does not apply if the consumer only used the telephone number to communicate with the debt collector about the debt by telephone call.

An industry commenter asked whether, under the proposed consumer-use method, a debt collector would be protected from liability when responding to a consumer by text message if, after attempting to communicate with the consumer by telephone, the debt collector received a text message from the consumer asking ''Who is this? What is this about? Please text me back.'' The Bureau determines that a consumer who responds to a missed telephone call by sending a text message asking ''who is this? what is this about?'' and requesting a return text message likely does not know that the underlying communication or attempted communication was from a debt collector or related to a debt. Such a request therefore would not, without more, suggest that the risk of third-party disclosure is low if the debt collector responded by text message.[324] For this reason, the Bureau is finalizing the consumer-use method for text messages with a clarification that it applies only if the consumer used the telephone number to communicate with the debt collector about the debt. Accordingly, § 1006.6(d)(5)(i) does not cover a debt collector who sends a text message to a consumer after receiving a text message from the consumer asking ''Who is this? What is this about? Please text me back.''

The Bureau received numerous comments regarding proposed § 1006.6(d)(3)(i)(A)'s recency requirement, *i.e.,* the requirement that the consumer have recently used the telephone number to contact the debt collector. As discussed in the section-by-section analysis of § 1006.6(d)(4)(i), multiple industry, consumer, and consumer advocate commenters confirmed the Bureau's understanding, as discussed in the proposal, that telephone numbers are regularly reassigned. Consumer advocate commenters thus generally supported applying the recency requirement to telephone numbers, and industry commenters generally did not oppose doing so.

Consumer advocate and industry commenters both argued, however, that the Bureau should define the term ''recently,'' with consumer advocates noting that a definition would better protect consumers and industry commenters noting that failing to define the term would create unnecessary litigation risk. A consumer advocate commenter urged the Bureau to define recent as within the past 30 days to reflect the month-to-month nature of many pay-as-you-go mobile telephone plans. This commenter also expressly opposed defining recent as within the past year, arguing that a period of this length fails to recognize that low-income consumers in financial crisis may change telephone numbers multiple times in a single year. Some industry commenters argued that 30 days would adequately protect consumers while allowing debt collectors sufficient time to respond to consumer inquiries. A few industry commenters argued in favor of 60 days without explaining their reasoning, and others supported a one-year period.

As discussed in the proposal, and as confirmed by commenters, millions of telephone numbers are disconnected and made available for reassignment each year, increasing the risk of third-party disclosure when a debt collector sends a text message.[325] For this reason, the Bureau is finalizing a recency requirement as part of the consumer-use

[322] Proposed § 1006.6(d)(3)(i)(A) would have applied to both email addresses and telephone numbers for text messages, but final § 1006.6(d)(5)(i) only applies to telephone numbers for text messages. This section-by-section analysis therefore addresses proposed § 1006.6(d)(3)(i)(A) only with respect to comments that specifically discussed text messages. Comments received in response to proposed § 1006.6(d)(3)(i)(A) that discussed email addresses are addressed in the section-by-section analysis of § 1006.6(d)(4)(i).

[323] *See* the section-by-section analysis of § 1006.6(d)(4)(i).

[324] Nothing in the final rule prohibits a debt collector from communicating by text message in this scenario, although the Bureau notes that the prohibition in § 1006.6(d)(1) would apply.

[325] *See* 84 FR 23274, 23301 (May 21, 2019) (noting that, according to a 2018 FCC notice of proposed rulemaking, 35 million telephone numbers are disconnected and made available for reassignment each year).

method for text messages. The Bureau agrees with commenters that the final rule should better define what constitutes ''recently.'' In this regard, the Bureau notes that the FCC has established a 45-day minimum aging period and a 90-day maximum aging period for telephone number reassignments.[326] In other words, no fewer than 45 days and no more than 90 days may pass between the time a carrier disconnects a telephone number and the time it reassigns the number to a new consumer. The Bureau does not have reason to believe that a significant number of consumers have their telephone numbers disconnected the same day they contact a debt collector. Accordingly, the Bureau believes that basing the text message recency requirement on the 45-day minimum-aging period would be unnecessarily restrictive. At the same time, because all disconnected telephone numbers must be reassigned within 90 days, the Bureau believes that basing the text message recency requirement on the 90-day maximum aging period would not adequately address the risk of third-party disclosure posed by reassignment. The Bureau therefore is finalizing a 60-day recency requirement as part of the consumer-use procedures for text messages. The Bureau finds that a 60-day period will protect consumers against the risk of reassignment, facilitate the responsible use of text message communications in debt collection, and provide stakeholders with clarity.

An alternative way to address the risk of third-party disclosure posed by the reassignment of telephone numbers is to require debt collectors to confirm that a telephone number belongs to a consumer before sending a text message to that number, such as by consulting a reliable third-party database. Indeed, several industry commenters urged the Bureau to incorporate the use of a third-party database into the procedures. For example, several industry commenters argued that debt collectors should receive a safe harbor from civil liability for an unintentional third-party disclosure when using any telephone number for text messages as long as the telephone number has recently been verified or validated as accurate. One industry commenter would have defined validated to mean that a debt collector had confirmed the accuracy of the telephone number using a third-party database.[327]

The FCC has observed that, although commercial databases currently exist to help callers determine whether a telephone number has been reassigned, these databases are not comprehensive.[328] For this reason, in December 2018, the FCC announced the creation of a new database to serve as a single, comprehensive source for determining whether a telephone number has been reassigned.[329] The purpose of the database, known as the Reassigned Numbers Database, is to help curb the proliferation of unwanted telephone calls directed to reassigned telephone numbers.[330] Once operational, the database will contain reassigned number information from each provider that obtains North American Numbering Plan U.S. geographic numbers and toll-free numbers.[331] Users will be able to consult the database to determine whether a telephone number has been permanently disconnected since a particular date—such as the date the consumer last consented to communicate by text message or the date of the consumer's most recent text message—and therefore no longer belongs to the consumer.[332] If the database shows that a particular telephone number has been disconnected, then a debt collector has reason to anticipate that sending a text message to that number will result in a third-party disclosure. Thus, once operational, the FCC's Reassigned Numbers Database can help debt collectors comply with FDCPA section 805(b) and the final rule's prohibition on third-party disclosures.

Accordingly, the final rule permits debt collectors sending text messages to use a complete and accurate database to verify that a particular telephone number continues to belong to the consumer. Debt collectors may rely either on this method or on the receipt of a recent text message from the consumer. Comment 6(d)(5)–1 clarifies that, for purposes of the consumer-use procedures, the FCC's Reassigned Numbers Database qualifies as a complete and accurate database,[333] as does any commercially available database that is substantially similar in terms of completeness and accuracy to the FCC's Reassigned Numbers Database.[334] The Bureau recognizes that, as a result of technological developments, debt collectors and others may develop new methods to confirm whether a telephone number has been reassigned, some of which may offer a level of certainty comparable to consulting a complete and accurate database. The Bureau will monitor the market for any such developments and consider whether to modify or expand the text message safe harbor procedures in the future.

For the reasons discussed above, the Bureau is finalizing § 1006.6(d)(5)(i), which provides that a debt collector may obtain a safe harbor from civil liability for an unintentional third-party disclosure when sending a text message to a telephone number if the consumer used the telephone number to communicate with the debt collector about the debt by text message, the consumer has not since opted out of text message communications to that telephone number, and within the past 60 days either: (1) The consumer sent a text message to the debt collector from that telephone number; or (2) the debt collector confirmed, using a complete and accurate database, that the telephone number has not been reassigned from the consumer to another user since the date of the consumer's most recent text message to the debt collector from that telephone number. As noted, the Bureau also is adopting new comment 6(d)(5)–1 to clarify the meaning of complete and accurate database, and new comment 6(d)(5)(i)–1 to clarify that § 1006.6(d)(5)(i) does not apply if the consumer used the telephone number to communicate with the debt collector about the debt only by telephone call.

[326] *See In re Advanced Methods to Target & Eliminate Unlawful Robocalls,* 33 FCC Rcd. 12024, 12030–31 (Dec. 12, 2018) (citing 47 CFR 52.15(f)(1)(ii), 52.103(d)).

[327] A consumer advocate commenter also proposed requiring debt collectors to verify consumers' contact information before communicating electronically, but the commenter did not define the term verify, and it is possible the commenter was simply advocating for an opt-in system.

[328] *Reassigned Numbers Database (RND) Technical Requirements Document,* 35 FCC Rcd. 38, ¶ 1.3 (Jan. 13, 2020) (observing that ''[c]ommercial databases exist to aid callers, but these databases are not comprehensive''); 33 FCC Rcd. at 12027 (observing that commercial databases ''are not comprehensive'').

[329] 33 FCC Rcd. at 12025.

[330] *Id.*

[331] *Id.*

[332] *Id.* at 12029.

[333] The Bureau recognizes that the FCC's Reassigned Numbers Database is not yet operational. Once it is operational, debt collectors may incorporate its use into their procedures under § 1006.6(d)(5)(i).

[334] As noted, the FCC has observed that currently available commercial databases are not comprehensive. 33 FCC Rcd. at 12027. If a commercially available database that is substantially similar in terms of completeness and accuracy to the FCC's Reassigned Numbers Database does exist or come into existence, debt collectors may incorporate its use into their procedures under § 1006.6(d)(5)(i).

6(d)(5)(ii)

Several industry commenters requested that the Bureau expand the procedures in proposed § 1006.6(d)(3)(i)(A), or create new procedures, to protect a debt collector who communicates with a consumer by text message after receiving the consumer's permission to do so. The Bureau believes that, if a consumer has consented to a debt collector's use of a particular telephone number for text messages and has not withdrawn that consent, the debt collector generally does not have reason to anticipate that using the telephone number to communicate with the consumer by text message will lead to a third-party disclosure—as long as the debt collector has taken steps to confirm that the telephone number has not been reassigned.[335] For this reason, the Bureau is finalizing § 1006.6(d)(5)(ii), which provides that a debt collector may obtain a safe harbor from civil liability for an unintentional third-party disclosure when sending a text message to a telephone number if the debt collector received directly from the consumer prior consent to use the telephone number to communicate with the consumer about the debt by text message, the consumer has not since withdrawn that consent, and within the past 60 days the debt collector either: (1) Obtained the prior consent or renewed consent from the consumer; or (2) confirmed, using a complete and accurate database, that the telephone number has not been reassigned from the consumer to another user since the date of the consumer's most recent consent to use that telephone number to communicate about the debt by text message. The additional steps to confirm that the telephone number has not been reassigned are similar to those in § 1006.6(d)(5)(i), and, like those steps, are designed to increase the likelihood that the telephone number continues to belong to the consumer when the debt collector communicates by text message.

As noted in the section-by-section analysis of § 1006.6(d)(5)(i), new comment 6(d)(5)–1 clarifies that the FCC's Reassigned Numbers Database qualifies as a complete and accurate database for purposes of § 1006.6(d)(5)(ii), as does any commercially available database that is substantially similar in terms of completeness and accuracy to the FCC's Reassigned Numbers Database. The Bureau also is adopting new commentary to clarify the meaning of prior consent provided directly to a debt collector in the context of § 1006.6(d)(5)(ii). Specifically, new comment 6(d)(5)(ii)–1 refers to comment 6(d)(4)(i)(B)–1 for guidance concerning how a consumer may provide prior consent directly to a debt collector generally, and to comment 6(d)(4)(i)(B)–2 for guidance concerning when a debt collector may treat a consumer who provides a telephone number for text messages as having provided prior consent directly to the debt collector.

6(e) Opt-Out Notice for Electronic Communications or Attempts To Communicate

The use of electronic media for debt collection communications can further the interests of both consumers and debt collectors. As the Bureau explained in the proposal, however, electronic communications also pose potential consumer harms.[336] One potential harm relates to consumer harassment. Because the marginal cost of transmitting electronic communications to consumers is low, particularly when compared to mail communications, debt collectors have less economic incentive to limit the number of such communications. Repeated or continuous debt collection communications can have the natural consequence of harassing, oppressing, or abusing the recipient.[337]

Another potential consumer harm relates to communication costs. As explained in the section-by-section analysis of § 1006.6(d)(3), consumers without unlimited text messaging plans may incur a charge each time they receive a text message, or each time they receive a text message that exceeds a specified limit. Some consumers without unlimited data plans also may incur a charge when they receive emails.

A way to help consumers address potentially harassing or costly electronic communications is to provide them with a convenient way to opt out of such communications.[338] Thus, proposed § 1006.6(e) would have required debt collectors to describe, clearly and conspicuously in every electronic communication, how consumers can opt out of receiving such communications directed at a specific email address, telephone number for text messages, or other electronic-medium address.[339] It also would have prohibited a debt collector from requiring, directly or indirectly, that the consumer, to opt out, pay any fee to the debt collector or provide any information other than the email address, telephone number for text messages, or other electronic-medium address subject to the opt-out request. In response to feedback, the Bureau is finalizing proposed § 1006.6(e) with modifications for clarity as described below. Among other things, final § 1006.6(e) increases protection for consumers and increases clarity for debt collectors by specifying that the opt-out method debt collectors provide must be reasonable and simple.

Opt-Out Concept in General

Most industry commenters supported proposed § 1006.6(e) although, as explained below, many industry commenters also requested that the Bureau clarify certain aspects of the proposal. Several industry commenters appeared to oppose proposed § 1006.6(e) on the ground that it would make electronic communications more difficult, and one suggested that, instead of requiring debt collectors to provide opt-out instructions in each electronic

[335] The section-by-section analysis of § 1006.6(d)(4)(i) explains the basis for the Bureau's belief that a debt collector generally does not have reason to anticipate a third-party disclosure when communicating by email with the consumer's permission. The same explanation applies to text messages.

[336] In this section-by-section analysis, the Bureau uses the phrase ''electronic communication'' to refer to emails, text messages, and other similar electronic communications that are readable.

[337] As explained in the section-by-section analysis of § 1006.14(a), the general prohibition in § 1006.14(a) prohibits conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. In the final rule, the Bureau is adopting two comments to clarify that the general prohibition on harassing conduct applies to debt collectors' use of communication media other than telephone calls, including cumulative communications involving telephone calls and other media.

[338] As the Bureau noted in the proposal, an opt-out requirement is consistent with several established public policies protecting consumers who receive electronic communications. For example, with respect to emails, the Controlling the Assault of Non-Solicited Pornography and Marketing (CAN–SPAM) Act of 2003, 15 U.S.C. 7701 *et seq.,* reflects a public policy in favor of providing consumers with a specific mechanism to opt out of certain email messages. *See* 15 U.S.C. 7704(a)(3) (requiring that commercial emails include a functioning return email address or other internet-based mechanism, clearly and conspicuously displayed, for the recipient to request not to receive future email messages from the sender at the address where the message was received); Fed. Trade Comm'n, *CAN–SPAM Act: A Compliance Guide for Business* (Sept. 2009), *https://www.ftc.gov/tips-advice/business-center/guidance/can-spam-act-compliance-guide-business* (explaining that messages covered by the CAN–SPAM Act ''must include a clear and conspicuous explanation of how the recipient can opt out of getting email from [the sender] in the future''). In addition, the FTC's regulations implementing the CAN–SPAM Act prohibit charging a fee or imposing other requirements on recipients who wish to opt out of certain email communications. 16 CFR 316.5.

[339] *See* 84 FR 23274, 23304–06 (May 21, 2019). Proposed comment 6(e)–1 would have clarified the meaning of clear and conspicuous and provided examples of how to comply with proposed § 1006.6(e).

communication, the Bureau should allow debt collectors to inform consumers periodically of the right to opt out, or in a standard notice on the debt collector's website. The Bureau determines that periodically notifying consumers of the right to opt out, or requiring consumers to find and review a notice on a debt collector's website, does not adequately protect consumers from potentially harassing and costly electronic communications. A consumer who finds electronic communications harassing or costly should not endure additional harassment or cost while waiting for a debt collector to explain how to opt out, and a consumer should not bear the burden and risk of locating, reviewing, and using an opt-out notice that appears only on a debt collector's website. Nor does the Bureau believe that allowing consumers to opt out of electronic communications makes such communications more difficult. Presumably, many consumers who opt out of electronic communications with a debt collector would not respond to such communications even if opting out were difficult or impossible.[340]

Although, as discussed in the section-by-section analysis of § 1006.6(d)(4), many consumer advocate commenters and multiple government and academic commenters urged the Bureau to adopt an opt-in system for electronic communications, they also supported allowing consumers to opt out of electronic communications once such communications have begun. These commenters argued that the ability to opt out of electronic communications is critical to prevent harassment, particularly because the Bureau did not include emails and texts messages in proposed § 1006.14(b)'s frequency limits.[341] Consumer advocate commenters also argued that enabling consumers to opt out of electronic communications is especially important for certain groups of consumers, such as those who are contacted using an employer-provided email address or telephone number and wish to end those contacts immediately, those who lack reliable access to a particular medium of electronic communication and therefore prefer to opt out of communications using that medium, and those who are contacted erroneously and prefer to opt out rather than to call the debt collector.

However, many consumer and consumer advocate commenters, and several government and academic commenters, also expressed concern that proposed § 1006.6(e), on its own, would not sufficiently protect consumers from the risks of electronic debt collection communications. For example, some commenters noted that, if a consumer was worried about phishers and scammers, the consumer might be reluctant to exercise an opt-out right, particularly one that required clicking on a link or replying to an email or text message from an unknown sender. Other commenters expressed concern that a debt collector might not honor a consumer's opt-out request, pointing to the difficulty reported by some consumers when trying to opt out of electronic communications outside of the debt collection context and to the Bureau's consumer survey, which showed that 75 percent of surveyed consumers who asked a creditor or debt collector to stop contacting them (orally or in writing) reported that the creditor or debt collector attempted to contact them anyway.[342] An academic commenter and a local government commenter also asserted that opt-out procedures generally create barriers to consumer action and that certain vulnerable populations, such as older consumers, might have difficulty navigating even relatively simply opt-out procedures.

The Bureau determines that a way to address potentially harassing or costly electronic communications is to provide consumers with a convenient way to opt out of such communications. In response to concerns that the ability to opt out, on its own, does not sufficiently protect consumers from the risks of electronic communications, the Bureau notes that § 1006.6(e) is one of several provisions in the final rule designed to address those risks. For example, § 1006.6(d)(3) through (5) describes procedures to limit third-party disclosures when sending an email or text message; § 1006.14(a) prohibits a debt collector from communicating electronically in a manner that has the natural consequence of harassing, oppressing, or abusing any person in connection with the collection of a debt; § 1006.14(h) prohibits a debt collector from using a medium of communication if a person has requested that the debt collector not use that medium; and §§ 1006.18(d) and 1006.22(f)(4) include protections regarding debt collectors' use of social media.

Ease of Use of Opt-Out Instructions

Many consumer and consumer advocate commenters, several academic commenters, a group of State Attorneys General, and other State and local government commenters noted that proposed § 1006.6(e) would have required a debt collector to describe how to opt out, but it would not have required the opt-out mechanism to take a particular form. For example, these commenters expressed concern that, as drafted, proposed § 1006.6(e) would have permitted a debt collector to construct a complicated opt-out mechanism, such as requiring a consumer to opt out by mail only, or by telephone call during particular hours. Several consumer advocate commenters observed that, even if a debt collector does not intend to make it difficult to opt out, an unnecessarily limited opt-out method may be problematic for some consumers. For example, if a debt collector inadvertently emailed a consumer at work, an opt-out method that required a return email from that email address could be problematic for a consumer whose employer-provided account is monitored and who would therefore prefer to contact the debt collector by telephone or through another communication medium. Similarly, if a debt collector required opt-out requests to be communicated by telephone during particular hours, those hours might not be convenient for a consumer. A group of State Attorneys General and a group of consumer advocate commenters argued that, in this respect, proposed § 1006.6(e) was less protective of consumers than other

[340] To the extent commenters asked the Bureau to clarify whether a creditor's electronic communications must include opt-out instructions, the Bureau confirms that § 1006.6(e) applies only to FDCPA debt collectors.

[341] One local government commenter argued that an opt-out approach for text messages effectively would permit an unfair debt collection practice. Specifically, the commenter argued that only an opt-in approach is consistent with FDCPA section 808(5), which prohibits a debt collector from causing charges to be made to any person for communications by concealment of the true purpose of the communication and provides, as an example, a consumer incurring collect telephone call charges because the debt collector concealed the true purpose of the call. While, as the commenter noted, the Bureau referred to FDCPA section 808(5) in the section-by-section analysis of proposed § 1006.6(e), the Bureau does not believe and did not mean to suggest that a debt collector necessarily violates FDCPA section 808(5) by sending a text message to a consumer with a limited text messaging plan. Rather, the Bureau believes that, as with any communication, a violation of FDCPA section 808(5) would require the debt collector to engage in concealment of the true purpose of the text message. The Bureau believes that a debt collector who communicates by text message pursuant to the procedures in § 1006.6(d)(5) would be unlikely to engage in such concealment. As explained further in the relevant section-by-section analysis, § 1006.6(d)(5) provides a safe harbor from civil liability to a debt collector who sends a text message to a telephone number only if, among other things, the consumer used the telephone number to send a text message to the debt collector or the consumer consented directly to the debt collector's use of text messages. In both cases, the consumer has evidenced a familiarity with the debt collector and a willingness to communicate by text message.

[342] *See* CFPB Debt Collection Consumer Survey, *supra* note 16, at 35.

consumer protection laws and regulations. For example, the CAN–SPAM Act requires email marketers to provide a reply email or internet-based means by which an opt-out request may be sent by the consumer,[343] and the FCC allows consumers to revoke consent under the TCPA in any manner that clearly expresses a desire not to receive further messages.[344]

Consumer, consumer advocate, government, and academic commenters who urged the Bureau to strengthen proposed § 1006.6(e) offered several suggestions. Many such commenters urged the Bureau to require a debt collector to accept an opt-out request in the same medium in which the debt collector communicated with the consumer and the opt-out instructions were delivered. Thus, for example, a consumer should be permitted to opt out of email communications by replying to a debt collector's email. Other commenters urged the Bureau to require a debt collector to accept an opt-out request in any medium that the debt collector uses to communicate with consumers. Thus, for example, a debt collector who communicates with consumers by telephone, email, and mail would have to accept an opt-out request submitted by any of those methods, even if the request is in response to an email. Other commenters argued that the final rule should adopt a more general standard, such by as requiring debt collectors to allow consumers to opt out using any ''convenient method'' or any ''reasonable method.''

Relatedly, several consumer advocate commenters urged the Bureau to strengthen proposed § 1006.6(e) by elaborating generally on the procedural and disclosure requirements that debt collectors must follow. For example, a consumer advocate commenter urged the Bureau to require debt collectors to provide consumers with a hyperlink allowing them to opt out of electronic communications. A group of consumer advocate commenters urged the Bureau to require debt collectors to list all the ways a consumer may opt out of electronic communications, and to do so in textual rather than graphic format to ensure that the information is available to visually impaired consumers who use text reading tools and to consumers who use email programs that do not download graphics. Other commenters suggested that the Bureau require debt collectors to disclose that the right to opt out can be exercised at any time, and to ensure that the disclosure appears in the body of a communication where it can be seen without scrolling down.

The Bureau agrees that the ability to opt out of electronic communications affords little protection if the costs to consumers of opting out prevent or unduly hinder them from making that choice. Accordingly, final § 1006.6(e) clarifies that a debt collector must describe a reasonable and simple method by which the consumer can opt out of further electronic communications or attempts to communicate by the debt collector to a particular electronic address or telephone number.[345] The Bureau also is adopting commentary providing examples, informed by suggestions from commenters, of opt-out methods that comply with the reasonable-and-simple standard. Specifically, comment 6(e)–1 clarifies that, in the context of text message communications, the standard is satisfied if a consumer can opt out by replying ''stop'' to the debt collector. Comment 6(e)–1 also clarifies that, in the context of email communications, the standard is satisfied if a consumer can opt out by clicking on a link in the email or replying with the word ''stop'' in the subject line. The Bureau expects that most debt collectors will follow these examples when they communicate electronically with consumers.

Permissible Fees and Required Information in Connection With Opt-Out Requests

Proposed § 1006.6(e) would have prohibited a debt collector from requiring, directly or indirectly, that the consumer, in order to opt out, pay any fee to the debt collector. A group of consumer advocate commenters noted that, because this prohibition was limited to paying a fee to a debt collector, a debt collector could still require the consumer to pay a fee to a third party. For example, the commenters noted, proposed § 1006.6(e) would appear to have allowed debt collectors to require a certified letter to opt out, with the fee paid to the postal service. In addition, these commenters observed, a debt collector who requires consumers to send a text message to opt out would force consumers with limited text messaging plans to incur a charge, with the fee paid to the consumer's telephone provider. An industry commenter recommended that debt collectors include, in all text messages to consumers, a statement that message rates may apply.

Final § 1006.6(e) retains the prohibition on fees as proposed. The consumer advocate commenters' concern about the cost of an opt-out notice sent by certified mail (and other similarly inconvenient media) is addressed by § 1006.6(e)'s reasonable-and-simple requirement; an opt-out method that requires a consumer to use certified mail (which entails the consumer arranging for a special form of delivery that is costlier than ordinary mail and generally unwarranted under the circumstances) is not reasonable and simple. Section 1006.6(e) does not, however, prohibit a consumer from incurring a fee for sending an opt-out request by text message as long as such fee is not paid, directly or indirectly, to the debt collector. Because such a consumer has already expressed a willingness to incur the costs of text message communications, the Bureau does not believe it is necessary to prohibit consumers from incurring such costs in § 1006.6(e). And, as discussed in detail in the section-by-section analyses of §§ 1006.6(b)(1) and 1006.14(h), a consumer may control communications in other ways, including by, for example, informing a debt collector by telephone that the consumer does not want to receive text messages. The Bureau also does not believe it is necessary to require debt collectors to note, in text messages to consumers, that message rates may apply. The Bureau understands from consumer advocate commenters that consumers with limited text messaging plans generally are aware that they may be charged for text messages.

Proposed § 1006.6(e) also would have prohibited a debt collector from requiring that the consumer, in order to opt out, provide any information other than the email address, telephone number for text messages, or other electronic-medium address subject to the opt-out request. Federal government agency staff encouraged the Bureau to ensure that this prohibition would not inadvertently prevent consumers from also sharing their opt-out preferences. The Bureau intended to allow debt collectors to solicit a consumer's opt-out preferences, and the final rule expressly adds the consumer's opt-out preferences to the list of information that a debt collector may require the consumer to provide.

[343] *See* 15 U.S.C. 7704(a)(3)(A) (making it ''unlawful for any person to initiate the transmission to a protected computer of a commercial electronic mail message that does not contain a functioning return electronic mail address or other internet-based mechanism'').

[344] *See In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991,* 30 FCC Rcd. 7961, 7996 (July 10, 2015), *set aside in part by ACA Int'l* v. *Fed. Commc'ns Comm'n,* 885 F.3d 687 (D.C. Cir. 2018).

[345] As explained in the section-by-section analysis of § 1006.6(d)(4)(ii), the reasonable-and-simple standard also appears in the Bureau's Regulation V. 12 CFR 1022.25.

Processing Period for Opt-Out Requests

Multiple industry commenters and one consumer advocate commenter requested that the Bureau specify the time period within which a debt collector would be required to process a consumer's request to opt out. One industry commenter suggested that the Bureau require debt collectors to process opt-out requests within a ''reasonable'' period of time, while another industry commenter suggested a 72-hour processing period. Several industry commenters suggested a 10-day processing period, which is the period the FTC has set for processing opt-out requests under the CAN–SPAM Act. An industry commenter who presently communicates with consumers by email stated that it processes opt-out requests in less than 10 minutes, another industry commenter predicted that debt collectors would be able to process opt-out requests in 24 to 48 hours, and another industry commenter predicted that debt collectors would be able to process opt-out requests in fewer than 10 days. A consumer advocate commenter proposed a processing period of 24 hours, arguing that the frequency of some debt collection communications means that a short compliance period is necessary to ensure that a consumer's opt-out request is honored.

The Bureau recognizes that any maximum processing period for opt-out requests under § 1006.6(e) must be short enough to protect consumers from unwanted electronic communications but long enough for compliance to be practical. Given the disparate periods of time suggested by commenters, and the fact that few debt collectors communicate electronically and process electronic opt-out requests today, the final rule does not specify the period of time afforded a debt collector to process an opt-out request under § 1006.6(e). However, depending on the circumstances, a debt collector who unintentionally communicates with a consumer electronically after receiving a consumer's request to opt out but before processing the request may have a bona fide error defense to civil liability under FDCPA section 813(c). For example, if a debt collector who schedules an email to be sent to a consumer later receives an opt-out request from the consumer but sends the previously scheduled email to the consumer before the request can be processed (notwithstanding the maintenance of procedures to avoid such an error), the debt collector may have a bona fide error defense to civil liability under FDCPA section 813(c).[346]

Other Requests for Clarification

The requirements of final § 1006.6(e), like the requirements of proposed § 1006.6(e), apply to all electronic communications using a specific email address, telephone number for text messages, or other electronic-medium address. A group of consumer advocate commenters expressed concern that direct messages sent using certain social media platforms—such as platforms that allow users to search by name rather than by email address, telephone number, or another account identifier—might not be covered by proposed § 1006.6(e) because those platforms may not use electronic-medium addresses. These commenters urged the Bureau to clarify that opt-out notices are required for all electronic communications. The language of § 1006.6(e) makes clear that it applies to all electronic communications, regardless of whether that particular form of electronic communication is specified in the rule. This includes direct messaging communications on social media and communications in an application on a website, mobile telephone, or computer. It also includes electronic communications using platforms that allow users to search by name or another identifier rather than by email address or telephone number.

Several industry commenters asked the Bureau to clarify the scope of an opt-out request made under § 1006.6(e). For example, some industry commenters asked whether a § 1006.6(e) opt-out request applies to all of a consumer's debts being collected by a particular debt collector or only to the specific debt about which the debt collector communicated. Other industry commenters asked whether a § 1006.6(e) opt-out request applies to all electronic communication media or only to the medium of electronic communication (or the particular address or telephone number) used by the debt collector to communicate with the consumer. Some industry commenters asked whether a § 1006.6(e) opt-out request should be treated as a request to cease all communication regardless of medium, while other industry commenters asked whether a consumer's request that a debt collector cease sending text messages to a particular telephone number should also be treated as request to cease telephone calls to that number. A consumer advocate commenter and a local government commenter asked whether a § 1006.6(e) opt-out request made to one debt collector binds future debt collectors collecting the same debt.

Consistent with proposed § 1006.6(e), final § 1006.6(e) requires a debt collector to describe how to opt out of further electronic communications or attempts to communicate by the debt collector to a particular address or telephone number. In general, the Bureau determines that a consumer who requests that a debt collector cease using a particular address or telephone number to communicate electronically about one of the consumer's debts likely wishes the debt collector to cease using that particular address or telephone number to communicate about any other debt being collected by the debt collector. Comment 14(h)(1)–3.ii addresses this issue further.

Moreover, absent evidence to the contrary, a consumer's request to opt out of electronic communications to a particular address or telephone number is not a request to opt out of electronic communications to a different address or telephone number, a request to opt out of all electronic communications, or a request to opt out of communications altogether. A consumer who objects to receiving electronic communications sent to a particular address or telephone number (because, for example, that address or number has been provided by the consumer's employer or is subject to usage fees) may not object to a debt collector's use of a different address or number or to a debt collector's use of a different medium of communication.

Similarly, absent evidence to the contrary, a consumer's request to opt out of text messages to a particular telephone number is not a request to opt out of telephone calls to that number. A consumer who objects to receiving text messages from a debt collector (because, for example, the consumer is charged for each such message) may not object to receiving telephone calls. Nor does a consumer's request to opt out under § 1006.6(e) bind a subsequent debt

[346] *Cf. Transworld Sys., Inc.,* 953 F.2d at 1036 (holding debt collector's letter, mailed shortly after receiving consumer's cease communication notification, constituted bona fide error where debt collector's procedures were reasonably adapted to avoid such an error); *ACB Receivables Mgmt., Inc.,* 15 F. Supp. 3d at 629 (denying bona fide error defense where debt collector communicated with consumer after receiving consumer's cease communication notification but failed to present any evidence of redundancy or safeguards in its procedures to prevent such errors); *Carrigan,* 494 F. Supp. at 827 (denying bona fide error defense where debt collector communicated with consumer after receiving consumer's cease communication notification but failed to provide evidence that it maintained proper procedures governing mail handling).

collector.[347] A consumer who objects to one debt collector's use of electronic communications might not object to another debt collector's use of such communications if, for example, the timing and frequency of the communications differ or the consumer's personal circumstances have changed.

In the proposal, the Bureau requested comment on whether to identify in the final rule a non-exclusive list of words or phrases—such as ''stop,'' ''unsubscribe,'' ''end,'' ''quit,'' or ''cancel''—that express an opt-out instruction. Several industry commenters requested that the final rule include such a list. Two industry commenters argued that the final rule should allow debt collectors to identify for consumers the exact words needed to opt out and that, if a consumer uses different words, a debt collector should have more time to process the request. Another industry commenter suggested that the Bureau identify an exclusive list of words that express an opt-out request. An industry commenter suggested that debt collectors should be required to treat only two words as expressing an opt-out instruction: ''stop'' and ''opt out.'' A group of consumer advocate commenters urged the Bureau to require debt collectors to honor standard opt-out phrases, such as ''stop,'' ''unsubscribe,'' ''end,'' ''quit,'' and ''cancel.''

The Bureau determines that words such as ''stop,'' ''unsubscribe,'' ''end,'' ''quit,'' or ''cancel'' generally express a consumer's intent to opt out. But these are not the only words that express such an intent. A consumer may respond to a debt collector's electronic communication with an email or text message that makes the consumer's desire to opt out clear without using one of these words. Given the variety of ways in which a consumer may express an intent to opt out, the Bureau declines to identify an exclusive list of words that express such an intention. Conversely, a debt collector who receives a request to ''stop,'' ''unsubscribe,'' ''end,'' ''quit,'' or ''cancel'' will be considered to have received an opt-out request even though the specific term the consumer used does not conform precisely to the opt-out instructions provided by the debt collector pursuant to § 1006.6(e).

Proposed § 1006.6(e) would have required a debt collector to describe how to opt out clearly and conspicuously, and proposed comment 6(e)–1 would have clarified, among other things, that an email would comply with the clear and conspicuous requirement by including instructions in a textual format, in a type size no smaller than the other text in the email. Several industry and consumer advocate commenters requested that the Bureau elaborate on the clear and conspicuous requirement, including by specifying a minimum type size for instructions contained in emails and clarifying whether a font comparison to the rest of an email should exclude graphics, logos, or other non-substantive content within the message. Several industry commenters also urged the Bureau to provide model instructions that would satisfy the clear and conspicuous requirement.

Final § 1006.6(e) retains the clear and conspicuous requirement. The Bureau also is adopting commentary that refers to comment 6(d)(4)(ii)(C)–1 for guidance on the meaning of clear and conspicuous and provides examples illustrating how to comply with the rule when sending a text message or email. The Bureau declines, however, to specify precisely where in an electronic communication the instructions required by § 1006.6(e) must be placed or how large the type size must be. Different debt collectors may design their electronic communications in different ways, and the Bureau does not believe it is necessary or warranted to specify such details, as long as the disclosure satisfies the clear and conspicuous standard.

An industry commenter asked the Bureau to clarify whether a debt collector who receives an opt-out request under § 1006.6(e) may send the consumer a single reply to acknowledge the request and advise the consumer that the request applies only to the specific communication medium used by the debt collector and the specific debt being collected. The same commenter also asked the Bureau to provide model language. As noted above, and as comment 14(h)(1)–3.ii illustrates, a consumer's request to opt out under § 1006.6(e) applies to any of the consumer's debts being collected by the debt collector—not just the specific debt being collected. Further, although § 1006.14(h)(2)(i) permits a debt collector to send an electronic confirmation of a consumer's request to opt out provided that the confirmation contains no information other than a statement confirming the person's request and that the debt collector will honor it, the Bureau does not believe it is necessary or warranted to provide model language given the brevity of the communication.

A group of consumer advocate commenters observed that, although proposed § 1006.6(e) would have required a debt collector to describe how to opt out of electronic communications directed to a particular address or telephone number, it would not have explicitly required the debt collector to honor such a request; instead, the requirement to honor an opt-out request would have appeared in proposed § 1006.14(h). The final rule retains the same structure, with the requirement to disclose an opt-out method appearing in § 1006.6(e) and the requirement to honor an opt-out request appearing in § 1006.14(h)(1). Section 1006.14(h)(1) broadly prohibits debt collectors from communicating or attempting to communicate with a person through a medium of communication if the person has requested that the debt collector not use that medium to communicate with the person, and comment 14(h)(1)–3.ii illustrates that such a request includes an opt-out request made pursuant to the § 1006.6(e) instructions.

Another consumer advocate commenter recommended that the Bureau permit consumers to provide debt collectors with a list of third parties who should not be contacted for any reason, including for location-call purposes. Although nothing in the final rule would prohibit a consumer from offering such a list or a debt collector from requesting or accepting such a list, the commenter's request is outside the scope of this rulemaking.

A local government commenter recommended that the Bureau require debt collectors to disclose to consumers additional information about how to limit debt collection communications. For example, the commenter suggested that the Bureau require debt collectors to disclose that consumers can cease all telephone communications or cease telephone communications to a particular number. As the Bureau noted in the proposal, § 1006.6(e) addresses a group of concerns that are unique to electronic communications and attempts to communicate. With respect to telephone calls in particular, consumers likely know how to ask debt

[347] The Bureau notes, however, that, as explained above, § 1006.6(d)(4)(iii) provides that a debt collector may obtain a safe harbor from civil liability for an unintentional third-party disclosure when sending an email to an email address if: (1) Any prior debt collector obtained the email address in accordance § 1006.6(d)(4)(i) or (ii); (2) the immediately prior debt collector used the email address to communicate with the consumer about the debt; and (3) the consumer did not opt out of such communications. Thus, if a consumer opts out of the immediately prior debt collector's use of an email address by following instructions provided pursuant to § 1006.6(e), a subsequent debt collector who uses that email address to communicate with the consumer would not be covered by § 1006.6(d)(4)(iii). Such a debt collector may, however, be covered by § 1006.6(d)(4)(i) or (ii).

collectors to stop placing unwanted telephone calls; § 1006.14(h)(1) would require debt collectors to honor such requests; and the rebuttable presumptions established by § 1006.14(b)(2) would address the frequency of such calls. For these reasons, the Bureau declines the commenter's suggestion to require debt collectors to provide more detailed information about how consumers may limit telephone communications.

An industry commenter asked the Bureau to create an exception to § 1006.6(e) for electronic communications sent to an email address provided by the consumer to a court pursuant to a State's e-filing rules, arguing that there may be a potential conflict with some State court e-filing rules. The Bureau declines the commenter's request. As discussed above, § 1006.6(e) requires a debt collector to disclose an opt-out method, whereas § 1006.14(h)(1) requires a debt collector to honor an opt-out request. The Bureau believes that the situation raised by the commenter is addressed by final § 1006.14(h)(2)(iii), which provides that, notwithstanding the prohibition in § 1006.14(h)(1), a debt collector may, if required by applicable law, communicate or attempt to communicate with a person in connection with the collection of any debt using a medium that the person has requested the debt collector not use.[348]

For all of the reasons discussed above, the Bureau is finalizing § 1006.6(e), which provides that a debt collector who communicates or attempts to communicate with a consumer electronically in connection with the collection of a debt using a specific email address, telephone number for text messages, or other electronic-medium address must include in such communication or attempt to communicate a clear and conspicuous statement describing a reasonable and simple method by which the consumer can opt out of further electronic communications or attempts to communicate by the debt collector to that address or telephone number. Final § 1006.6(e) also provides that the debt collector may not require, directly or indirectly, that the consumer, in order to opt out, pay any fee to the debt collector or provide any information other than the consumer's opt-out preferences and the email address, telephone number for text messages, or other electronic-medium address subject to the opt-out request. In addition, the Bureau is adopting comment 6(e)–1, which refers to comment 6(d)(4)(ii)(C)–1 for guidance on the meaning of clear and conspicuous and to comment 6(d)(4)(ii)(C)(*4*)–1 for guidance on the meaning of reasonable and simple, and provides examples illustrating the rule.

The Bureau is finalizing § 1006.6(e) as an interpretation of FDCPA sections 806 and 808, pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors. FDCPA section 806 prohibits conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Because the marginal cost of transmitting electronic communications to consumers is low, particularly when compared to mail communications, debt collectors have less economic incentive to limit the number of such communications. As multiple consumer advocate commenters confirmed, a reasonable and simple mechanism to opt out allows some consumers to protect themselves from emails and text messages they believe are harassing, oppressive, or abusive. Section 1006.6(e) provides consumers with such a mechanism.

FDCPA section 808 prohibits the use of unfair or unconscionable means to collect or attempt to collect any debt. It is unfair or unconscionable under the FDCPA for a debt collector to send a consumer an electronic communication, such as an email or text message, without providing a reasonable and simple method to opt out. Because the marginal cost of transmitting electronic communications to consumers is low, particularly when compared to mail communications, debt collectors have less economic incentive to limit the number of such communications. Moreover, as multiple consumer advocate commenters confirmed, for a consumer who does not maintain an unlimited data plan, emails and text messages can lead to charges the consumer does not want to incur. In the absence of a reasonable and simple opt-out method, a consumer who wants to unsubscribe from electronic communications may incur time and cost doing so. On balance, in the Bureau's view, these costs to consumers do not outweigh the benefits to debt collectors of omitting opt-out instructions from electronic communications.

The Bureau also is finalizing § 1006.6(e) pursuant to its authority under section 1032(a) of the Dodd-Frank Act to prescribe rules to ensure that the features of any consumer financial product or service are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances. A consumer's ability to opt out of electronic communications from a debt collector is a feature of debt collection, and the opt-out instructions required by proposed § 1006.6(e) disclose that feature to consumers.

Section 1006.10 Acquisition of Location Information

FDCPA section 804 imposes certain requirements and limitations on a debt collector who communicates with any person other than the consumer for the purpose of acquiring location information about the consumer.[349] FDCPA section 803(7) defines the term location information.[350] The Bureau proposed § 1006.10 to implement FDCPA sections 803(7) and 804.[351] Proposed § 1006.10 generally mirrored the statute, with minor wording and organizational changes for clarity. In addition, proposed § 1006.10(c) would have clarified that proposed § 1006.14(b)'s limits on telephone calls also apply to location calls, and proposed comments 10(a)–1 and 10(b)(2)–1 would have clarified how § 1006.10 applies in the decedent debt context.

The Bureau received two overarching comments regarding proposed § 1006.10. First, several consumer advocates recommended prohibiting any communications with third parties, including for location purposes. These commenters argued that such communications risk violating the privacy of consumers, subjecting the third parties to harassment, and giving domestic abusers the opportunity to learn details of a consumer's financial situation or to manipulate the debt collector into revealing other private information about the consumer. The Bureau declines to adopt such a prohibition because FDCPA section 804 expressly allows debt collectors to contact third parties to seek location information and, as discussed below, includes restrictions on the form, content, and frequency of location communications that are specifically designed to protect consumers' privacy and third parties from harassment.

FDCPA section 805(c) provides that, subject to certain exceptions, if a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further

[348] For additional discussion, see the section-by-section analysis of § 1006.14(h)(2)(iii).

[349] 15 U.S.C. 1692b.

[350] 15 U.S.C. 1692a(7).

[351] *See* 84 FR 23274, 23307 (May 21, 2019).

communication with the consumer, the debt collector shall cease further communication with the consumer with respect to such debt.[352] A group of State Attorneys General recommended giving third parties (*i.e.,* parties who are not consumers under either FDCPA section 803(3) or 805(d)) the right to cease communications from debt collectors. The Bureau declines to include such a provision—which does not appear in the FDCPA and which the Bureau did not propose—in this final rule. However, several other provisions in the statute or the final rule (or both) apply to location communications and may provide third parties similar protection. For example, under the final rule, a third party's request to never be contacted again is a factor that may rebut a debt collector's presumption of compliance with § 1006.14(b)(1) and FDCPA section 806(5) when telephone call volume is at or below the levels specified in § 1006.14(b)(2)(i).[353] Moreover, as discussed below, FDCPA section 804(3) and final § 1006.10(c) prohibit debt collectors from communicating more than once with a third party to seek location information unless requested to do so by such person, or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information. For these reasons, and for the reasons discussed below, the Bureau is finalizing proposed § 1006.10 largely as proposed, with minor changes for clarity. The Bureau is finalizing proposed § 1006.10 pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors and to interpret FDCPA section 804.

10(a) Definition

Consistent with the statute, the Bureau proposed § 1006.10(a) to provide that location information means a consumer's place of abode and telephone number at such place or the consumer's place of employment. The Bureau received several comments on this proposed definition. Several industry commenters asked the Bureau to clarify that location information includes a consumer's mobile telephone number and email address. Other commenters noted that proposed § 1006.10(a) mirrored the FDCPA section 803(7)'s disjunctive definition of location information, *i.e.,* the consumer's place of abode and telephone number at such place, ''or'' the consumer's place of employment. An industry commenter asked whether debt collectors could continue seeking one element of location information if they already had the other, while a consumer advocate asked the Bureau to clarify that possessing one element prohibits a debt collector from further location communications. Finally, consumer advocates recommended that the Bureau prohibit a debt collector from calling third parties under the pretense of gaining information that the debt collector already possesses.

The Bureau declines to finalize the types of clarifications the commenters requested. The Bureau believes the definition of ''location information'' currently does not present a serious source of harm to consumers or burden to debt collectors. For example, the Bureau is unaware of significant recent litigation or enforcement actions concerning the definition of location information. While the Bureau understands that there may be some uncertainty regarding mobile telephone numbers and email addresses, the Bureau notes that nothing in the final rule prohibits a debt collector who is engaged in a permissible location communication from requesting other pieces of contact information for the consumer. Finally, the Bureau does not believe that it is necessary or warranted to provide additional interpretation regarding the pretext for location communications. The Bureau notes that § 1006.10(b) specifies that communications under this section must be ''for the purpose of acquiring location information.'' The Bureau will monitor this definitional issue for any potential consumer harm or compliance concerns and revisit at a later time if needed.

10(b) Form and Content of Location Communications

The Bureau proposed § 1006.10(b) to implement the paragraphs of FDCPA section 804 that address the form and content of location communications.[354] Proposed § 1006.10(b) generally mirrored the statute, and the Bureau received only a few comments addressing it. For the reasons discussed below, the Bureau is finalizing § 1006.10(b) as proposed.

Two industry commenters expressed dissatisfaction with FDCPA section 804(1), proposed to be implemented as § 1006.10(b)(1), which requires that, during location communications, debt collectors state, among other things, ''that [they are] confirming or correcting location information'' for the consumer. The commenters believed that such language reveals that the consumer owes a debt. A group of State Attorneys General asked the Bureau to adopt a broad interpretation of FDCPA section 804(5) (proposed to be implemented as § 1006.10(b)(4)). FDCPA section 804(5) restricts debt collectors from using any language or symbol in mailed location communications that indicates the debt collector is in the debt collection business. The commenter requested that the Bureau interpret this restriction as applying to location communications sent by media in addition to mail.

The Bureau has considered these comments but declines to interpret the statutory requirement related to these provisions. The Bureau did not propose changes to these statutory provisions and concludes that additional information, including through public comment, would be advisable before adopting any such interpretations.

One industry commenter asked for clarity on proposed § 1006.10(b)(5), which would have implemented FDCPA section 804(6), and provided, in relevant part that, if a debt collector knows that a consumer is represented by an attorney, the debt collector must not communicate with any person other than the attorney, unless the attorney fails to respond ''within a reasonable period of time.'' The commenter asked the Bureau to clarify the meaning of a ''reasonable period of time.'' The Bureau believes that reasonableness generally depends upon the facts and circumstances surrounding a debt collector's communications with a consumer's attorney. Accordingly, the Bureau declines to identify a blanket period of time after which all communications with persons other than a consumer's attorney are permissible in all cases.

Finally, in its Policy Statement on Decedent Debt, the FTC stated that it would refrain from taking enforcement action under FDCPA section 804(2) against debt collectors who state that they are seeking to locate a person ''with the authority to pay any outstanding bills of the decedent out of the decedent's estate.''[355] The Bureau requested comment on the language debt collectors may use to locate a person handling the decedent's affairs in the FTC's Policy Statement (''with the authority to pay any outstanding bills of the decedent out of the decedent's estate'') compared to proposed comment

[352] 15 U.S.C. 1692c(c).

[353] *See* the section-by-section analysis of § 1006.14(b)(2).

[354] *See* FDCPA section 804(1)–(2) and (4)–(6), 15 U.S.C. 1692b(1)–(2) and (4)–(6) (proposed as § 1006.10(b)(1) through (5)).

[355] FTC Policy Statement on Decedent Debt, *supra* note 157, at 44918–23.

10(b)(2)–1 (''authorized to act on behalf of the deceased consumer's estate''). An industry commenter supported the Bureau's language, while a trade group commenter and a group of consumer advocates stated that they had no concerns with the proposal. Several commenters, however, preferred that debt collectors use other language to locate the person authorized to act on behalf of the deceased consumer's estate. Most of these commenters preferred the FTC's language for several reasons, including that some individuals might be authorized to act on behalf of the estate only in limited ways that do not involve paying the deceased consumer's debts; that the privacy interests the FDCPA aimed to protect were lower in the decedent debt context; and that referring to the authority to act on behalf of the estate was likely to prompt clarifying questions that might reveal that the consumer owes a debt. One industry commenter stated that it asked for the person ''handling the financial affairs'' of the deceased consumer and that the Bureau should adopt this language. A trade group commenter asked the Bureau to allow debt collectors to use the FTC's language in response to follow-up questions during a location communication, while another trade group commenter suggested that the rule allow both the FTC's and the Bureau's language.

The Bureau understands commenters' policy arguments but remains concerned about the phrase ''outstanding bills'' from the FTC's Policy Statement. FDCPA section 803(5) defines debt broadly to include ''any obligation or alleged obligation of a consumer to pay money arising out of a transaction . . . primarily for personal, family, or household purposes.'' [356] Because the definition is not limited to delinquent or defaulted obligations, even references to outstanding bills may reveal that the consumer owes a debt under the FDCPA. Accordingly, the Bureau is finalizing comment 10(b)(2)–1, in relevant part, as proposed. To increase flexibility, final comment 10(b)(2)–1 also permits debt collectors to identify the person authorized to act on behalf of the deceased consumer's estate as the person handling the financial affairs of the deceased consumer because the Bureau notes that this language is also unlikely to reveal the existence of a debt.

Two commenters made additional suggestions. A trade group commenter requested that the Bureau exempt location communications from the definition of communication in the decedent debt context. And consumer advocates asked the Bureau to require debt collectors to check whether public records listed an executor or administrator, and if so, to prohibit communications with anyone other than that individual. The Bureau declines to interpret communications so as not to include any location communications in the decedent debt context. The Bureau also declines to adopt a requirement to check public records. The Bureau supports the FTC's encouragement for debt collectors to make good-faith efforts to search public records before communicating with a deceased consumer's estate.[357] Nevertheless, the Bureau concludes that final § 1006.10's provisions regulating location communications, combined with final § 1006.6(a)'s restrictions on the individuals with whom debt collectors may communicate, provides sufficient restrictions on communications consistent with the statutory provisions, without the need for definitional changes or new record-checking requirements.

For the reasons discussed above, the Bureau is finalizing § 1006.10 and comments 10(a)–1 and 10(b)(2)–1 largely as proposed, with minor changes for clarity.

Comment 10(a)–1 provides that, if a consumer obligated or allegedly obligated to pay any debt is deceased, location information includes the information described in § 1006.10(a) for a person who is authorized to act on behalf of the deceased consumer's estate, as described in § 1006.6(a)(4) and its associated commentary. Comment 10(b)(2)–1 provides that, if the consumer obligated or allegedly obligated to pay the debt is deceased, and the debt collector is attempting to locate the person who is authorized to act on behalf of the deceased consumer's estate, the debt collector does not violate § 1006.10(b)(2) by stating that the debt collector is seeking to identify and locate the person who is authorized to act on behalf of the deceased consumer's estate. The debt collector may also state that the debt collector is seeking to identify and locate the person handling the financial affairs of the deceased consumer.

10(c) Frequency of Location Communications

Proposed § 1006.10(c) would have implemented FDCPA section 804(3), which provides that a debt collector must not communicate with a person for the purpose of obtaining location information more than once, unless the debt collector reasonably believes that the person's earlier response was erroneous or incomplete and that the person now has correct or complete information. Proposed § 1006.10(c) also specified that debt collectors engaging in location communications by telephone must comply with the telephone frequency limits in § 1006.14(b).

A government commenter and several consumers and consumer advocates objected to the proposal to apply the same frequency limits to location calls as to telephone calls generally (*i.e.,* up to seven unanswered telephone calls to a person during a seven-day period).[358] These commenters stated that the proposed frequency limits were too high for any person, but especially for third parties receiving location calls, who may be more likely to find such calls harassing because they do not owe the debt. Consumer advocates also suggested that third parties were unlikely to answer location telephone calls and therefore would not receive the benefit of proposed § 1006.10(c)'s restriction on debt collectors communicating more than once with third parties for location information purposes. Some of these commenters proposed various alternative frequency limits, such as one attempt per third party per week.

The Bureau declines to revise § 1006.10(c) to set forth unique telephone calling frequencies for third parties. As discussed in the section-by-section analysis of § 1006.14, the Bureau finds that the frequency standards described in that section are appropriate for third parties as well as consumers. Moreover, as discussed above, debt collectors' telephone calls to third parties are cabined by the general statutory prohibition, implemented in § 1006.6(d), against communicating with third parties unless they have the purpose of obtaining location information. The Bureau acknowledges that, as suggested by some consumer advocates, some third parties could receive excess telephone calls. The Bureau is not aware, however, that debt collectors are routinely or successfully claiming in litigation or enforcement

[356] 15 U.S.C. 1692a(5). *See also* the section-by-section analysis of § 1006.2(h).

[357] FTC Policy Statement on Decedent Debt, *supra* note 157, at 44919–20.

[358] Specifically, proposed § 1006.14(b) provided a bright-line rule that a debt collector does not violate FDCPA section 806(5)'s prohibition against repeated or continuous telephone calls if the debt collector places seven or fewer telephone calls to a person about a debt during a seven-day period (and does not place another telephone call to the person after having had a telephone conversation with the person during the seven-day period). 84 FR 23274, 23401 (May 21, 2019).

actions that such telephone calls are properly placed for the purpose of acquiring location information and consistent with the prohibition against communicating more than once with a third party to seek location information. Finally, location communications are subject to § 1006.14's general prohibition on harassing, oppressive, or abusive conduct.

Section 1006.14 Harassing, Oppressive, or Abusive Conduct

FDCPA section 806 [359] prohibits a debt collector from engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. It lists six non-exhaustive examples of such prohibited conduct. The Bureau proposed § 1006.14 to implement and interpret FDCPA section 806.[360] Except with respect to § 1006.14(b) and (h), proposed § 1006.14 generally restated the statute, with only minor wording and organizational changes for clarity.

The following section-by-section analyses summarize and address comments related to proposed § 1006.14(a), (b), and (h). Apart from one comment related to proposed § 1006.14(g) that does not require any changes to regulation text or commentary,[361] the Bureau did not receive feedback specifically addressing proposed § 1006.14(c) through (g) and therefore is finalizing these paragraphs as proposed. The Bureau is finalizing § 1006.14 pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors, as well as pursuant to its authority to implement and interpret FDCPA section 806.

The Bureau notes that it received many comments from individual and consumer advocate commenters describing harassing conduct that they or their clients have experienced by debt collectors. For example, some commenters stated that they are afraid to answer telephone calls because debt collectors have called them repeatedly and used profane language. Other commenters described feeling shame when debt collectors disclosed information to neighbors and friends about debts they allegedly owed. Commenters described debt collectors threatening them with criminal prosecution or bodily harm if they did not pay an alleged debt immediately. Some commenters explained that these types of behaviors by debt collectors cause them stress that manifests into physical symptoms such as increased blood pressure, heavy breathing, pain, and loss of sleep. The Bureau emphasizes that the conduct described by commenters above is prohibited by FDCPA section 806 and final § 1006.14, even if specific examples of such conduct are not discussed in the regulation text or commentary.

14(a) In General

As noted, FDCPA section 806 generally prohibits a debt collector from engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt, and FDCPA section 806(1) through (6) lists six non-exhaustive examples of such prohibited conduct. Proposed § 1006.14(a) would have largely restated FDCPA section 806.[362] For the reasons discussed below, the Bureau is finalizing § 1006.14(a) generally as proposed but is adopting new comments 14(a)–1 and –2 in response to feedback requesting clarity about its scope.

The Bureau received a number of comments requesting clarification about the scope of FDCPA section 806 as it would have been implemented in proposed § 1006.14(a). For example, a group of consumer advocates asked that the Bureau include in the rule text or commentary the statement the Bureau made in the preamble to the proposal that § 1006.14(a) applies to communication media other than telephone calls. The same group of consumer advocates asked the Bureau to clarify that § 1006.14(a) applies based on the cumulative effect of a debt collector's conduct across multiple communication media. An industry commenter asked the Bureau to confirm the opposite—*i.e.,* that § 1006.14(a) applies separately to each communication method used by the debt collector.

In light of these comments, the Bureau is adopting two comments to clarify that the general prohibition on harassing conduct in FDCPA section 806, as implemented in § 1006.14(a), applies whether debt collectors place telephone calls or use other communication media. In addition, the comments clarify that all communication media are analyzed individually as well as cumulatively.[363]

Comment 14(a)–1 clarifies that § 1006.14(a), which implements FDCPA section 806, sets forth a general standard that prohibits a debt collector from engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. The comment clarifies, further, that the general prohibition covers the specific conduct described in § 1006.14(b) through (h), as well as any conduct by the debt collector that is not specifically prohibited by § 1006.14(b) through (h) but that the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. The comment explains that the conduct can occur regardless of the communication media the debt collector uses, including in-person interactions, telephone calls, audio recordings, paper documents, mail, email, text messages, social media, or other electronic media, even if not specifically addressed by § 1006.14(b) through (h).

Comment 14(a)–1 also includes an example involving a scenario in which, in connection with the collection of a debt: A debt collector sends a consumer numerous, unsolicited text messages per day for several consecutive days; the consumer does not respond; the debt collector does not communicate or attempt to communicate with the consumer using any other communication medium; and that, by sending the text messages, the debt collector has not violated § 1006.14(b) through (h). The comment clarifies that even though the debt collector has not violated any specific prohibition under § 1006.14(b) through (h), it is likely that the natural consequence of the debt collector's text messages is to harass,

[359] 15 U.S.C. 1692d.

[360] *See* 84 FR 23274, 23307–22 (May 21, 2019).

[361] The commenter requested guidance on a debt collector's responsibility to identify the person the debt collector has reached during a telephone call (*i.e.,* whether the debt collector has reached, or is being contacted by, the consumer or a third party). The commenter noted that this question is relevant to complying with the requirement under FDCPA section 806(6) (proposed as § 1006.14(g)) to meaningfully disclose, except with respect to location information calls, the debt collector's identity on telephone calls, as well as with respect to other requirements and prohibitions under the FDCPA and the regulation (as proposed). In response to this comment, the Bureau confirms that there are a number of contexts, including the meaningful disclosure of identity provision, in which the statute (and final rule) requires a debt collector to determine the identity of the person to whom the debt collector is speaking; the Bureau declines to provide detailed guidance as to how debt collectors should make such a determination.

[362] *See* 84 FR 23274, 23307 (May 21, 2019).

[363] As provided for in comment 14(b)(1)–1, a debt collector who complies with § 1006.14(b)(1) and FDCPA section 806(5) complies with § 1006.14(a) and FDCPA section 806 solely with respect to the frequency of its telephone calls. When a debt collector both places telephone calls and uses at least one other type of communication media, compliance with § 1006.14(a) depends on the whether the cumulative communications involving telephone calls and any other communication media have the natural consequence of harassing, oppressing, or abusing any person in connection with the collection of a debt.

oppress, or abuse the person receiving them and that when such natural consequence occurs, the debt collector has violated § 1006.14(a) and FDCPA section 806.

Comment 14(a)–2 addresses cumulative communications by the debt collector, and clarifies that, depending on the facts and circumstances, conduct that on its own would violate neither the general prohibition in § 1006.14(a), nor any specific prohibition in § 1006.14(b) through (h), nonetheless may violate § 1006.14(a) when such conduct is evaluated cumulatively with other conduct. The comment further clarifies that such conduct can occur through any communication medium the debt collector uses, including in-person interactions, telephone calls, audio recordings, paper documents, mail, email, text messages, social media, or other electronic media. The comment then provides an example in which the debt collector places seven unanswered telephone calls within seven consecutive days to a consumer in connection with the collection of a debt and, during the same time period, sends multiple additional unsolicited emails about the debt to the consumer, to which the consumer does not respond. The comment notes that it is likely that the natural consequence of the cumulative effect of the debt collector's telephone calls and emails is to harass, oppress, or abuse the person receiving them; when such natural consequence occurs, the debt collector has violated § 1006.14(a) and FDCPA section 806.

The Bureau notes that, as discussed in the section-by-section analysis of § 1006.14(b) setting forth the Bureau's final rule regarding telephone call frequencies, the Bureau received thousands of comments from consumers, consumer advocates, a local government, a group of State Attorneys General, members of Congress, and other commenters expressing concern that the proposal—which included numeric limits for debt collection telephone calls but did not include numeric limits for debt collection contacts through other communication media—would have allowed debt collectors to send excessive or unlimited text messages and emails, or otherwise inundate consumers with these electronic communications. Some commenters expressed concern, for example, that debt collectors would program their systems to send multiple emails per second and cause consumers' data and text messaging plans to be maxed out, preventing consumers from using their devices.

The Bureau understands that few debt collectors currently send electronic communications, and the Bureau is not aware of these debt collectors sending excessive electronic communications. Even if, as a result of this final rule, debt collectors choose to send electronic communications more frequently than they currently do, the Bureau does not believe that sending excessive electronic communications, including by programming systems to send multiple emails per second, generally would be a profitable strategy for debt collectors. Additionally, this type of conduct would undoubtedly harm consumers. It would not have been permitted by the proposal and is not permitted by the final rule. FDCPA section 806, as implemented by § 1006.14(a), covers, among other things, the debt collector's use of any communication medium in connection with the collection of a debt. Consequently, a debt collector would violate the FDCPA and Regulation F by sending text messages or emails, making social media posts, or the like, if the natural consequence of that conduct is to harass, oppress, or abuse any person in connection with the collection of a debt. New final comments 14(a)–1 and –2 further clarify this point.

Finally, the Bureau received a request to clarify that § 1006.14(a) applies even if a consumer does not opt out of receiving electronic debt collection communications or communication attempts pursuant to the instructions in § 1006.6(e) or exercise the right to request that the debt collector stop using a particular communication medium under § 1006.14(h). The Bureau affirms that it does. Sections 1006.6(e) [364] and 1006.14(h) [365] provide consumers with tools to limit or stop debt collectors from communicating or attempting to communicate with them.[366] Regardless of whether a consumer uses such tools, the final rule prohibits a debt collector from engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt, as provided for in FDCPA section 806 and § 1006.14(a). Because neither the text of § 1006.14(a) nor the text of § 1006.6(e) or § 1006.14(h) states or implies that a consumer would have to opt out of receiving electronic communications or request the debt collector stop using a particular communication medium to trigger § 1006.14(a)'s general prohibition against harassing, oppressive, or abusive conduct, the Bureau concludes that it is not necessary or warranted to add new commentary to specify this fact.

For the reasons discussed above, the Bureau is finalizing § 1006.14(a) largely as proposed, but with a minor grammatical revision to more closely align with the statute. Final § 1006.14(a) thus provides that a debt collector must not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt, including, but not limited to, the conduct described in § 1006.14(b) through (h). In addition, as discussed, the Bureau is finalizing new comments 14(a)–1 and –2 to clarify that § 1006.14(a) applies, among other things, to a debt collector's conduct in using any medium of communication in connection with the collection of a debt.

14(b) Repeated or Continuous Telephone Calls or Telephone Conversations

FDCPA section 806(5) [367] describes one example of conduct prohibited by section 806: Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number. Proposed § 1006.14(b) would have implemented and interpreted FDCPA section 806(5)—and, by extension, the general prohibition on harassing conduct in FDCPA section 806.[368] Specifically, proposed § 1006.14(b)(1) set forth the prohibition on placing telephone calls or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass; § 1006.14(b)(2) described bright-line frequency limits for telephone calls and telephone conversations during a seven-day period; and proposed § 1006.14(b)(3) through (5) described telephone calls excluded from the frequency limits, the

[364] Pursuant to § 1006.6(e), a debt collector who communicates or attempts to communicate with a consumer electronically in connection with the collection of a debt using a specific email address, telephone number for text messages, or other electronic-medium address must include in such communication or attempt to communicate a clear and conspicuous statement describing a reasonable and simple method by which the consumer can opt out of further electronic communications or attempts to communicate by the debt collector to that address or telephone number.

[365] Section 1006.14(h)(1) provides that, in connection with the collection of any debt, a debt collector must not communicate or attempt to communicate with a person through a medium of communication if the person has requested that the debt collector not use that medium to communicate with the person.

[366] A consumer may also notify a debt collector in writing that the consumer wants the debt collector to cease further communication with the consumer, and pursuant to § 1006.6(c)(1), a debt collector must not communicate or attempt to communicate further with a consumer with respect to such debt.

[367] 15 U.S.C. 1692d(5).

[368] *See* 84 FR 23274, 23308–21 (May 21, 2019).

effect of complying with the frequency limits, and a definition, respectively.

As discussed in detail in the section-by-section analysis of final § 1006.14(b)(1) through (4), the Bureau is finalizing its proposal regarding telephone call frequencies with revisions in light of feedback. Among other things, rather than finalizing a bright-line rule for permissible and prohibited telephone call frequency, the Bureau is finalizing telephone call frequencies in the form of a rebuttable presumption that a debt collector has either complied with or violated the prohibition in § 1006.14(b)(1) regarding repeated or continuous telephone calls and telephone conversations.

In this section-by-section analysis, the Bureau addresses feedback regarding proposed comment 14(b)(1)–1, which, for the reasons discussed below, the Bureau is finalizing, with revisions, as comment 14(b)–1. The Bureau also addresses feedback regarding proposed § 1006.14(b)(1)(ii) and (4), which the Bureau is not finalizing as part of this rule. Public comments regarding all other aspects of proposed § 1006.14(b) are addressed in turn in the section-by-section analysis of final § 1006.14(b)(1) through (4).

Final Comment 14(b)–1

As noted, proposed § 1006.14(b)(1) contained the provision implementing FDCPA section 806(5). Specifically, as proposed, § 1006.14(b)(1)(i) provided that, in connection with the collection of a debt, a debt collector must not place telephone calls or engage any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.[369] As discussed further in the section-by-section analysis of final § 1006.14(b)(1), proposed § 1006.14(b)(1)(i) thus largely restated FDCPA section 806(5), except that, whereas the statute prohibits ''[c]ausing a telephone to ring,'' proposed § 1006.14(b)(1)(i) would have applied when a debt collector ''place[s] telephone calls.'' This interpretation meant that the proposed prohibition would have applied even if a debt collector's telephone call did not cause a traditional ring, as long as the telephone call connected to the dialed number. Proposed comment 14(b)(1)–1 would have clarified that, for purposes of the proposed telephone call frequency limits, ''placing a telephone call'' includes conveying a ringless voicemail (or ''voicemail drop'') but does not include sending an electronic message (*e.g.,* a text message or an email) to a mobile telephone.

The Bureau received comments questioning whether the phrase ''placing a telephone call'' in proposed commentary to § 1006.14(b)(1) also applied to the bright-line telephone call frequency limits in proposed § 1006.14(b)(2), which used similar language. The Bureau intended proposed comment 14(b)(1)–1 to apply to the concept of placing a telephone call everywhere that concept is used in § 1006.14(b). Therefore, the Bureau is renumbering proposed comment 14(b)(1)–1 as comment 14(b)–1 and is revising it to clarify that the interpretation applies throughout § 1006.14(b).

Ringless voicemails. The Bureau received a number of comments regarding its proposal in comment 14(b)(1)–1 to interpret the phrase ''placing a telephone call'' to apply to ringless voicemails. Some industry commenters argued that the consumer experience with ringless voicemails is fundamentally different—and better—than with telephone calls and that ringless voicemails therefore should not be subject to telephone call frequency limits. They explained that a ringless voicemail is more like an email or text message than a telephone call. As described by one commenter, with a ringless voicemail, a consumer only receives a new voicemail according to the consumer's prescribed preferences, and, after receiving a new voicemail, the consumer can then choose if, when, and how the actual voicemail message content is presented. The commenter explained that, in most ringless voicemail applications, a consumer can swipe away any voicemail the consumer does not wish to read, listen to, or otherwise engage with, just like a consumer can do with an email or text message. This commenter also noted compliance challenges with tracking the cumulative number of telephone calls and ringless voicemails, given that the two types of calls are placed through independent systems run by different vendors. The commenter said that, if debt collectors have to track both telephone calls and ringless voicemails, they will opt to use one over the other instead of dealing with the complexities of cross channel frequency limit tracking. However, other industry commenters, Federal government agency staff, local government commenters, a group of consumer advocate commenters, and other commenters supported the proposal to clarify that ''placing a telephone call'' includes conveying a ringless voicemail.

As noted above, section 806(5) of the FDCPA prohibits a debt collector from ''causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.'' [370] The focus on telephone calls suggests that the provision was meant to apply to communications that present the opportunity for the parties to engage in a live telephone conversation or that result in an audio message. Ringless voicemails are audio messages that allow debt collectors to bypass a person's opportunity to answer the telephone by connecting directly to the person's voicemail. Even telephone calls that result in an audio message without an audible ring, if made repeatedly and continuously, nonetheless may be intended to harass or may have the natural consequence of harassing a person in ways that the FDCPA prohibits, particularly if, for example, the messages contain similar content and do not provide new information to the person receiving the messages. The Bureau recognizes that its interpretation of FDCPA section 806(5) may result in compliance challenges for a small number of debt collectors who place telephone calls and ringless voicemails using different systems and different vendors. However, the Bureau expects that those debt collectors will be able to overcome such challenges by developing new tracking systems; modifying their business models to use either telephone calls or ringless voicemails but not both; or using both in volumes that, even if combined, would be unlikely to create a violation.

Communication media other than telephone calls. The Bureau received a large number of comments regarding its proposal in comment 14(b)(1)–1 to interpret the phrase ''placing a telephone call'' not to include sending an electronic message (*e.g.,* a text message or an email) to a mobile telephone, as well as its decision to not otherwise propose specific frequency limits for communication media other than telephone calls.

Consumer, consumer advocate, State and local government, and State Attorneys General commenters stated that the Bureau should impose frequency limits on electronic communication media.[371] State Attorneys General commenters described the prohibition in proposed § 1006.14(a)—which would have

[369] *See id.* at 23308.

[370] 15 U.S.C. 1692d(5).

[371] Some of these commenters stated more broadly that the Bureau should apply frequency limits to all forms of communication media.

covered, and as finalized does cover, electronic communications—as insufficient to protect consumers from excessive electronic communications, noting that FDCPA section 806 has been difficult to apply in any context and has resulted in a significant amount of litigation and conflicting court opinions. One Federal government commenter reasoned that ''placing a telephone call'' should include sending a text message because the FCC has interpreted the phrase ''mak[ing] any call'' in the TCPA as encompassing the sending of text messages.[372]

Commenters criticized the Bureau's rationale for not proposing to impose numeric limits on electronic communications. In the proposal, the Bureau grounded its justification in the specific language of FDCPA section 806(5), which the Bureau believed indicated Congress's intention to apply the provision to communications that present the opportunity for the parties to engage in a live telephone conversation or that result in an audio message. The Bureau also explained that it was not aware of debt collectors sending electronic messages to consumers repeatedly or continuously with intent to harass them or to cause substantial injury. Commenters asserted that the Bureau's reasoning for proposing telephone call frequency limits is equally applicable to electronic communication media, arguing that electronic communications are not less intrusive than telephone calls because consumers often receive notifications when they get text messages or emails that interrupt what they are doing and require them to assess whether such communications need immediate attention. Some commenters also criticized the Bureau's justification that there is little, if any, evidence that electronic communications harm consumers, arguing that the only reason evidence is lacking is because such communication media are not specifically contemplated under current law and thus not yet widely used by industry.

A group of State Attorneys General and State and local government commenters, among others, predicted that, if the Bureau did not impose numeric limits on electronic debt collection communications or communication attempts, debt collectors would rely on them heavily; some of these commenters explained that electronic communications are virtually costless.[373] Some commenters also observed that, absent a numeric limit on electronic communications, consumers with limited or pay-per-service plans—who tend to be lower-income and more likely to be subject to debt collection—will incur costs when debt collectors send text messages and emails.[374]

Consumer advocates recommended that, if the Bureau does not impose numeric frequency limits on electronic communications, the Bureau should at least require debt collectors to report on their use of emails, text messages, and direct messages. Consumer advocates also encouraged the Bureau to consider specific limits in the future if debt collectors abuse these communication media.

The Bureau received a large number of comments from the credit and collections industry expressing general support for the Bureau's proposal not to apply numeric frequency limits to communication media other than telephone calls.[375] Many industry commenters distinguished electronic communications from telephone calls, arguing that, unlike telephone calls, electronic communication media do not harass consumers because they are passive communications that consumers can engage with at their convenience or can opt out of receiving entirely.[376] Industry commenters argued that the proposed opt-out provision in § 1006.6(e) and the general prohibition against conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt in proposed § 1006.14(a), along with FDCPA section 806, would impose sufficient limits on a debt collector's use of electronic communications.

Industry commenters asserted that a numeric frequency limit on electronic communication media would harm consumers.[377] Many of these industry commenters explained that consumers prefer to communicate through electronic media because they can interact with and respond to an electronic message when it is most convenient. If the Bureau were to impose numeric frequency limits on electronic communications, it could discourage debt collectors from utilizing such media to communicate with consumers. Other industry commenters explained that the ability to communicate by email and text message will offset the negative impacts of the proposed telephone call frequency limits, such as the inability to establish contact with consumers.[378] Some industry commenters cautioned that, if communications are restricted too much, debt collectors will instead file lawsuits against consumers to collect the debts.

The Bureau declines to impose numeric limitations on a debt collector's use of electronic communication media or of a combination of telephone calls and electronic communication media. Because debt collectors do not presently engage in widespread use of electronic communications, the Bureau concludes that it does not have sufficient information to warrant applying numeric limitations to electronic communications. However, the Bureau reiterates that FDCPA section 806 and § 1006.14(a) apply to debt collectors' conduct in using such media,[379] and the final rule contains several other provisions designed to curb harassment

[372] *See, e.g., In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991,* 18 FCC Rcd. 14,014, 14,115 ¶ 165 (2003).

[373] Some commenters recommended specific numeric limits for electronic communications, ranging from one per week to two per day, or specific numeric limits for cumulative communications across all communication media, ranging from two per week to one per day.

[374] To address concerns about the cost of text messaging, at least one consumer advocate commenter requested that the Bureau require debt collectors to use FTEU text messaging. Members of Congress stated that the Bureau, by not requiring FTEU text messaging, is placing the cost burden of text messages on consumers. More generally, a large number of commenters identified a consumer's lack of consent to electronic communications as a significant concern and requested that the Bureau require consumers to opt into receiving such communications from debt collectors. The Bureau addresses these comments in the section-by-section analysis of § 1006.6, which discusses communications in debt collection generally.

[375] However, one industry commenter acknowledged that the scope of FDCPA section 806 and 806(5) is broad enough to include modern communication media such as emails and text messages if they are used to harass, oppress, or abuse a person in connection with the collection of a debt. Another industry commenter agreed but cautioned the Bureau against attributing carrier errors, such as sending the same text message multiple times, to the debt collector.

[376] *See* the section-by-section analysis of § 1006.6. Industry commenters made similar points about communications by mail. Since the Bureau did not receive comments suggesting that communications solely by mail should be subject to particular weekly frequency limits, the Bureau does not further address those comments in this section-by-section analysis.

[377] One industry commenter asked the Bureau to provide a safe harbor when the frequency of a debt collector's electronic communications is at or below the proposed telephone call frequency limits without a corresponding per se violation or presumption of a violation when the frequency of a debt collector's electronic communications is above the proposed limits.

[378] However, at least one industry commenter disagreed and explained that debt collectors may not have valid, personal email addresses for all accounts and may be unable to send text messages to certain telephone numbers.

[379] In particular, new comments 14(a)–1 and –2 address many policy concerns raised by stakeholders about how the proposal would have treated debt collectors' use of text messages and other electronic communication media.

from electronic communications and empower consumers to restrict debt collection communications.[380] The Bureau also intends to actively monitor the market and to gather information on these electronic communications in general so that it may determine in the future whether numeric limitations on electronic communications are necessary and warranted and, if so, what specific numeric limitations the Bureau should consider.

For the reasons discussed above, the Bureau is finalizing proposed comment 14(b)(1)–1 as final comment 14(b)–1 with minor revisions to provide that ''placing a telephone call'' for purposes of § 1006.14(b) includes conveying a ringless voicemail but does not include sending an electronic message (*e.g.,* a text message or an email) that may be received on a mobile telephone.[381]

Proposed Provisions Not Finalized

Identification and prevention of Dodd-Frank Act unfair act or practice. As noted above, proposed § 1006.14(b)(1) set forth the prohibition regarding repeated or continuous telephone calls and telephone conversations, with proposed § 1006.14(b)(1)(i) largely restating the text of the prohibition in FDCPA section 806(5). The Bureau proposed § 1006.14(b)(1)(ii), in turn, to identify, for FDCPA debt collectors who were also covered by the Dodd-Frank Act, the conduct articulated in FDCPA section 806(5) as an unfair act or practice under section 1031 of the Dodd-Frank Act.[382] As proposed, § 1006.14(b)(1)(ii) provided that, to prevent the unfair act or practice, a debt collector must not exceed the bright-line telephone call frequency limits that were set forth in proposed § 1006.14(b)(2).[383]

As discussed in the section-by-section analysis of § 1006.1(c), while some commenters supported the Bureau's proposed use of its Dodd-Frank Act section 1031 authority, a number of industry commenters expressed concern that the Bureau's proposed use of its Dodd-Frank Act section 1031 authority could—despite the stated limits of the proposal as only applying to FDCPA debt collectors—lead, if finalized, to provisions that relied on such authority, including the prohibitions on unfair, deceptive, and abusive acts and practices under section 1031 of the Dodd-Frank Act, being applied to first-party debt collectors. These commenters urged the Bureau to adopt proposed § 1006.14(b)(1) using only its FDCPA authority. The Bureau understands commenters' concerns that conduct the Bureau deemed to be prohibited by the FDCPA and the Dodd-Frank Act when undertaken by FDCPA debt collectors could be construed also to be prohibited when undertaken by other entities collecting debts, even if they are not FDCPA debt collectors. In response to commenters' concerns, the Bureau notes, as discussed elsewhere in this Notice,[384] that the FDCPA recognizes the special sensitivity of communications by FDCPA debt collectors relative to communications by creditors, and, therefore, the FDCPA provides protections for consumers receiving such communications from debt collectors but not creditors.

Moreover, as noted above, and as is discussed in detail below, the Bureau has determined to finalize a rebuttable-presumption approach in § 1006.14(b)(2), rather than a bright-line rule, regarding telephone call frequencies. As discussed in the section-by-section analysis of § 1006.14(b)(2), whether the presumption of compliance or of a violation, as applicable, may be rebutted depends upon the relevant facts and circumstances. Furthermore, the final rule specifies non-exhaustive factors that, considered together with whether the frequency of a debt collector's telephone calls exceeded or was within the rule's specified frequencies, are relevant to determining whether a debt collector's conduct violated the prohibition in FDCPA section 806(5) and final § 1006.14(b)(1), including whether the debt collector had the intent to annoy, abuse, or harass the person at the called number. In light of this change, the Bureau has determined that it is not necessary to also identify the conduct described in FDCPA section 806(5) or § 1006.14(b) as an unfair, deceptive, or abusive act or practice under section 1031 of the Dodd-Frank Act or to find that the telephone call frequencies will prevent such an unfair act or practice. Accordingly, the Bureau is not finalizing proposed § 1006.14(b)(1)(ii) and is renumbering the FDCPA standard in proposed § 1006.14(b)(1)(i) as final § 1006.14(b)(1).

Effect of complying with telephone call frequencies. Proposed § 1006.14(b)(4)[385] would have clarified that a debt collector who did not exceed the telephone call frequency limits described in proposed § 1006.14(b)(2) complied with § 1006.14(b)(1) and FDCPA section 806(5) and did not, based on the frequency of its telephone calls, violate § 1006.14(a), FDCPA section 806, or sections 1031 or 1036(a)(1)(B) of the Dodd-Frank Act.[386] Because the Bureau is not finalizing the proposed bright-line frequency limits for telephone calls, the Bureau is not finalizing proposed § 1006.14(b)(4) regarding the effects of complying with those limits. As discussed in the section-by-section analysis of § 1006.14(b)(1), however, the Bureau is incorporating similar concepts in newly adopted comments 14(b)(1)–1 and –2 and as part of final § 1006.14(b)(2).

14(b)(1) In General

Proposed § 1006.14(b)(1)(i) would have implemented the statutory prohibition in FDCPA section 806(5) by providing that, in connection with the collection of a debt, a debt collector must not place telephone calls or engage any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.[387] As discussed above, the Bureau is finalizing proposed § 1006.14(b)(1)(i) renumbered as § 1006.14(b)(1). For the reasons discussed below, the Bureau is finalizing the text of § 1006.14(b)(1)(i) as proposed but is adopting new comments 14(b)(1)–1 and –2 to clarify the interaction of final § 1006.14(b)(1) and (2).[388]

[380] For example, under § 1006.6(e), a debt collector who communicates or attempts to communicate with a consumer electronically in connection with the collection of a debt using a specific email address, telephone number for text messages, or other electronic-medium address must include in such communication or attempt to communicate a clear and conspicuous statement describing a reasonable and simple method by which the consumer can opt out of further electronic communications or attempts to communicate by the debt collector to that address or telephone number. In addition, § 1006.14(h)(1) provides that, in connection with the collection of any debt, a debt collector must not communicate or attempt to communicate with a person through a medium of communication if the person has requested that the debt collector not use that medium to communicate with the person. A consumer may also notify a debt collector in writing that the consumer wants the debt collector to cease further communication with the consumer, and pursuant to § 1006.6(c)(1), a debt collector must not communicate or attempt to communicate further with a consumer with respect to such debt.

[381] Unlike proposed comment 14(b)(1)–1, final comment 14(b)–1 does not refer to section 1031 of the Dodd-Frank Act because, as discussed elsewhere in this section-by-section analysis, the Bureau is not relying on its Dodd-Frank Act section 1031 authority to finalize any part of § 1006.14.

[382] 12 U.S.C. 5531(b), (c).

[383] *See* 84 FR 23274, 23309 (May 21, 2019).

[384] *See, e.g.,* the section-by-section analysis of § 1006.6(d)(3) through (5).

[385] *See* 84 FR 23274, 23319 (May 21, 2019).

[386] 12 U.S.C. 5531, 5536(a)(1)(B).

[387] *See* 84 FR 23274, 23308 (May 21, 2019).

[388] In addition to the issues discussed in this section-by-section analysis, the Bureau reiterates that, for the reasons discussed in the section-by-section analysis of § 1006.14(b), the Bureau is finalizing the proposal to interpret FDCPA section 806(5)'s prohibition against ''causing a telephone to ring'' to be a prohibition against ''placing telephone calls.''

Consistent with FDCPA section 806(5), proposed § 1006.14(b)(1)(i) would have applied to telephone calls placed by a debt collector to any person, not just to the consumer. Thus, as proposed, § 1006.14(b)(1)(i) would have applied to, among other things, telephone calls placed to obtain location information about a consumer as described in § 1006.10. Federal government agency staff supported this approach. One individual commenter expressed concern that a consumer would be negatively affected if a debt collector placed numerous location information calls to the consumer's employer. A group of consumer advocates recommended that the Bureau limit location information calls to third parties to one telephone call attempt per third party per week, while another consumer advocate commenter recommended that location information calls to third parties be prohibited altogether. Some commenters, including individuals and a consumer advocate commenter, incorrectly stated that the proposal would permit ''unlimited'' telephone calls to third parties.

In response to commenters' concerns, the Bureau notes that FDCPA section 806(5) protects ''any person'' from such conduct. Because FDCPA section 806(5) does not distinguish between a debt collector's conduct toward third parties and consumers, the Bureau is applying the same telephone call standards to all telephone calls placed by debt collectors in connection with the collection of a debt.[389] Consistent with FDCPA section 804, the final rule places additional limits on telephone calls to third parties for the purpose of acquiring location information.[390] The Bureau also notes that, as discussed in the section-by-section analysis of § 1006.14(b)(2), a debt collector's presumption of compliance with § 1006.14(b)(1) and FDCPA section 806(5) may be rebutted, based on the facts and circumstances.

Some industry commenters asked the Bureau to define the term telephone conversation that appears in § 1006.14(b)(1). A group of consumer advocates suggested the term should include any time the consumer answers the debt collector's telephone call, even if the debt is not discussed. The term telephone conversation in final § 1006.14(b)(1) comes directly from FDCPA section 806(5) and has the same meaning as it does in the statute. To be clear, however, the term is not synonymous with a debt collection communication, as defined in FDCPA section 803(2) and implemented in final § 1006.2(d). A debt collection communication occurs if information regarding a debt is conveyed directly or indirectly to any person through any medium. If a debt collector leaves a voicemail for a consumer that includes details about the debt, the debt collector has engaged in a debt collection communication with the consumer but has not had a telephone conversation. Likewise, if a consumer answers a debt collector's telephone call and, before anything else is said, asks the debt collector to call back in 10 minutes, the debt collector has engaged in a telephone conversation with the consumer but may not have had a debt collection communication.

Several industry commenters also raised hypothetical questions asking whether particular types of telephone calls would count as ''placed'' for purposes of § 1006.14(b)(1) and, in turn, for purposes of the proposed telephone call frequency limits in § 1006.14(b)(2). Elsewhere in § 1006.14(b), the Bureau is adopting new commentary clarifying how to count placed telephone calls. That commentary further clarifies when a debt collector has placed a telephone call or engaged in a telephone conversation for purposes of § 1006.14(b).[391]

For the reasons discussed above, the Bureau is finalizing the text of proposed § 1006.14(b)(1)(i) as final § 1006.14(b)(1). The Bureau is also adding new comments 14(b)(1)–1 and –2 to clarify the effect of complying with § 1006.14(b)(1).[392]

Specifically, comment 14(b)(1)–1 provides that a debt collector who complies with final § 1006.14(b)(1) and FDCPA section 806(5)'s specific prohibition also complies with final § 1006.14(a) and FDCPA section 806's general prohibition solely with respect to the frequency of its telephone calls. The comment further clarifies that the debt collector nevertheless could violate § 1006.14(a) and FDCPA section 806 if the natural consequence of another aspect of its telephone calls, unrelated to frequency, is to harass, oppress, or abuse any person in connection with the collection of a debt. Comment 14(b)(1)–2 provides an illustrative example.

14(b)(2) Telephone Call Frequencies; Presumptions of Compliance and of a Violation

FDCPA section 806[393] prohibits a broad range of debt collection communication practices that harm consumers and others. Section 806(5),[394] in particular, prohibits debt collectors from causing a telephone to ring or engaging a person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass. Proposed § 1006.14(b)(2) would have set forth bright-line frequency limits for debt collection telephone calls.[395] Proposed § 1006.14(b)(2) provided that, subject to exclusions in proposed § 1006.14(b)(3), a debt collector violates the FDCPA section 806(5) prohibition implemented in proposed § 1006.14(b)(1)(i) and the unfair act or practice under section 1031 of the Dodd-Frank Act the Bureau proposed to identify in § 1006.14(b)(1)(ii) by exceeding the telephone call frequency limits in proposed § 1006.14(b)(2). Specifically, proposed § 1006.14(b)(2)(i) provided that, subject to exclusions, a debt collector must not place a telephone call to a person[396] more than seven times within seven consecutive days in connection with the collection of a particular debt. Proposed § 1006.14(b)(2)(ii) provided that, subject to exclusions, a debt collector must not place a telephone call to a person in connection with the collection of a particular debt within a period of seven consecutive days after having had a telephone conversation with that person in connection with the collection of such debt (with the date of the telephone conversation being the first

[389] Given the interplay between proposed § 1006.14(b)(1) and (2), the application of proposed § 1006.14(b)(1)(i) to any person would have meant that the proposed telephone call frequency limits in § 1006.14(b)(2) also would have applied to telephone calls placed by a debt collector to any person. Likewise, the telephone call frequencies in final § 1006.14(b)(2) apply to location information calls and balance a debt collector's potential need to obtain information about a consumer necessary to establish right party contact with the potentially harassing effect such calls may have directly on the third party, or indirectly on the consumer.

[390] *See* the section-by-section analysis of § 1006.10. Pursuant to § 1006.10(c), a debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer must not communicate more than once with such person unless requested to do so by such person, or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information.

[391] *See* the section-by-section analysis of final § 1006.14(b)(4).

[392] As discussed in the section-by-section analysis of § 1006.14(b), the Bureau is renumbering proposed comment 14(b)(1)–1 as comment 14(b)–1.

[393] 15 U.S.C. 1692d.

[394] 15 U.S.C. 1692d(5).

[395] *See* 84 FR 23274, 23309 (May 21, 2019).

[396] Proposed § 1006.14(b)(2) would have applied not only to debt collection calls placed to consumers who owe or are alleged to owe debt, but to any person (with certain exceptions described below). See the section-by-section analysis of § 1006.14(b)(1) for further discussion on this aspect of the proposal.

day of the seven-consecutive-day period).[397]

The Bureau requested comment on all aspects of proposed § 1006.14(b)(2), including on whether the Bureau should adopt a rebuttable-presumption approach in lieu of the proposed bright lines,[398] and if so, whether the Bureau should retain any of the exclusions described in proposed § 1006.14(b)(3).

The Bureau received thousands of comments from a variety of stakeholders about the proposed telephone call frequency limits, including about the merits of a bright-line rule versus a rebuttable-presumption approach and about the specific proposed limits. Commenters addressed both the proposed seven telephone call weekly frequency limit and the proposed one telephone conversation weekly frequency limit. Notably, commenters voiced stronger criticisms of the proposed seven telephone call weekly frequency limit, with most commenters opposing it because in their view it was either too high (*i.e.,* too permissive) or too low (*i.e.,* too restrictive).

In light of feedback, and for the reasons discussed below, the Bureau is finalizing proposed § 1006.14(b)(2) to retain the proposed telephone call frequencies but to replace the bright-line rule with an approach under which a debt collector who places telephone calls or engages in telephone conversations: (1) Within those frequencies has a rebuttable presumption of compliance with FDCPA section 806(5) and § 1006.14(b)(1); and (2) in excess of one or both of those frequencies has a rebuttable presumption of a violation of FDCPA section 806(5) and § 1006.14(b)(1).

Comments Regarding Bright-Line Rule

Commenters spanning a wide spectrum of stakeholders—including debt collectors, industry trade groups, consumer advocates, and a group of State Attorneys General—conceptually supported a bright-line rule. A variety of reasons were cited by the different commenters, including that FDCPA section 806(5) is vague, courts have not consistently interpreted the provision, industry needs more clarity and certainty, and a bright-line limit will provide relief to consumers. One consumer advocate commented that a bright-line rule ran counter to the Bureau's observations elsewhere in the proposal about the importance of context in determining whether a particular contact is abusive or harassing, but nonetheless found merit in the Bureau seeking to develop a bright-line rule on the number of permitted telephone calls. The SBA suggested that more exceptions were needed for a bright-line limit to work, particularly for law firms trying to negotiate settlements.

Some industry commenters opposed a bright-line rule conceptually because they asserted that it would depart from the statutory language in FDCPA section 806(5), which contains an express intent requirement. They commented that FDCPA jurisprudence has established that there is no bright-line number of telephone calls to demonstrate whether a debt collector had the intent to harass and that courts have found that placing more than seven telephone call attempts in seven days is not harassing or abusive. These commenters described how case law has established factors to consider when determining whether a debt collector had the requisite intent, such as the pattern and frequency of telephone calls, the time between calls, the presence or absence of abusive language on those calls, the location to which those calls were placed, and whether the debt collector called back after the recipient hung up.

One industry trade group commenter took a different approach, acknowledging that using a bright-line ''number-of-calls'' surrogate to determine either the debt collector's awareness of natural consequences or the debt collector's intent may be appropriate if the telephone number is known by the debt collector to belong to the consumer. This may be the case if the debt collector had prior contact with the consumer at that number or if the consumer is identified in a voicemail greeting. However, this commenter asserted that, if a telephone number is not known to belong to the consumer, and especially if the debt collector has several possible numbers for the consumer provided either by the creditor or a prior debt collector or obtained through the debt collector's own location efforts, then the proposed bright-line rule is at odds with the statutory mandate because there would be no intent to annoy, abuse, or harass.

Some industry commenters found the proposed bright-line rule to be too inflexible and noted a preference for a multi-factor approach to telephone call frequencies. These commenters were concerned that the bright-line approach would limit a debt collector's ability to reach consumers at different times and on different dates, and that it would hinder communication particularly in the context of settlement negotiations, loss mitigation discussions, and litigation. A credit union commenter expressed concern that a bright-line approach ignored the nature and content of the telephone conversation, which the commenter asserted is more instructive as to whether successive telephone calls have the effect of harassment, oppression, or abuse.

Several industry commenters advocated for a rule that would make telephone calls within particular limits per se compliant but allow debt collectors to rebut the presumption that calls in excess of any call frequency limit violate the FDCPA. One of these commenters claimed that the proposal would have deemed non-harassing telephone calls in excess of the proposed frequency limits a per se violation and therefore would have been inconsistent with FDCPA section 806(5). Another commenter disputed that the Bureau properly could conclude that every telephone call above the proposed limits would be problematic. The commenter urged the Bureau to permit a debt collector to make additional telephone calls if the debt collector concludes that there is a compelling reason to do so and that doing so will not harm the consumer, provided that the debt collector appropriately documents the basis for its decision.

A group of consumer advocates commented that a bright-line rule is generally in the best interest of consumers. However, the group also pointed out that setting the limits on a per-debt basis, as proposed, would insulate from liability a debt collector who was collecting on seven accounts even if the debt collector made the maximum allowable 49 calls per week, every week, with the intent to annoy, abuse, or harass. These commenters urged the Bureau to provide in the rule that complying with the telephone call frequency limits would create only a rebuttable presumption of compliance with § 1006.14(b)(1) and FDCPA section 806(5).[399]

[397] For ease of reference in this part of the section-by-section analysis, the Bureau sometimes refers to the limit in proposed § 1006.14(b)(2)(i) as the ''proposed seven telephone call weekly frequency limit,'' the limit in proposed § 1006.14(b)(2)(ii) as the ''proposed one telephone conversation weekly frequency limit,'' and the two limits together as the ''proposed telephone call frequency limits.''

[398] The Bureau requested comment on different variations, such as adopting only a rebuttable presumption of a violation or only a rebuttable presumption of compliance. In the proposal, the rebuttable-presumption alternative was discussed in the section-by-section analyses of proposed § 1006.14(b)(2) and § 1006.14(b)(4).

[399] This commenter also argued that the telephone call frequency limits in proposed § 1006.14(b)(2) should not create a safe harbor under the general prohibition in proposed § 1006.14(a) or FDCPA section 806, because it would be possible to violate these general prohibitions even while complying with the telephone call frequency limits. As support, the

The same group of consumer advocates expressed concern that under the proposed bright-line rule, debt collectors who placed telephone calls within the specific proposed frequency limits would not be liable even if they placed those calls in rapid succession. The group also noted that debt collectors could target their successive telephone calls on weekends or holidays, which might be more likely to harass consumers. Another consumer advocate commented that it was less likely that a debt collector would use all of its permissible telephone calls on the same day if the frequency limit for weekly telephone calls was lower than what the Bureau proposed (this commenter suggested an alternative limit of three), but cautioned that, if a debt collector made seven telephone calls in one day, it would often be perceived as harassment by the consumer. A few industry commenters stated that it would be unlikely for debt collectors to make rapid succession telephone calls under a bright-line rule because that would use up the limited number of weekly telephone call attempts available to debt collectors. One commenter asserted that debt collectors would strategically space their telephone calls throughout the seven-day period to establish contact with the consumer. A nonprofit commenter, writing on behalf of a variety of stakeholders, expressed concern that imposing a bright-line limit on telephone calls and providing a safe harbor for compliance under that limit might encourage debt collectors to place the maximum permissible telephone call attempts, perhaps more than they would have placed without such a limit in place.

Comments Regarding Proposed Seven Telephone Call Weekly Frequency Limit

Some consumer and industry commenters supported the proposed seven telephone call weekly frequency limit in proposed § 1006.14(b)(2)(i).[400] A debt buyer commenter stated the belief that the proposed limit would strike an appropriate balance by enabling consumers who demonstrate a willingness to pay their debts to connect by telephone with a representative to achieve a voluntary repayment schedule and thus avoid legal collection efforts. Industry commenters wrote that the proposed limit would provide a debt collector with multiple opportunities to connect with the consumer and give the debt collector time to work through multiple telephone numbers. Other commenters, including some consumers, believed the proposed limit would prevent harassment. Some industry commenters thought the proposed limit would reduce unnecessary litigation. Others urged the Bureau not to impose a lower limit than proposed because doing so, they asserted, would mean less opportunity for consumers to work out a payment plan and might lead to unintended harmful impacts on consumers and the economy if it were to hamper the efficiency of the debt collection process.

In contrast, as noted above, a significant number of commenters opposed the proposed seven telephone call weekly frequency limit. Many commenters argued that the proposed limit was too high (*i.e.,* too permissive). Many others argued that it was too low (*i.e.,* too restrictive).

A diverse group of stakeholders criticized the proposed seven telephone call weekly frequency limit as too permissive to provide meaningful consumer protection. Thousands of consumers opposed the proposed seven telephone call weekly frequency limit because it would, in their view, allow debt collectors to harass consumers by calling them up to seven times per week, per debt. Other commenters criticized the proposed limit as applied to a consumer with multiple debts in collection, observing, for example, that the proposed limit would have permitted debt collectors to call a consumer with eight medical debts 56 times per week, or a consumer with five overdue bills 35 times per week.

Commenters, including consumers, consumer advocates, legal aid providers, members of Congress, State Attorneys General, academic institutions, an FTC Commissioner, and local governments, expressed concern that the proposed limit would lead to an excessive number of telephone calls. Some commenters believed this proposed limit would encourage debt collectors to engage in FDCPA-prohibited behavior. For example, a group of State Attorneys General noted that the proposal acknowledged that debt collectors are aware that many consumers have multiple debts in collection and are receiving telephone calls from other debt collectors and thus may place additional telephone calls with intent to annoy, abuse, or harass.

Some commenters raised the concern that, for a consumer with five debts being collected by the same debt collector, the permissible call volume for that debt collector would surpass the threshold for potential violations of FDCPA section 806(5). These commenters explained that courts have found as few as three to six telephone calls per week to be harassing and cited to existing frequency limits in Massachusetts, Washington State, and New York City as models for the Bureau. Some commenters discussed how technology advances may make consumers' experience of receiving repeated telephone calls more harassing. They noted that consumers often carry their mobile telephones with them, making frequent calls less necessary and more harassing; that the use of cloud-based services to link devices means that one message can notify a consumer multiple times; and that dialers can lead to repeated and annoying telephone calls.

Commenters, including legal aid providers, consumer advocates, and consumers, among others, described a plethora of ways that the proposed seven telephone call weekly frequency limit would negatively impact consumers. Some commenters claimed the number of potential telephone calls would cause various social and emotional effects, such as overwhelming stress; anxiety; emotional distress, withdrawal, and social isolation; harms to one's social well-being and mental health; and physical health problems, including susceptibility to disease as a result of chronic stress and sleep disruptions. Some commenters cited lower work productivity as an effect of the number of potential telephone calls, because consumers could not easily turn off their mobile telephones to avoid telephone calls due to their need to remain reachable to work colleagues and family. Commenters also stated that the number of potential telephone calls would negatively affect certain subsets of consumers. Some expressed concern that the number of potential telephone calls would lead to consumers being pressured or coerced into paying even if their income is exempt from garnishment under Federal law—especially seniors and disabled individuals who are particularly vulnerable to abusive debt collection practices and who may be unaware of such protection. One local government commenter asserted that the proposed limit would disproportionately affect lower-income and minority consumers. Several commenters explained that

commenter pointed to rapid succession calling. Comments about the interplay between proposed § 1006.14(a) and (b) are addressed in the section-by-section analysis of final § 1006.14(b)(1).

[400] In some instances, where commenters addressed the proposed telephone call frequency limits, it was not clear whether they were addressing the proposed seven telephone call weekly frequency limit, the proposed one telephone conversation weekly frequency limit, or both proposed limits. Where it was not clear which proposed limit the commenter was addressing, generally the comments are summarized in the section-by-section analysis describing the proposed seven telephone call weekly frequency limit.

lower-income consumers often have limited telephone plans, meaning that a high number of telephone calls may cause their plans to trigger a maximum limit or fill their voicemail boxes.

Some commenters argued that there is little to no evidence that debt collectors' ability to collect would be negatively impacted if the proposed limit was set at a number less than seven. Several consumer and nonprofit commenters asserted that a high number of telephone calls does not result in increased collections, with one commenter noting that a consumer's ability to pay will not increase regardless of how frequently the debt collector contacts the consumer. A State Attorney General and a nonprofit commenter suggested that the number of telephone calls that would be permitted under the proposed limit could result in consumers disengaging or being too stressed to answer the telephone, which would frustrate, rather than facilitate, debt resolution. One commenter noted how the Bureau of the Fiscal Service of the U.S. Department of Treasury conducted a pilot program focused on servicing defaulted student loans; the program found that borrowers answered less than 2 percent of telephone calls, which the commenter argued shows the ineffectiveness of repeated calls. An FTC Commissioner commented that, with each successive telephone call after the first, the value decreases to the consumer because the consumer is less likely to answer and receive information, yet the value increases to the debt collector because it causes undue stress to the alleged debtor; thus, by the time a sixth or seventh call comes in, harassing rather than informing seems to be the marginal utility.

Consumer, legal aid provider, and consumer advocate commenters asserted that the proposed seven telephone call weekly frequency limit would increase telephone call volume from the status quo, particularly, as some noted, for location information calls. Some commenters acknowledged that the proposal would appear to limit or decrease telephone call volume for consumers with one debt but noted that telephone call volume would likely increase overall for consumers with multiple debts in collection.

Relatedly, some commenters focused their criticism on how the proposed seven telephone call weekly frequency limit would not have covered the cumulative number of communications, particularly electronic communications, and how the proposed limit was structured as a per-debt limit, not a per-person limit. Some commenters expressed the view that allowing up to seven telephone calls per week per debt would be excessive and permit harassing tactics in the absence of additional limits on electronic communications. A group of State legislators and several consumer advocate commenters identified the number of telephone calls for student loan and medical debt that would be permitted under the proposal as particularly concerning. Others explained that it is common for seniors in particular to have several medical debts placed with the same debt collector, and that it is common for a debt collection agency to collect numerous separate accounts for the same consumer. A legal aid provider noted that consumers seeking its assistance with debt collection issues usually have more than one debt, which multiplies the number of telephone calls they receive daily. The commenter asserted that this situation increases the chance that any one debt collector will say or do something untruthful or threatening, which in turn increases the probability that consumers will act hastily and not understand their rights.

Commenters suggested a variety of lower limits for permissible telephone call frequency. A large number of consumer commenters urged specific limits, such as two or three telephone call attempts per consumer, per week.[401] Consumer advocate and nonprofit commenters also recommended the Bureau limit debt collectors to three telephone call attempts per consumer, per week. Other suggestions included: Seven attempts per week, per type of debt (*i.e.,* medical, credit card); three cumulative attempts across all communication media per week, per consumer; and three attempts per week, per debt. One nonprofit and one local government commenter urged the Bureau to follow the limits discussed in the Small Business Review Panel Outline.[402] A local government agency commenter noted the local government has operated for decades under a limit of two contacts about a debt per seven-day calendar period.

Industry trade groups and other industry commenters generally opposed the proposed seven telephone call weekly frequency limit, arguing it was too restrictive. The Bureau received hundreds of comments from industry stakeholders who expressed concern that the proposed telephone call frequency limits were too constraining. Hundreds of creditor and collections industry commenters stated that reaching consumers by telephone is very difficult because most consumers have several telephone numbers and are often unavailable to speak. They wrote that the proposed limit would make it harder to connect with consumers and asserted that consumers would face various unintended consequences, including failure to reach workable repayment plans, additional interest and fees, negative credit reporting, and debt collection litigation. Separately, many accounts receivable management industry commenters stated that limiting communication would harm consumers because consumers fare best when they know their full financial situation and all available options.

Industry commenters asserted that, based on their experience, the proposed limit would not have permitted enough telephone call attempts to establish contact with consumers. Some commenters argued that the Bureau should not limit telephone call attempts because debt collectors must attempt to contact multiple numbers at various times of the day in order to establish right party contact, while other commenters requested that the proposed limit be increased for the same reasons. One industry trade group commenter, citing a 2016 survey of its members, noted that certain debt categories have an average of more than six telephone numbers per account and that student loans have an average of four telephone numbers per account. Another industry trade group commenter, representing debt collectors for student loans, among other members, cited data from one of its members that it takes 20 attempts on average to reach a consumer. A debt collector commented that it typically receives one to two telephone numbers from the creditor from which its debts are purchased and three to five new telephone numbers when trying to locate a consumer, meaning that it takes approximately 50 to 75 telephone calls to reach a single consumer. One commenter explained that, because consumers can always request that a debt collector stop calling, there is no need for a limit on weekly telephone

[401] Over a thousand commenters supported a limit of one telephone conversation per week and two telephone call attempts per consumer (not per debt). Other commenters supported limiting telephone call attempts to three per week, per consumer, or to one telephone conversation and three attempts per week, per consumer (not per debt).

[402] The Small Business Review Panel Outline described a proposal under consideration that would have limited a debt collector's weekly contact attempts with consumers by any communication medium. The proposal under consideration would have specifically limited debt collectors to three contact attempts per unique communication medium and six total contact attempts before confirming consumer contact; and to two contact attempts per unique communication medium and three total contact attempts after confirming consumer contact. *See* Small Business Review Panel Outline, *supra* note 36, at 25–26.

calls. A debt collector commenter suggested limiting only actual communications and not attempts, noting that debt collectors often have multiple telephone numbers to work through.

Industry stakeholders and other commenters expressed various concerns about the proposed seven telephone call weekly frequency limit and stated it could have negative impacts on consumers. Some asserted that it would be overly burdensome; explained that a different approach may be needed based on the type of consumer, debt, or account status; and suggested the limit should account for smartphone technology and call blocking rules that have increased blocked calls from legitimate financial service providers. Some commenters expressed concern that the proposed limit would increase debt collectors' costs or more broadly have a negative impact on the economy, especially for small businesses. Commenters asserted that the limit would lengthen the debt resolution process and provide fewer opportunities to resolve debts in the manner best suited for the situation and, as a result, increase interest, fees, and penalties for consumers. Commenters wrote that consumers would be unable to obtain critical information about their accounts in collections, including when they ask a debt collector to call them back at a different, more convenient time or after they gather more information. Commenters also stated that consumers would experience increases in litigation, credit reporting, and wage garnishment and offsets. Commenters explained that the proposed limit would negatively affect access to credit and increase the cost of credit for all consumers. They also argued that the proposed limit would lead to an increase in letters, text messages, and emails, even though some consumers may prefer telephone calls to other communication media.

Some industry commenters argued that the Bureau lacked data and other evidence to support the proposed seven telephone call weekly frequency limit. Some urged the Bureau to study more thoroughly the number of telephone call attempts that would be necessary to ensure that effective communication is not needlessly hindered.

Some commenters requested that the Bureau impose different limits on telephone call frequency to address different circumstances. For example, some commenters argued that the proposed telephone call frequency limits should not apply once litigation or other civil action is initiated (or, as the SBA urged, specifically while a settlement is being negotiated) to enable communication between consumers and attorneys to resolve the matter quickly before going to court. These commenters explained that a debtor may need to consult with someone else before agreeing to a repayment plan and may need additional telephone calls with the debt collector during the week. One debt collector commenter suggested an alternative frequency limit of 15 telephone call attempts per consumer, per debt, which the commenter wrote was based on an internal data analysis. An industry trade group pointed to specific circumstances necessitating additional calls, such as resolving a dishonored check or correcting a deficiency in loan consolidation or rehabilitation paperwork. Some commenters also identified reverse mortgages and student loans as specific markets that would be negatively affected by the proposed limit.

Several commenters challenged the Bureau's exercise of FDCPA authority to impose the proposed telephone call frequency limits.[403] Commenters focused on what they believed was the failure of the proposed telephone call frequency limits to properly reflect the FDCPA section 806(5) ''intent'' standard. Some noted that there are a number of reasons why debt collectors would make such telephone calls, most of which are not intended to intimidate or pressure the consumer. Another commenter argued that Congress considered and rejected telephone call frequency limits when it passed the FDCPA.

Comments Regarding Proposed One Telephone Conversation Weekly Frequency Limit

Many commenters, including comments from approximately 500 credit unions, expressed support for the proposed one telephone conversation weekly frequency limit. Some commenters stated agreement with the Bureau's reasoning in the proposal that a debt collector who has been able to engage in a telephone conversation with a consumer about a debt generally has less reason to communicate with the consumer within the following week and expressed the belief that the proposed limit would permit regular communication while also preventing harassment. An industry commenter noted that, if there is a legitimate reason for another telephone call, proposed § 1006.14(b)(3) provided for several reasonable exceptions. A consumer advocate commenter noted that the proposed limit was intuitive because it would permit a weekly reminder to consumers who owe a debt, but nevertheless stated a belief that the limit would be problematic when coupled with the proposed seven telephone call weekly frequency limit.

Many commenters, including a group of consumer advocates, supported the proposed one telephone conversation weekly frequency limit but expressed the view that imposing such a limit on a per-debt basis would be too permissive because it could result in harassment for consumers who have multiple debts in collection.[404] Some commenters noted that the proposed one telephone conversation weekly frequency limit is particularly concerning in the context of medical debt and student loan debt, where there are often several debts collected by the same debt collector.

In contrast, a number of industry commenters expressed concern with the proposed one telephone conversation weekly frequency limit. They asserted that the proposed limit would undermine the proposal's purpose of assisting consumers in making better-informed decisions about debts they owe or allegedly owe and would instead harm consumers by causing them to miss information and opportunities to avoid negative consequences. Several industry commenters explained that, for debt collectors, consistency in communications and good customer service is essential to providing the best solutions. Others noted that, after successful communication has been established with a consumer, limiting continued communication is not in the best interest of the consumer or the debt collector. One industry trade group commenter cautioned that the proposed one telephone conversation weekly frequency limit would result in higher rates of delinquency, which in turn would cause creditors to tighten

[403] Some industry commenters also criticized the Bureau's proposed use of unfairness authority under Dodd-Frank Act section 1031 to impose the proposed telephone call frequency limits. As discussed in the section-by-section analysis of § 1006.14(b), commenters raised several concerns about how the proposal, if finalized, could be applied to first-party debt collectors. A few commenters, moreover, challenged the Bureau's proposed identification of an unfair practice and the necessity of imposing telephone call frequency limits to prevent the identified unfair practice. As noted earlier, the Bureau is finalizing § 1006.14(b)(1) through (4) pursuant to its authority under the FDCPA only and not section 1031(b) of the Dodd-Frank Act.

[404] Some commenters cited the CFPB Debt Collection Consumer Survey as support for this argument, noting that the Consumer Survey found that the majority of consumers who had been contacted about repaying a debt in the prior year had been contacted about more than one debt, with 57 percent contacted about two to four debts, and 15 percent contacted above five or more debts. Others cited the same fact without citing the Consumer Survey.

underwriting and lend less money generally. Another commenter noted that the proposed limit would lead to increased credit reporting and litigation.

Commenters identified a number of situations for which they believed more frequent communication would be particularly important. Industry trade group commenters cited the examples of a consumer working out a debt modification or forbearance and of debts involving motor vehicles if there is a risk of repossession. Several industry commenters described the scenario of a consumer asking for more time to pay or promising to pay but the consumer did not follow through. Some commenters pointed to if consumers are at risk of foreclosure or engaged in loss mitigation.

In the proposal, the Bureau sought comment on the alternative of limiting only the total number of telephone calls a debt collector could place about a debt during a defined time period, regardless of whether the debt collector had engaged in a conversation with that person about that debt during the relevant period. At least one commenter supported this alternative approach of limiting the total number of telephone calls, but not conversations, while another commenter supported the inverse—limiting actual conversations, but not the total number of telephone calls.

A small number of commenters addressed how the proposal generally would have counted a consumer-initiated conversation as the debt collector's one permissible telephone call for the next seven consecutive days. A group of consumer advocates supported this aspect of the proposal, asking the Bureau to specify that the proposed one telephone conversation weekly frequency limit applies regardless of whether the debt collector or consumer initiated the conversation. On the other hand, an industry trade group requested that the Bureau exempt consumer-initiated calls from the proposed one telephone conversation weekly frequency limit. See the section-by-section analysis of § 1006.14(b)(4) for more detail on how these comments are addressed.

Commenters also addressed the exclusions in proposed § 1006.14(b)(3) in the context of the proposed one telephone conversation weekly frequency limit. The Bureau discusses comments relating to the proposed exclusions in more detail in the section-by-section analysis of § 1006.14(b)(3) below.

Some commenters suggested alternative time periods for the proposed one telephone conversation weekly frequency limit. A group of nonprofit commenters suggested a limit of one telephone call every two weeks, explaining that a biweekly limit would decrease the overall frequency of telephone calls directed toward consumers, while still allowing debt collectors the opportunity to collect payment based on a timeframe whereby the consumer is more likely to have the funds to pay the debt. Other comments suggesting alternative time periods are described under the subheading *Comments Regarding Proposed Seven Telephone Call Weekly Frequency Limit* above.

The Final Rule

The Bureau is not finalizing the proposed telephone call frequency limits, which would have imposed bright-line rules regarding telephone calls. Rather, final § 1006.14(b)(2) includes telephone call frequencies as part of a more flexible rebuttable-presumption framework.

Final § 1006.14(b)(2)(i) provides that, subject to the exclusions in § 1006.14(b)(3), a debt collector is presumed to comply with § 1006.14(b)(1) and FDCPA section 806(5) if the debt collector places a telephone call to a particular person in connection with the collection of a particular debt neither: (1) More than seven times within seven consecutive days; nor (2) within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt (with the date of the telephone conversation being the first day of the seven-consecutive-day period).[405] Section 1006.14(b)(2)(ii) provides that, subject to the exclusions in § 1006.14(b)(3), a debt collector is presumed to violate § 1006.14(b)(1) and FDCPA section 806(5) if a debt collector places a telephone call to a particular person in connection with the collection of a particular debt in excess of either of the telephone call frequencies described in § 1006.14(b)(2)(i). Comments 14(b)(2)(i)–1 and 14(b)(2)(ii)–1 include examples illustrating when a debt collector has a presumption of compliance or of a violation, respectively. Comments 14(b)(2)(i)–2 and 14(b)(2)(ii)–2 clarify how the presumptions can be rebutted and include non-exhaustive lists of factors that may rebut the respective presumptions. More detail on the operation of the rebuttable-presumption framework and the rebuttal factors described in the commentary is provided below.

Rebuttable-presumption approach generally; rationale for change from proposed bright-line rule. The Bureau proposed § 1006.14(b)(2) to specify a bright-line rule for telephone call frequencies that would have violated FDCPA section 806 and 806(5) and Regulation F, with narrow exceptions in proposed § 1006.14(b)(3). As noted earlier, FDCPA section 806 prohibits a broad range of debt collection communication practices that harm consumers and others, and section 806(5) in particular prohibits debt collectors from making telephone calls or engaging a person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass. FDCPA section 806(5) does not identify a specific number of telephone calls or telephone conversations within any particular timeframe that would violate the statute. In the FTC Staff Commentary on the FDCPA, the FTC noted, among other interpretations, that '' '[c]ontinuously' means making a series of telephone calls, one right after the other'' and '' '[r]epeatedly' means calling with excessive frequency under the circumstances.''[406] Since the FDCPA was enacted in 1977, courts interpreting FDCPA section 806(5) have not developed a consensus or bright-line test for telephone call frequency that would violate that provision. Moreover, while several States and localities have imposed numerical limits on debt collection contacts, the limits vary, and most jurisdictions have not established any numerical limits.[407] Technological developments also have intensified the consumer-protection concerns underlying FDCPA section 806(5), as described in the proposal.[408]

In light of these developments, numerous problems with telephone call frequency persist. As the proposal described, frequent telephone calls are a consistent source of consumer-initiated litigation and consumer complaints to Federal and State regulators, and consumers' lawsuits allege injuries such as feeling harassed, stressed, intimidated, or threatened, and sometimes allege adverse impacts on employment.[409] In addition, from 2011 through 2018, the Bureau and the FTC received over 100,000 complaints about repeated debt collection telephone

[405] A debt collector who places no telephone calls during this time period would similarly be presumed to comply with the telephone call frequency limits under § 1006.14(b)(2)(i), and in fact would comply with them, for such time period.

[406] *See* 53 FR 50097, 50105 (Dec. 13, 1988).

[407] *See* 84 FR 23274, 23309 (May 21, 2019).

[408] *See id.* at 23309–10 (describing the development of the predictive dialer).

[409] *See id.* at 23310.

calls.[410] As described in the FDCPA 2020 Annual Report, during 2019, consumers submitted complaints about communication tactics used when collecting debts, and the majority of complaints about communication tactics concerned communication over the telephone. Common categories of complaints about communication tactics were frequent or repeated calls (55 percent) and continued contact attempts despite requests to stop contact (29 percent).[411]

Consumers' experiences with, and complaints about, repeated or continuous debt collection telephone calls do not necessarily establish that the conduct in each instance would have violated FDCPA section 806(5).[412] But they do suggest, as described in the proposal, a widespread consumer protection problem that has persisted for 40 years notwithstanding the FDCPA's existing prohibitions and case-by-case enforcement by the FTC and the Bureau as well as private FDCPA actions.[413] To address this persistent harm, the Bureau proposed § 1006.14(b)(2) as described above.

The proposed telephone call frequency limits accounted for a number of competing considerations, as described in the proposal. On the one hand, even a small number of debt collection calls may have the natural consequence of causing a consumer to experience harassment, oppression, or abuse, and therefore, assuming the debt collector is aware of this effect, the debt collector's placement of even a small number of such calls to that consumer may indicate that the debt collector has the requisite intent to annoy, abuse, or harass.[414] At the same time, debt collectors have a legitimate interest in reaching consumers because communicating with consumers is central to their ability to recover amounts owed to creditors, and too greatly restricting debt collectors' and consumers' ability to communicate with one another could prevent debt collectors from establishing right-party contact and resolving debts, even when doing so is in the interests of both consumers and debt collectors.[415] The Bureau also considered whether debt collectors' reliance on making repeated telephone calls to establish contact with consumers could be reduced by other aspects of the proposal designed to address legal uncertainty regarding how and when debt collectors may communicate with consumers[416] and regarding how debt collectors may use electronic communication media.[417] In view of all these considerations, the Bureau proposed to draw the line at which a debt collector places telephone calls repeatedly or continuously with the intent to annoy, abuse, or harass any person at the called number (and the line at which such calls have the natural consequence of harassing, oppressing, or abusing any person) at seven telephone calls in a seven-day period about a particular debt. The proposal would have allowed debt collectors to call up to seven times per week across multiple telephone numbers (*e.g.,* a home landline, mobile, work), and to leave a limited-content message each time, and it would have not placed a specific numerical limit on how many letters, emails, and text messages debt collectors could send.

The Bureau similarly balanced a variety of policy considerations in proposing the one telephone conversation weekly frequency limit, as described in the proposal. The Bureau considered both the legitimate interests of consumers and debt collectors in resolving debts and the potentially harmful effects on consumers of repeated or continuous telephone calls after a telephone conversation. A debt collector who already has engaged in a telephone conversation with a consumer about a debt may have less of a need to place additional telephone calls to that consumer about that debt within the next seven days than a debt collector who has yet to reach a consumer. As a result, a debt collector who has already conversed with a consumer may be more likely to intend to annoy, abuse, or harass the consumer by placing additional telephone calls within one week after a telephone conversation. At the same time, a consumer who has spoken by telephone to a debt collector about a debt may be more likely than a consumer who has not spoken by telephone to a debt collector about a debt to experience annoyance, abuse, or harassment if the debt collector places additional, unwanted telephone calls to the consumer about that debt again within the next seven days.[418]

[410] *See id.* Citing the Bureau's FDCPA Annual Reports published from 2012 through 2019 and the Bureau's consumer complaint database generally, the proposal described how some consumers describe being called multiple times per day, every day of the week, for weeks or months at a time and how some consumers report that repeated calls make them feel upset, stressed, intimidated, hounded, or weary, or that such calls interfere with their health or sleep or—when debt collection voicemails fill their inboxes—their ability to receive other important messages. The proposal noted certain caveats about the counts of consumer complaints. *See id.* at 23310 n.287.

[411] 2020 FDCPA Annual Report, *supra* note 9, at 15 (*see* Line 4 of Table 1).

[412] For example, consumers may complain about telephone calls they do not want to receive, but this does not necessarily mean that the debt collector who placed the calls had the intent to annoy, harass, or abuse necessary to establish a violation of FDCPA section 806(5), or that the telephone calls had the natural consequence of harassing, oppressing, or abusing the consumer in violation of FDCPA section 806.

[413] *See* 84 FR 23274, 23310 n.292 (May 21, 2019) (detailing examples of FTC complaints alleging FDCPA section 806(5) violations based on frequency of telephone calls to consumers).

[414] *See id.* at 23311–12. The proposal described how in the Bureau's Debt Collection Consumer Survey, nearly 90 percent of respondents who said they were contacted more than three times per week indicated that they were contacted too often; 74 percent of respondents who said they were contacted one to three times per week indicated that that they were contacted too often; and 22 percent of respondents who said that they were contacted less than once per week indicated that even this level of contact was too often. The Bureau notes, however, that a consumer reporting that a debt collector called too frequently does not necessarily establish that the debt collector called in violation of the FDCPA.

[415] *See id.* at 23312. In the proposal, the Bureau described feedback from small entity representatives that consumers who do not communicate with a debt collector may have negative information furnished to consumer reporting agencies or may face additional fees or a collection lawsuit, which has financial or opportunity costs. The Bureau also noted that as much as some consumers might prefer to avoid speaking to debt collectors, many consumers benefit from communications that enable them to promptly resolve a debt through partial or full payment or an acknowledgement that the consumer does not owe some or all of the alleged debt.

[416] *Id.* In the proposal, the Bureau described how, for example, debt collectors who leave voicemails for consumers currently face a dilemma about whether to risk liability under FDCPA sections 806(6) and 807(11) by omitting disclosures required under those sections, or to risk liability under FDCPA section 805(b) by including the disclosures and potentially disclosing a debt to a third party who might overhear the message. The Bureau proposed § 1006.2(j) to address that dilemma by defining a limited-content message that debt collectors may leave for consumers without violating FDCPA sections 805(b), 806(6), or 807(11). The Bureau wrote that permitting such messages should ensure that debt collectors can leave voicemails with a return call number for a consumer to use at the consumer's convenience, which may help reduce the need for debt collectors to place repeated telephone calls to contact consumers. As described in more detail in the section-by-section analysis for § 1006.2(j), the Bureau is finalizing § 1006.2(j) with a few changes to the scope of the definition—limiting the definition of limited-content message to voicemail messages that are not knowingly left with third parties—as well as to the required and optional content.

[417] *Id.* The Bureau's proposals in §§ 1006.6(d)(3) and 1006.42 were designed to clarify that debt collectors may communicate electronically with consumers who prefer to communicate that way. Further, the Bureau did not propose to subject email, text messages, or other electronic communications to numerical frequency limits. See the discussion of electronic communications in the section-by-section analysis of § 1006.14(a) and (b).

[418] *See* 84 FR 23274, 23316–17 (May 21, 2019). The Bureau explained further that a consumer may experience, and a debt collector may intend to cause, such annoyance, abuse, or harassment from a second telephone conversation within one week

Continued

In the proposal, the Bureau sought comment on a rebuttable-presumption approach as an alternative to a bright-line rule where: (1) A debt collector who places telephone calls at or below the frequency limits presumptively would comply with § 1006.14(b)(1); (2) a debt collector who exceeds the frequency limits presumptively would violate § 1006.14(b)(1); and (3) the presumptions could be rebutted based on the facts and circumstances of a particular situation. The Bureau explained that it did not propose the rebuttable-presumption approach because the benefits of such an approach were unclear. The Bureau stated its preliminary view that most, if not all, of the circumstances that might require a debt collector to exceed the proposed telephone call frequency limits could be addressed by specific exceptions to a bright-line rule; and the Bureau wrote that a well-defined, bright-line rule with specific exceptions could provide needed flexibility without sacrificing the clarity of a bright-line rule. The Bureau noted that a bright-line rule may also promote predictability and reduce the risk and uncertainty of litigation.[419]

The comments from thousands of stakeholders, evidencing a range of viewpoints on the issue of telephone call frequency limits, reflect the inherent challenges in trying to craft a rule for telephone call frequencies that appropriately balances consumer protection with the interests of debt collectors and consumers in efficient operation of the debt collection process. The Bureau proposed to draw a bright line, reasoning that the certainty and predictability of telephone call frequency limits outweighed the benefits of a more flexible approach, such as a rebuttable-presumption rule. After considering the robust comments on the proposal, the Bureau now has decided to adopt a different approach.

As described earlier, consumer advocates, State Attorneys General, legal aid providers, consumers, and various other stakeholders strongly opposed the proposed telephone call frequency limits, arguing that the proposed bright-line rule would insufficiently protect consumers. They cited various scenarios in which seven or fewer telephone calls within a week could still annoy, harass, or abuse consumers and indicate the debt collector's intent to do so. One scenario commenters highlighted was rapid succession calling, in which a debt collector places a series of telephone calls in rapid succession over the course of just a few minutes as a potential way of harassing, annoying, or abusing a consumer, even if the cumulative number of telephone calls did not exceed the proposed seven telephone call weekly frequency limit. Commenters also argued, for example, that consumers could be harassed, annoyed, or abused if a debt collector placed up to seven telephone calls over the course of a week even after the consumer had indicated the consumer did not want to be contacted again or did not owe the debt in question.[420] The consistent theme in these comments was that the proposed telephone call frequency limits still left room for consumers to be annoyed, harassed, or abused depending on the circumstances of the telephone calls.

At the same time, debt collectors, industry trade groups, and other industry commenters provided a variety of arguments for why a bright-line rule for telephone call frequencies would be potentially detrimental to consumers and unworkable from an operational perspective. They asserted that various types of telephone calls warranted a more permissive approach, such as telephone calls required by applicable law (*e.g.,* to alert the consumer of loss-mitigation options) or placed as part of active litigation. Others argued that the rule should permit debt collectors to place telephone calls that would enable the consumer to avoid imminent, demonstrable negative consequences, such as an impending foreclosure or automobile repossession. Having considered these comments, the Bureau has decided that the proposed bright-line rule may not have adequately accounted for situations in which the purpose, context, and effect of certain telephone calls may reflect not an intent to harass, annoy, or abuse the consumer, but rather an intent to help the consumer avoid a negative outcome or an intent to comply with law. Although the Bureau did propose a handful of exclusions from the telephone call frequency limits,[421] the Bureau recognizes that it is difficult to anticipate all scenarios that would merit exclusion or more lenient treatment and has decided that the proposal's list of exclusions was insufficient.

The Bureau also recognizes the arguments made by stakeholders about the weight of the evidence the Bureau used to justify the proposed telephone call frequency limits and the particular legal authorities on which the Bureau proposed to rely. Consumer advocates and other commenters challenging the proposed telephone call frequency limits cited, among other sources, language in the proposal's preamble, Bureau and FTC consumer complaint data, certain judicial decisions, and some State and local laws to argue for stricter limits. On the other hand, industry commenters challenged the Bureau's basis for setting the limits in the proposal by citing different case law, internal data analyses in some cases, and other sources. Moreover, as discussed above, under the proposal the Bureau would have interpreted the FDCPA to set bright-line limits at the specified levels; the Bureau also proposed that such limits were necessary to prevent an identified unfair practice under section 1031 of the Dodd-Frank Act, premises which were challenged by some stakeholders.

As discussed above, there are competing considerations inherent in crafting a workable telephone call frequency standard that adequately protects consumers. During this rulemaking process, telephone call frequency limits generated strong reaction from stakeholders who possess different and reasonably held views on what the limits should be, or whether there even should be limits at all. And as noted above, case law is unsettled on the question of how FDCPA section 806(5) draws the line at permissible telephone call frequency,[422] which is

even if the consumer, rather than the debt collector, initiated the first telephone conversation. Therefore, under the proposal, if a consumer initiated a telephone conversation with the debt collector, that telephone conversation generally would have counted as the debt collector's one permissible telephone conversation for the next week, subject to certain exclusions in proposed § 1006.14(b)(3).

[419] *See id.* at 23311, 23319–20.

[420] This scenario would be a violation of the cease-communication provision in final § 1006.6(c)(1).

[421] *See* the section-by-section analysis of § 1006.14(b)(3).

[422] *See, e.g., Rigby* v. *Crosscheck Servs., LLC,* No. 19–cv–36–jdp, 2020 WL 1492893, at *5–6 (W.D. Wis. Mar. 27, 2020) (concluding that it was a genuine issue of fact whether a debt collector intended to annoy, abuse, or harass the consumer by placing a total of 76 telephone calls over a period of four-and-a-half months, sometimes repeatedly within the span of a few minutes, and when the debt collector was asked to pause or stop the calls on three occasions); *Bruner* v. *AllianceOne Receivables Mgmt., Inc.,* No. 15 C 9726, 2017 WL 770993, at *2–3 (N.D. Ill. Feb. 28, 2017) (finding that 11 telephone calls made over six weeks ''plausibly indicates intent to harass or annoy'' under the circumstances). *But see, e.g., Martin* v. *Allied Interstate, LLC,* 192 F. Supp. 3d 1296, 1307 (S.D. Fla. 2016) (finding that 19 telephone calls over a month, the majority unanswered, without more—*e.g.,* where derogatory language was used during the call—is not sufficient to sustain a claim of harassment under FDCPA section section 806(5)); *Carman* v. *CBE Grp., Inc.,* 782 F. Supp. 2d 1223, 1229, 1232 (D. Kan. 2011) (granting summary judgment on FDCPA section 806(5) claim in debt collector's favor even though the debt collector called the debtor 149 times during two months,

reinforced by the fact that commenters cited different opinions to buttress their respective positions on the proposed limits.[423]

The Bureau has reconsidered the bright-line rule approach and has decided to finalize instead a rebuttable-presumption approach to telephone call frequency. The rebuttable-presumption framework provides additional flexibility, as well as enhanced consumer protections in certain respects. The telephone call frequencies remain as proposed—*i.e.,* seven telephone calls and one conversation per week, per debt—but, under the final rule, the debt collector is only presumed to comply with or violate § 1006.14(b)(1) and FDCPA section 806(5) based on those frequency levels. As discussed below, the commentary being adopted in the final rule clarifies the operation of the rebuttable presumption and includes lists of non-exhaustive factors that stakeholders may use to rebut the presumptions, along with examples.

The Bureau has determined that the rebuttable-presumption framework better balances the competing considerations regarding telephone call frequency. As the Bureau noted in the proposal, a rebuttable-presumption approach does not provide the same level of predictability or litigation-risk reduction as a bright-line rule. But the final rule does provide greater certainty than the status quo. The Bureau is adopting a standard that anchors the telephone call frequency limits at specified levels—seven telephone calls per week, per debt, and one conversation per week, per debt—while permitting variances from those frequency levels when stakeholders can prove that specific factual circumstances merit them. Moreover, the detailed commentary being adopted in the final rule clarifying the operation of the rebuttable presumption and including examples will inform judicial analysis of line-drawing questions in applying FDCPA section 806(5). More broadly, the Bureau is now persuaded that the additional flexibility afforded by the rebuttable-presumption approach outweighs the enhanced certainty and clarity that would have been provided by the proposed bright-line rule. The final rule also contains certain enhanced consumer protections. For example, the proposed bright-line rule would not have addressed circumstances in which debt collectors engage in rapid succession calling while still complying with the proposed seven telephone call weekly frequency limit. This final rule addresses this conduct.[424]

Notwithstanding the final rule's shift to a rebuttable-presumption approach, the Bureau is retaining the specific numeric frequency limits that it proposed. The Bureau determines as a general matter that the FDCPA case law, the high volume of consumer complaints in this area, the evidence described in the Bureau's FDCPA Reports, technological developments, and other policy considerations described in this section-by-section analysis and in the proposal support a regulatory intervention that clarifies the limits on telephone call frequency. In addition, as discussed in the proposal, when Congress conferred FDCPA rulemaking authority on the Bureau through the Dodd-Frank Act in 2010, it relied, in part, on consumers' experiences with repeated or continuous debt collection telephone calls to observe that case-by-case enforcement of the FDCPA had not ended the consumer harms that the statute was designed to address.[425]

Relatedly, the Bureau declines to change the specific levels for the telephone call frequency in § 1006.14(b)(2) in response to certain commenters' suggestions to set lower or higher limits. As noted above, a common suggestion by commenters urging stricter limits was three telephone call attempts per week, per consumer. Conversely, industry commenters urged the Bureau to adopt more permissive limits, such as 15 telephone calls per week, per debt. The Bureau has determined that the specific levels proposed as telephone call frequency limits—seven telephone calls and one conversation, per debt, in each seven-consecutive-day period—are reasonable policy judgments in view of the existing evidence and the competing considerations discussed above (and in the proposal), within a rebuttable-presumption framework. The final rule allows rebuttal of the presumption of compliance or of a violation, respectively, even if the debt collector places telephone calls at or below, or in excess of, the telephone call frequency levels. Consequently, the rebuttable-presumption framework addresses many of the policy concerns animating the requests for higher or lower limits under a bright-line rule.[426]

The Bureau recognizes that many commenters—particularly consumer advocates, State Attorneys General, and consumers—criticized the proposal for imposing limits on a per-debt, rather than per-person, basis. The per-debt approach is unchanged in the final rule. The section-by-section analysis of § 1006.14(b)(4) discusses the Bureau's reasoning for finalizing the per-debt approach as proposed.

because there was ''no evidence of an unacceptable pattern of calls'').

[423] One Federal district court opinion cited by a group of consumer advocates urging the Bureau to impose stricter telephone call frequency limits illustrates this point. The court allowed an FDCPA section 806(5) claim to proceed based on a consumer's receipt of 15 telephone calls over a three-week period. *See Ambroise* v. *Am. Credit Adjusters, LLC,* No. 15–22444–CIV–ALTONAGA/O'Sullivan, 2016 WL 6080454, at *3 (S.D. Fla. Mar. 22, 2016). The court, however, noted that while the telephone call frequency ''weighs in favor of granting the maximum statutory damages,'' it could not conclude ''the violations were intentional or particularly egregious,'' pointing to (among other things) how the debt collector did not make any additional telephone calls after the consumer told the debt collector to stop calling. For this reason, the court declined to allow recovery of the statutory maximum for damages. *Id.*

[424] The final rule contains a presumption of compliance under final § 1006.14(b)(2)(i) which the commentary clarifies may be rebutted where there is evidence of rapid succession calling. *See* comment 14(b)(2)(i)–2.i. The Bureau notes that, in addition to commenters raising concerns about rapid succession calling, various judicial decisions have recognized this practice as a potential basis for an FDCPA section 806(5) violation. *See, e.g., Neu* v. *Genpact Servs., LLC,* No. 11–CV–2246 W(KSC), 2013 WL 1773822, at *4–5 (S.D. Cal. Apr. 25, 2013) (holding that 150 telephone calls in 51 days raised a triable issue of fact as to the debt collector's intent to harass and observing that ''[a] reasonable trier of fact could find that [calling the consumer six times in one day] alone, apart from the sheer volume of calls placed by [the debt collector], is sufficient to find that [the debt collector] had the 'intent to annoy, abuse or harass'''); *Arteaga* v. *Asset Acceptance, LLC,* 733 F. Supp. 2d 1218, 1228 (E.D. Cal. 2010) (''Calling a debtor numerous times in the same day, or multiple times in a short period of time, can constitute harassment under the FDCPA.'').

[425] *See* 84 FR 23274, 23310 (May 21, 2019). The proposal described how in a 2010 report prepared in connection with the Restoring American Financial Stability Act of 2010 (the Senate's predecessor bill to the Dodd-Frank Act), the Senate Committee on Banking, Housing, and Urban Affairs cited consumer complaints to the FTC about, among other things, debt collectors ''bombarding [them] with continuous calls'' to conclude that abusive debt collection practices had continued to proliferate since the FDCPA's passage. S. Rep. No. 111–176, at 19 (2010). In connection with that finding, among others, Congress granted the Bureau the authority to prescribe rules with respect to the activities of FDCPA debt collectors. 15 U.S.C. 1692*l*. The Bureau also cites these Dodd-Frank Act legislative history and FDCPA provisions in response to commenters who argued that the FDCPA legislative history does not support the imposition of the telephone call frequency limits proposed by the Bureau.

[426] Although the Bureau's adoption of a rebuttable-presumption framework using the same proposed frequency levels could, as some commenters asserted, lead to an increase in letters, text messages, and emails for consumers who may have preferred telephone calls, the general prohibition against harassing, oppressive, or abusive conduct in § 1006.14(a) and FDCPA section 806 would protect consumers from undue increases in debt collectors' use of such communication media, and the Bureau has clarified in newly adopted commentary to § 1006.14(a) that the general prohibition addresses communications and attempted communications involving other types of media. *See* comments 14(a)–1 and –2.

The Bureau also is not finalizing any of the variations of the rebuttable-presumption approach on which the Bureau sought comment in the proposal, such as finalizing only a presumption of compliance or violation (but not both), or finalizing a safe harbor for telephone calls below the specified frequency paired with a presumption of a violation for telephone calls above the specified frequency (or the opposite). The Bureau believes these variations would add needless complexity to the framework without clear benefits, in comparison to the rebuttable-presumption approach adopted in the final rule. Further, any variation that includes a per se rule as an element of the framework would suffer from the same disadvantages as commenters identified with the proposed bright-line rule.

Rebuttable Presumption of Compliance

As noted above, § 1006.14(b)(2)(i) provides for a rebuttable presumption of compliance. Under § 1006.14(b)(2)(i), subject to the exclusions in § 1006.14(b)(3), a debt collector is presumed to comply with § 1006.14(b)(1) and FDCPA section 806(5) if the debt collector places a telephone call to a particular person in connection with the collection of a particular debt neither: (1) More than seven times within seven consecutive days; nor (2) within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt. The date of the telephone conversation is the first day of the seven-consecutive-day period.

The final rule includes new commentary to clarify various aspects of the telephone call frequency provisions and the rebuttable-presumption framework.[427] Comment 14(b)(2)(i)–1 describes the rebuttable presumption of compliance and emphasizes that, to have the presumption of compliance, the debt collector's telephone call frequencies must not exceed the limits set in either prong of § 1006.14(b)(2)(i). The comment also includes three examples illustrating the application of the rule and the circumstances in which the debt collector would be presumed to comply with § 1006.14(b)(1) and FDCPA section 806(5).

Comment 14(b)(2)(i)–2 clarifies how the presumption of compliance can be rebutted and includes a non-exhaustive list of factors that may rebut the presumption of compliance. The comment first clarifies that, to rebut a presumption of compliance, it must be proven that a debt collector who did not place a telephone call in excess of either of the telephone call frequencies described in § 1006.14(b)(2)(i) nevertheless placed a telephone call or engaged a person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number. This language in the comment generally tracks the language of FDCPA section 806(5). Comment 14(b)(2)(i)–2 also explains that, for purposes of determining whether the presumption of compliance has been rebutted, it is assumed that debt collectors intend the natural consequence of their actions. The Bureau has included this language to clarify how the rebuttable presumption relates to the ''natural consequence'' language in FDCPA section 806 and the intent requirement in FDCPA section 806(5). The Bureau notes that some commenters criticized the proposed telephone call frequency limits as not incorporating the FDCPA section 806(5) intent requirement. In the proposal, the Bureau cited judicial decisions to support the interpretation that debt collectors generally intend the natural consequence of their actions.[428] The Bureau finds the two opinions cited in the proposal persuasive because one logically harmonizes the ''natural consequence'' language in FDCPA section 806 with the intent requirement in FDCPA section 806(5),[429] while the other recognizes ''perhaps the oldest rule of evidence'' applied across areas of law—that a person ''is presumed to intend the natural and probable consequences of [that person's] acts.''[430] Accordingly, the Bureau has incorporated this concept in comment 14(b)(2)(i)–2.[431]

Comment 14(b)(2)(i)–2 also clarifies that the non-exhaustive list of factors in comments 14(b)(2)(i)–2.i through .iv may be considered either individually or in combination with one another or with other, non-specified factors. The comment further clarifies that the factors may be viewed in light of any other relevant facts and circumstances and therefore may apply to varying degrees. The Bureau notes that the factors included in comments 14(b)(2)(i)–2.i through .iv are generally aligned with circumstances cited by courts as relevant to the determination of whether FDCPA section 806(5) has been violated.[432]

Comment 14(b)(2)(i)–2.i clarifies that the frequency and pattern of telephone calls the debt collector places to a person, including the intervals between them, is a factor that may rebut the presumption of compliance. The comment further clarifies the considerations relevant to this factor include whether the debt collector placed telephone calls to a person in rapid succession (*e.g.,* two unanswered telephone calls to the same telephone number within five minutes) or in a

[427] While the final rule retains aspects of the proposed commentary for § 1006.14(b)(2), including some similar examples, the commentary has been revised to such a degree in light of the rebuttable-presumption approach that this section-by-section analysis does not describe particular differences from the proposed language and instead just focuses on the final content.

[428] *See* 84 FR 23274, 23312 n.304 (May 21, 2019) (citing *Litt* v. *Portfolio Recovery Assocs. LLC,* 146 F. Supp. 3d 857, 873 (E.D. Mich. 2015); *United States* v. *Falstaff Brewing Corp.,* 410 U.S. 526, 570 n.22 (1973) (Marshall, J., concurring in result)).

[429] *See Litt,* 146 F. Supp. 3d at 873 (''[W]hile the general proscription of § 1692d does not use the word 'intent,' such a requirement is inferred from the necessity to establish that the natural tendency of the conduct is to embarrass, upset or frighten a debtor. If the natural tendency of certain conduct is to embarrass, upset or frighten, then one who engages in such conduct can be presumed to have intended the natural consequences of his acts.'').

[430] *Falstaff,* 410 U.S. at 570 n.22 (Marshall, J., concurring in result).

[431] In the proposal, the Bureau posited that the alternative rebuttable-presumption approach could allow a consumer to show that the debt collector knew or should have known that the proposed telephone call frequency limits would have the natural consequence of harassing, oppressing, or abusing the consumer. However, the Bureau declines to specify a more particularized intent standard under § 1006.14(b)(2), such as ''know or have reason to know'' because the Bureau believes doing so would entail significant legal and practical complexity. The Bureau also has concern that imposing a more particularized intent standard could lead to evasion if debt collectors could then try to disclaim an intent to harass, annoy, or abuse the consumer after the fact by attesting to their lack of intent.

[432] *See, e.g., Davis* v. *Diversified Consultants, Inc.,* 36 F. Supp. 3d 217, 228 (D. Mass. 2014) (''[T]here are no bright-line rules as to what constitutes harassment or what demonstrates intent to annoy. Instead, such findings have been based on a consideration of multiple factors. For example, in determining whether the intent requirement is met, courts often look to the volume, frequency, and persistence of calls, to whether defendant continued to call after plaintiff requested it cease, and to whether plaintiff actually owed the alleged debt.''); *Valle* v. *Nat'l Recovery Agency,* No. 8:10–cv–2775–T–23MAP, 2012 WL 1831156, at *1 (M.D. Fla. May 18, 2012) (''Factors often examined in assessing a claimed violation of Section 1692d and Section 1692d(5) include (1) the volume and frequency of attempts to contact the debtor, (2) the volume and frequency of contacts with the debtor, (3) the duration of the debt collector's attempted communication and collection, (4) the debt collector's use of abusive language, (5) the medium of the debt collector's communication, (6) the debtor's disputing the debt or the amount due, (7) the debtor's demanding a cessation of the communication, (8) the debt collector's leaving a message, (9) the debt collector's calling at an unreasonable hour, (10) the debt collector's calling the debtor at work, (11) the debt collector's threatening the debtor, (12) the debt collector's lying to the debtor, (13) the debt collector's impersonating an attorney or a public official, (14) the debt collector's contacting a friend, co-worker, employee, employer, or family member, and (15) the debt collector's simulating or threatening legal process.'').

highly concentrated manner (*e.g.,* seven telephone calls to the same telephone number within one day). Comment 14(b)(2)(i)–2.i then provides an example illustrating application of this factor. The Bureau has included this factor because many commenters raised the pattern and frequency of telephone calls as relevant to determining intent under FDCPA section 806(5), and courts have often cited this factor as well, as described above. The Bureau believes that the frequency and pattern of the telephone calls, including the intervals between them, are indicative of both the intent of the debt collector and the natural consequence on the person called. The Bureau has also included specific language in the comment to address concerns raised by commenters about debt collectors engaging in rapid succession calling or placing telephone calls in a concentrated matter on days that may be less convenient for some consumers (such as Sundays or holidays).[433] Application of this factor is not limited to rapid succession or highly concentrated calling, however, and is dependent on all of the relevant facts and circumstances that may indicate an intent on the part of the debt collector to harass, annoy, or abuse the consumer.

Comment 14(b)(2)(i)–2.ii clarifies that the frequency and pattern of any voicemails the debt collector leaves for a person, including the intervals between them, is another factor that may rebut the presumption of compliance. The comment notes that the considerations relevant to this factor include whether the debt collector left voicemails for a person in rapid succession (*e.g.,* two voicemails within five minutes left at the same telephone number) or in a highly concentrated manner (*e.g.,* seven voicemails left at the same telephone number within one day). The Bureau included this factor for similar reasons to those underlying inclusion of the factor in comment 14(b)(2)(i)–2.i.

Comment 14(b)(2)(i)–2.iii clarifies that another factor that may rebut the presumption of compliance is the content of a person's prior communications with the debt collector. The comment explains that among the considerations relevant to this factor are whether the person previously informed the debt collector, for example, that the person did not wish to be contacted again about the particular debt, that the person refused to pay the particular debt, or that the person did not owe the particular debt. The comment clarifies that this factor also includes a consumer's cease communication notification described in § 1006.6(c) and a consumer's request under § 1006.14(h) that the debt collector not use telephone calls to communicate or attempt to communicate with the consumer. The comment also clarifies that the amount of time elapsed since any such prior communications may be relevant to this factor. The Bureau has included this factor based on concerns raised by commenters that a debt collector could annoy, harass, or abuse consumers by continuing to place telephone calls even after the person informed the debt collector about the person's desire not to be contacted again about the particular debt or that the consumer does not owe or refuses to pay the particular debt. Although the number of additional telephone calls at issue would not exceed the telephone call frequencies, in view of the prior conversation, especially a recent prior conversation, the person may be more likely to find the additional telephone calls annoying, harassing, or abusive. Moreover, the Bureau believes that in this circumstance it generally would be more likely that the debt collector intended to annoy, harass, or abuse the person.[434]

Comment 14(b)(2)(i)–2.iv clarifies that a factor that may be used to rebut the presumption of compliance is the debt collector's conduct in prior communications or attempts to communicate with the person. The comment explains that among the considerations relevant to this factor are whether, during a prior communication or attempt to communicate with a person, the debt collector, for example, used obscene, profane, or otherwise abusive language (*see* § 1006.14(d)), used or threatened to use violence or other criminal means to harm the person (*see* § 1006.14(c)), or called at an unusual or inconvenient time or place (*see* § 1006.6(b)(1)). The comment also clarifies that the amount of time elapsed since any such prior communications or attempts to communicate may be relevant to this factor. The Bureau has included this factor for similar reasons as comment 14(b)(2)(i)–2.iii. The Bureau believes that, if a debt collector previously used obscene language or threatened violence during a debt collection telephone call, or called at an inconvenient place or time, and thereby violated another rule provision (and the FDCPA itself), then the person receiving the subsequent telephone calls may be more likely to find they are annoying, harassing, or abusive. The Bureau also believes that by placing the subsequent telephone calls, it generally would be more likely that the debt collector intended to annoy, harass, or abuse the person.

Comment 14(b)(2)(i)–3, which is substantively unchanged from proposed comment 14(b)(2)–2, addresses misdirected telephone calls. The comment explains that, for purposes of the telephone call frequencies in § 1006.14(b)(2)(i), if within a period of seven consecutive days, a debt collector attempts to communicate with a particular person by placing telephone calls to a particular telephone number, and the debt collector then learns that the telephone number is not that person's number, the telephone calls that the debt collector made to that number are not considered to have been telephone calls placed to that person during that seven-day period for purposes of § 1006.14(b)(2)(i). The comment also provides an example illustrating application of the rule. As the Bureau wrote in the proposal, a person is unlikely to be harassed by debt collection calls that are placed to a telephone number that belongs to someone else.[435]

Rebuttable Presumption of a Violation

As noted above, § 1006.14(b)(2)(ii) provides that a debt collector is presumed to violate § 1006.14(b)(1) and FDCPA section 806(5) if the debt collector places a telephone call to a particular person in connection with the collection of a particular debt in excess of either of the telephone call frequencies described in

[433] Courts evaluating FDCPA section 806(5) claims sometimes have focused on rapid succession calling as well, as noted in some of the cases cited earlier in this section-by-section analysis. The FTC Staff Commentary on the FDCPA, while not binding on the Bureau, also provides support for interpreting FDCPA section 806(5) to prohibit rapid succession calling under the ''continuously'' prong. *See* 53 FR 50097, 50105 (Dec. 13, 1988).

[434] The Bureau notes the comment it received from a credit union pointing out that the nature and content of a conversation may be instructive as to whether successive calls may harass, annoy, or abuse consumers.

[435] A small number of comments discussed whether the Bureau should provide additional clarification about how a debt collector determines that a telephone number is not associated with a particular person. A compliance consulting firm commented that the Bureau should let company policy dictate the determination, while another commenter believed that the Bureau should give additional clarification. Consumer advocate commenters urged the Bureau to require debt collectors to check the telephone number against the FCC's Reassigned Number Database or one of the commercial databases that is already available to see if it has been reassigned since the debt collector last verified that it belonged to the consumer. The Bureau declines to mandate any particular method by which a debt collector must learn that the telephone number is not associated with a particular person within the meaning of the comment.

§ 1006.14(b)(2)(i). The telephone call frequencies are subject to the exclusions in § 1006.14(b)(3). Comment 14(b)(2)(ii)–1 provides two examples illustrating the rule.

Comment 14(b)(2)(ii)–2 clarifies how the presumption of a violation can be rebutted and includes a non-exhaustive list of factors that may rebut the presumption of a violation. The comment clarifies that, to rebut the presumption of a violation, it must be proven that a debt collector who placed a telephone call in excess of either of the frequencies described in § 1006.14(b)(2)(i) nevertheless did not place a telephone call or engage any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number. The comment clarifies that, for purposes of determining whether a presumption of a violation has been rebutted, it is assumed that debt collectors intend the natural consequence of their actions. The comment notes that comments 14(b)(2)(ii)–2.i through .iv provide a non-exhaustive list of factors that may rebut the presumption of a violation.[436] The comment explains that the factors may be considered either individually or in combination with one another or other non-specified factors.[437] The comment also clarifies that the factors may be viewed in light of any other relevant facts and circumstances and therefore may apply to varying degrees.[438]

Comment 14(b)(2)(ii)–2.i clarifies that one factor that may rebut the presumption of a violation is whether a debt collector placed a telephone call to comply with, or as required by, applicable law. The comment provides an example in which a debt collector placed one telephone call above the applicable telephone call frequency limit to inform the consumer of available loss mitigation options in compliance with the Bureau's mortgage servicing rules under Regulation X, 12 CFR 1024.39(a). The comment clarifies that the debt collector's compliance with applicable law is a factor that may rebut the presumption of a violation. The Bureau includes this factor because telephone calls placed to comply with or as required by applicable law generally would not reflect an intent on the part of the debt collector to harass, annoy, or abuse a consumer. Numerous commenters cited compliance with applicable law as a basis for excluding a telephone call from the proposed bright-line telephone call frequency limits pursuant to § 1006.14(b)(3). The Bureau is not excluding this category of telephone calls from the frequency limits entirely, however, because, as stated in the proposal, the Bureau understands that legally required communications infrequently are delivered over the telephone, in contrast to by mail or other means.

Comment 14(b)(2)(ii)–2.ii describes that another factor that may rebut the presumption of a violation is whether a debt collector placed a telephone call that was directly related to active litigation involving the collection of a particular debt. The comment provides an example in which an additional telephone call beyond the applicable telephone call frequency was placed to complete a court-ordered communication with the consumer about the debt, or as part of negotiations to settle active debt collection litigation regarding the debt. The comment explains that the direct relationship between the additional telephone call and the active debt collection litigation is a factor that may rebut the presumption of a violation.[439] The Bureau has included this factor because these types of telephone calls may enable communication between consumers and debt collectors to resolve a debt collection matter during litigation and, depending on the facts and circumstances, may not reflect an intent on the part of the debt collector to harass, annoy, or abuse the consumer.

Comment 14(b)(2)(ii)–2.iii clarifies that another factor that may rebut the presumption of a violation is whether a debt collector placed a telephone call in response to a consumer's request for additional information when the exclusion in § 1006.14(b)(3)(i) for telephone calls made with the consumer's prior consent given directly to the debt collector did not apply. The comment includes an example in which, during a telephone conversation, the consumer tells the debt collector that the consumer would like more information about the amount of the debt but that the consumer cannot talk at that moment, and the consumer ends the telephone call before the debt collector can seek prior consent under § 1006.14(b)(3)(i) to call back with the requested information.[440] The fact that the debt collector placed the additional call in response to the consumer's request is a factor that may rebut the presumption of a violation. The Bureau has included this factor based on consideration of circumstances in which the debt collector places a telephone call in response to the consumer's request, and thus may be placing the call without intent to harass, annoy, or abuse the consumer, but where the exclusion under § 1006.14(b)(3)(i) does not apply because the debt collector has not obtained the consumer's consent.

Comment 14(b)(2)(ii)–2.iv clarifies that a factor that may rebut the presumption of a violation is whether a debt collector placed a telephone call to convey information to the consumer that, as shown through evidence, would provide the consumer with an opportunity to avoid a demonstrably negative effect relating to the collection of the particular debt, where the negative effect was not in the debt collector's control, and where time was of the essence.[441] Comment 14(b)(2)(ii)–2.iv.A provides the following example: A debt collector and consumer engage in a lengthy conversation regarding settlement terms; the call drops toward the end of the conversation; and the debt collector immediately places an additional telephone call to complete

[436] While the Bureau believes that telephone calls placed under these four circumstances generally would not reflect an intent on the part of the debt collector to harass, annoy, or abuse the consumer, it is possible that there could be factual circumstances where such a telephone call *is* placed with that intent. Therefore, the Bureau is including such telephone calls within the rebuttable presumption rather than excluding them from the telephone call frequencies altogether under final § 1006.14(b)(3).

[437] As suggested by commenters, there may be other circumstances where it may be proven that a debt collector who placed telephone calls in excess of either of the telephone call frequencies described in § 1006.14(b)(2)(i) nevertheless did not place a telephone call or engage any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number. Because the list of factors identified in comments 14(b)(2)(ii)–2.i through .iv is not exhaustive, other factors may be considered, if warranted by the relevant facts and circumstances.

[438] The language in comment 14(b)(2)(ii)–2, including how debt collectors are assumed to intend the natural consequence of their actions and how the factors may apply to varying degrees, parallels the language in comment 14(b)(2)(i)–2 describing the rebuttable presumption of compliance. This reflects how operation of the two presumptions under the rule—but not the factors themselves—is intended to be the same.

[439] Commenters, including the SBA, suggested that the proposed telephone call frequency limits should not apply once litigation or other civil action is initiated (or specifically while a settlement is being negotiated). This factor responds to the commenters' suggestion.

[440] This factor addresses concerns raised by some commenters that the proposed seven telephone call weekly frequency limit would harm consumers by preventing a debt collector from calling a consumer back, at the consumer's request, at a different, more convenient, time or after they gather more information; and ultimately lead to increases in litigation, negative credit reporting, and wage garnishment and offsets.

[441] This factor addresses concerns raised by some commenters that the proposed seven telephone call weekly frequency limit would provide fewer opportunities to resolve debts in manner best suited for the situation, and as a result, would increase interest, fees, and penalties for consumers.

the conversation. As explained in the comment, the fact that the debt collector placed the telephone call to permit the debt collector and the consumer to complete the conversation about settlement terms, which provides the consumer an opportunity to avoid a demonstrably negative effect that was not in the debt collector's control (*i.e.,* having to repeat a substantive conversation with a potentially different representative of the debt collector) and where time was of the essence (*i.e.,* to prevent the delay of settlement negotiations by seven days), is a factor that may rebut the presumption of a violation.

Comment 14(b)(2)(ii)–2.iv.B provides an example in which: A consumer previously entered into a payment plan with the debt collector regarding a debt; the conditions for the payment plan were set by the creditor; among those conditions is that only the creditor, in its sole discretion, may approve waivers of late fees; the debt collector learns on a Monday that the consumer's payment failed to process, and the applicable grace period is set to expire the next day; and the debt collector places a telephone call to the consumer on that Monday to remind the consumer that a late fee will be applied by the creditor for non-payment unless the consumer makes the payment by the next day. As explained in the comment, the fact that the debt collector placed the telephone call to alert the consumer to the pending penalty, giving the consumer an opportunity to avoid a demonstrably negative effect that was not in the debt collector's control and where time was of the essence, is a factor that may rebut the presumption of a violation.

Comment 14(b)(2)(ii)–2.iv.C provides a counterexample to the first two scenarios in which: On a Monday, a debt collector placed a telephone call to a consumer to offer a ''one-time only'' discount on the payment of a debt; the debt collector stated that the offer would expire the next day; yet, in fact, the debt collector could have offered the same or a similar discount through the end of the month. The comment explains that because the negative effect on the consumer was in the debt collector's control, the discount offer is not a factor that may rebut the presumption of a violation.

The Bureau has included the rebuttal factor described in comment 14(b)(2)(ii)–2.iv and the illustrative examples in comments 14(b)(2)(ii)–2.iv.A through .C based on consideration of comments to the proposal. As noted earlier in this section-by-section analysis, industry commenters presented a variety of fact patterns that they believed called for exclusions because the consumer would avoid harm or potentially would benefit from the communication. However, the Bureau declines to include categorical exclusions for these types of telephone calls. Because the rebuttal factors are non-exhaustive, the Bureau need not address each scenario raised by commenters; the question of whether the presumption can be rebutted in a given case ultimately depends on the circumstances. Furthermore, the Bureau has included language and structured the examples in this comment to emphasize the factor's limitations: That evidence must show that the additional telephone call provided the consumer with an opportunity to avoid a demonstrably negative effect; that the negative effect was not in the debt collector's control; and that time was of the essence. The Bureau concludes that cabining the factor in this manner is necessary for clarity and to avoid circumvention.

14(b)(3) Certain Telephone Calls Excluded From the Telephone Call Frequencies

Proposed § 1006.14(b)(3) would have excluded four types of telephone calls from the telephone call frequency limits in proposed § 1006.14(b)(2).[442] Specifically, proposed § 1006.14(b)(3)(i) would have excluded telephone calls made to respond to a request for information from the person whom the debt collector is calling; proposed § 1006.14(b)(3)(ii) would have excluded telephone calls made with such person's prior consent given directly to the debt collector; proposed § 1006.14(b)(3)(iii) would have excluded telephone calls that do not connect to the dialed number; and proposed § 1006.14(b)(3)(iv) would have excluded telephone calls placed to a person described in proposed § 1006.6(d)(1)(ii) through (vi).[443] For the reasons discussed below, the Bureau is not finalizing the proposed § 1006.14(b)(3)(i) exclusion for telephone calls made to respond to a request for information from the person whom the debt collector is calling. The Bureau is finalizing the other proposed exclusions as § 1006.14(b)(3)(i) through (iii), with certain revisions discussed below.

Proposed Provision Not Finalized

Proposed § 1006.14(b)(3)(i) would have excluded from the frequency limits telephone calls that a debt collector places to a person to respond to a request for information from that person.[444] Proposed comment 14(b)(3)(i)–1 would have clarified that, once a debt collector responds to a person's request for information, the exception in proposed § 1006.14(b)(3)(i) would not apply to subsequent telephone calls placed by the debt collector to the person, unless the person makes another request for information. Proposed comment 14(b)(3)(i)–2 provided an example of the rule.

Industry commenters requested clarification on a variety of issues related to the proposed § 1006.14(b)(3)(i) exclusion. For example, commenters asked the Bureau to define ''request for information''; questioned whether certain scenarios fit within the exception; asked how specific the consumer's request for information must be; and asked how many follow-up telephone call attempts are permitted under the proposed exclusion.[445] A group of consumer advocate commenters recommended that the exclusion not apply if debt collectors placed telephone calls in response to requests for information that consumers submitted through other communication media.

The Bureau is not providing the requested clarifications or making the recommended changes because the Bureau is not finalizing proposed § 1006.14(b)(3)(i). After considering the comments, the Bureau recognizes that a telephone call that a debt collector places to a person to respond to a request for information from that person usually also fits under the exclusion for prior consent in proposed § 1006.14(b)(3)(ii). Therefore, in an effort to streamline the final rule, the Bureau is not finalizing proposed § 1006.14(b)(3)(i) and instead is expanding the examples in the commentary to the prior consent exclusion, renumbered as final § 1006.14(b)(3)(i), to describe a scenario in which a person, through a request for information, also provides prior consent for a debt collector to place additional telephone calls, and the debt collector then places telephone calls to the

[442] *See* 84 FR 23274, 23317–19 (May 21, 2019).

[443] Persons described in proposed § 1006.6(d)(1)(ii) through (vi) include the consumer's attorney, a consumer reporting agency, the creditor, the creditor's attorney, and the debt collector's attorney.

[444] *See* 84 FR 23274, 23318 (May 21, 2019).

[445] However, one industry commenter stated it was not necessary to clarify how to determine whether a debt collector makes a particular telephone call in response to a request for information, as opposed to for some other purpose, or how to determine whether the debt collector has responded to a request for information.

person to respond to a request for information from that person.[446] The Bureau also is specifying in comment 14(b)(2)(ii)–2.iii that, in the unlikely event that a person's request for information from a debt collector does not meet the requirements of the prior consent exclusion in final § 1006.14(b)(3)(i), the fact that a debt collector placed a telephone call in response to a consumer's request for additional information is a factor that may be used by a debt collector to rebut a presumption of a violation under § 1006.14(b)(2)(ii).[447]

Scope of Exclusions

Industry commenters and the SBA asked the Bureau to exclude additional types of telephone calls from the proposed § 1006.14(b)(2) telephone call frequency limits.[448] For example, industry commenters requested that the Bureau add an exclusion for telephone calls required by, or made to comply with, applicable law, as well as telephone calls related to litigation.[449] Industry commenters also requested exclusions for other types of telephone calls such as telephone calls that would be ''beneficial'' to the consumer; telephone calls placed to a consumer after a consumer does not follow through with an agreed-upon payment or the consumer's payment is declined; telephone calls placed before a debt collector has established contact with a person; and ringless voicemails. The SBA requested that the Bureau exclude all telephone calls placed by small entity debt collectors from the proposed § 1006.14(b)(2) telephone call frequency limits.

The Bureau declines to add additional exclusions to § 1006.14(b)(3). As discussed in the section-by-section analysis of § 1006.14(b)(3)(i) through (iii), the Bureau is finalizing three of the proposed exclusions. These exclusions cover telephone calls placed with a person's prior consent (§ 1006.14(b)(3)(i)), telephone calls that do not connect to the dialed number (§ 1006.14(b)(3)(ii)), and telephone calls placed to certain professional persons (§ 1006.14(b)(3)(iii)). The Bureau is excluding these categories of telephone calls from the § 1006.14(b)(2)(i) telephone call frequencies because the Bureau concludes that such telephone calls are not placed by debt collectors with intent to annoy, abuse, or harass a person and generally do not have the natural consequence of harassing, oppressing, or abusing any person.[450]

As discussed in the section-by-section analysis of § 1006.14(b)(2), the Bureau is finalizing a rebuttable-presumption approach instead of the proposed telephone call frequency limits. The rebuttable-presumption approach inherently acknowledges that there are individual circumstances, beyond the categorical exclusions identified in § 1006.14(b)(3), in which telephone calls exceeding the final § 1006.14(b)(2)(i) frequencies are not placed with the intent to annoy, abuse, or harass, and do not have the natural consequence harassing, oppressing, or abusing any person. The rebuttable-presumption approach will provide debt collectors with many of the flexibilities that they sought from the requested exclusions, while also allowing for consideration of the particular facts and circumstances surrounding a telephone call that exceeds the final § 1006.14(b)(2)(i) frequencies.

Depending on the facts and circumstances, the Bureau's rebuttable-presumption approach to telephone call frequencies may, in fact, provide more flexibility to debt collectors with respect to other scenarios for which commenters requested exclusions, such as telephone calls that would be beneficial to the consumer and telephone calls placed to a consumer after a consumer does not follow through with an agreed upon payment or the consumer's payment is declined. More specifically, as described in comment 14(b)(2)(ii)–2.iv, another factor that may be used to rebut a presumption of a violation is whether a debt collector placed a telephone call to convey information to the consumer that, as shown through evidence, would provide the consumer with an opportunity to avoid a demonstrably negative effect relating to the collection of the particular debt, where the negative effect was not in the debt collector's control, and where time was of the essence.

Regarding other specific requests for exclusions, industry commenters explained that the proposed § 1006.14(b)(2) telephone call frequency limits are in tension with the Bureau's mortgage servicing rules' live contact and early intervention requirements in Regulation X, 12 CFR part 1024. Another industry commenter identified tension with the U.S. Department of Housing and Urban Development's Home Equity Conversion Mortgage program regulations, 24 CFR part 206, and State servicing laws that require a servicer to attempt to contact a borrower when a loan is initially called due and payable. Industry commenters also explained that, during litigation, attorneys may be directed to notify the consumer of scheduling matters, to coordinate the date for a hearing or mediation, or to respond to settlement discussions. Industry commenters also stated that court rules may require parties to confer prior to scheduling a hearing. Industry commenters noted that it may be necessary to have multiple, time-sensitive discussions during settlement negotiations, and while the proposed consent exclusion would seem to address this concern, debt collectors may forget to request consent from a consumer to place additional telephone calls.

The Bureau understands that very few legally required communications must be delivered by telephone. However, the Bureau also acknowledges that legally required communications delivered by telephone may facilitate consumer engagement and reach consumers more quickly than if other communication media are used. As discussed in more detail in the section-by-section analysis of § 1006.14(b)(2), the telephone calls that commenters describe could be covered by two factors that a debt collector may use to rebut a presumption of a violation of § 1006.14(b)(1), including: Whether a debt collector placed a telephone call to comply with, or as required by, applicable law, as discussed in comment 14(b)(2)(ii)–2.i; and whether a debt collector placed a telephone call that was directly related to active litigation involving the collection of a particular debt, as discussed in comment 14(b)(2)(ii)–2.ii.[451]

The Bureau also declines to add an exclusion for telephone calls placed before a debt collector has established contact with a person. FDCPA section 806(5) prohibits a debt collector from causing a telephone to ring or engaging any person in a telephone call

[446] See the section-by-section analysis of § 1006.14(b)(3)(i) for more information on the exclusion for telephone calls placed with a person's prior consent.

[447] See the section-by-section analysis of § 1006.14(b)(2) for more information on the telephone call frequencies and the factors that may rebut the presumption of a violation.

[448] The Bureau specifically requested comment on this topic. See also the section-by-section analysis of § 1006.14(b)(2) for further discussion of comments relating to potential exclusions from the proposed telephone call frequency limits.

[449] The SBA requested an exclusion for telephone calls made while a debt collector is trying to negotiate a settlement.

[450] The Bureau is finalizing certain limits on telephone calls placed with a person's prior consent so that such telephone calls do not have the natural consequence of harassing, oppressing, or abusing the person who consented to the additional telephone calls. *See* the section-by-section analysis of § 1006.14(b)(3)(i).

[451] *See* the section-by-section analysis of § 1006.14(b)(2).

repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number, without regard to whether the debt collector has previously established contact with that person. At the same time, as described in the section-by-section analysis of § 1006.14(b)(2), the Bureau recognizes that debt collectors have a legitimate interest in reaching consumers, and that communicating with consumers is central to debt collectors' ability to recover amounts owed to creditors. The Bureau expects that the flexibility provided by the rebuttable-presumption approach to telephone call frequencies, discussed in the section-by-section analysis of § 1006.14(b)(2), as well as debt collectors' ability to leave limited-content messages, discussed in the section-by-section analysis of § 1006.2(j), will enable debt collectors to reach consumers in a timely manner without introducing additional consumer harms.

The Bureau declines to add an exclusion for ringless voicemails for the reasons discussed in the section-by-section analysis of § 1006.14(b).

In response to the SBA's request to exclude small entities from the § 1006.14(b)(2)(i) telephone call frequencies, the Bureau notes that the final rule applies to debt collectors, as that term is used in the FDCPA. Small entities are only excluded from the definition of debt collector to the extent they meet the criteria for one of the specific exclusions from the general definition.[452]

Exclusions Under Rebuttable-Presumption Approach

A few industry commenters asked the Bureau to maintain the proposed § 1006.14(b)(3) exclusions even if the final rule adopted a rebuttable-presumption approach. One commenter explained that maintaining the exclusions would aid courts in determining whether the debt collector has rebutted the presumption of a violation when excess telephone calls fall under one or more of the proposed § 1006.14(b)(3) exclusions.

As discussed in the section-by-section analysis of § 1006.14(b)(2), the Bureau is implementing a rebuttable-presumption approach in this final rule and finalizing three of the proposed exclusions. Telephone calls placed by a debt collector that are excluded under § 1006.14(b)(3) do not count toward the telephone call frequencies in § 1006.14(b)(2)(i) that determine whether a debt collector is presumed to comply with or violate § 1006.14(b)(1) and FDCPA section 806(5). Therefore, telephone calls excluded under § 1006.14(b)(3) will not be used to determine whether a debt collector has rebutted a presumption of a violation under § 1006.14(b)(2)(ii).[453]

14(b)(3)(i)

Proposed § 1006.14(b)(3)(ii) would have excluded from the proposed telephone call frequency limits in § 1006.14(b)(2) telephone calls that a debt collector places to a person with the person's prior consent given directly to the debt collector.[454] Under the proposal, a debt collector would have been permitted to place as many telephone calls as necessary before reaching the consumer, but once the debt collector reached the consumer, further telephone calls would not have been covered by the prior consent exclusion. Proposed comment 14(b)(3)(ii)–1 would have referred to the commentary to proposed § 1006.6(b)(4)(i) for guidance concerning a person giving prior consent directly to a debt collector, and proposed comment 14(b)(3)(ii)–2 provided an example of the rule. For the reasons discussed below, the Bureau is revising the proposed prior consent exclusion, renumbered as § 1006.14(b)(3)(i), to limit the duration of prior consent to no more than seven consecutive days.

One industry commenter recommended that the Bureau limit the number of telephone calls permitted per day and per week under the § 1006.14(b)(3) exclusions, including the prior consent exclusion, while another industry commenter opposed such limits. Some industry commenters explained that it is not necessary to limit telephone calls made under the prior consent exclusion because consumers can withdraw consent at any time. One industry commenter recommended that the proposed § 1006.14(b)(2) telephone call frequency limits reset when a consumer asks a debt collector to call back at another time. Industry commenters also requested clarification about what constitutes prior consent, whether certain scenarios fit within the exclusion, and how to document prior consent. Consumer advocate commenters requested that the Bureau limit the prior consent exclusion to one additional telephone call and expressed concern that debt collectors could otherwise pressure consumers into providing blanket consent for unlimited additional telephone calls over an unspecified period of time.

In general, the Bureau believes that a person can determine when additional telephone calls from, or telephone conversations with, a debt collector would not be harassing, and that a debt collector who has a person's prior consent to place additional telephone calls does not place such calls with intent to annoy, abuse, or harass the person. In the proposal, the prior consent exclusion would have lasted until the debt collector reached the person who consented to the additional telephone calls. Therefore, if the debt collector were unable to reach the person, the person's prior consent to additional telephone calls would have lasted indefinitely. The Bureau recognizes that the debt collector's additional telephone calls, placed indefinitely, may have the natural consequence of which is to harass, oppress, or abuse the person in connection with the collection of a debt.

The Bureau considered limiting the number of telephone calls a debt collector may place under the prior consent exclusion, as suggested by consumer advocate commenters, but concluded that such an approach would be impractical, given that it often takes debt collectors multiple telephone calls to reach a person. Instead, the Bureau is amending proposed § 1006.14(b)(3)(ii), renumbered as § 1006.14(b)(3)(i), to limit the duration of prior consent to no more than seven consecutive days, which is the same time period to which the telephone call frequencies in § 1006.14(b)(2)(i) apply. Specifically, final § 1006.14(b)(3)(i) provides that telephone calls placed to a person do not count toward the § 1006.14(b)(2)(i) telephone call frequencies if they are placed with such person's prior consent given directly to the debt collector and within a period no longer than seven consecutive days after receiving the prior consent.[455] In addition, as explained in new comment 14(b)(3)(i)–2, a person's seven-consecutive-day prior consent described in § 1006.14(b)(3)(i) will expire sooner, if any of the following occurs prior to the conclusion of the seven-consecutive-day period: (1) The person consented to the additional telephone calls for a shorter time period and such time period has ended; (2) the person revokes such prior consent; or (3) the debt collector has a

[452] *See* the section-by-section analysis of § 1006.2(i).

[453] See the section-by-section analysis of, and commentary to, § 1006.14(b)(2)(i) and (ii) for a non-exhaustive list of factors that may be used to rebut presumptions of compliance with, and violation of, § 1006.14(b)(1) and FDCPA section 806(5).

[454] *See* 84 FR 23274, 23318 (May 21, 2019).

[455] The date the debt collector receives prior consent counts as the first day of the seven-consecutive-day period.

telephone conversation with the person regarding the particular debt.

In response to commenters' requests for clarification about what constitutes prior consent, the Bureau is amending proposed comment 14(b)(3)(ii)–1, renumbered as comment 14(b)(3)(i)–1. The comment continues to refer to § 1006.6(b)(4)(i) and its associated commentary for guidance about giving prior consent directly to a debt collector, but it also clarifies that nothing in § 1006.14(b)(3)(i) regarding prior consent for telephone call frequencies permits a debt collector to communicate, or attempt to communicate, with a consumer as prohibited by §§ 1006.6(b) and 1006.14(h).

Industry commenters raised a variety of hypothetical scenarios and asked whether the consent exclusion would apply to specific fact patterns. The Bureau is revising proposed comment 14(b)(3)(ii)–2, renumbered as comment 14(b)(3)(i)–3.i through .iii, to address how the consent exclusion applies in a number of scenarios raised by commenters. For example, the Bureau is adding an illustrative example in comment 14(b)(3)(i)–3.iii that describes a situation in which a consumer provides prior consent to receive additional telephone calls by sending an email to the debt collector requesting additional information.

Industry commenters also asked about how to document a consumer's prior consent. The Bureau declines to prescribe a specific manner in which debt collectors could document a consumer's prior consent. However, as discussed in the section-by-section analysis of § 1006.100(a), debt collectors must retain records created in the ordinary course of business that evidence compliance with the FDCPA and Regulation F, as well as records created in the ordinary course of business that evidence that the debt collector refrained from conduct prohibited by the FDCPA and the regulation.[456]

14(b)(3)(ii)

Proposed § 1006.14(b)(3)(iii) would have excluded from the frequency limits telephone calls that a debt collector places to a person that do not connect to the dialed number (*e.g.,* that result in a busy signal or are placed to an out-of-service number).[457] Proposed comments 14(b)(3)(iii)–1 and –2 provided examples of telephone calls that do and do not connect to the dialed number. For the reasons discussed below, the Bureau is finalizing the exclusion as proposed, but renumbered as § 1006.14(b)(3)(ii) and with certain revisions to the proposed commentary.

Some industry commenters expressed support for the proposed exclusion for telephone calls that do not connect to the dialed number, and no commenters opposed the proposed exclusion. As described above, one industry commenter recommended that the Bureau place limits on the number of telephone calls permitted per day and per week under the § 1006.14(b)(3) exclusions, while another industry commenter opposed such limits. Several industry commenters raised hypothetical questions regarding the operation of the proposed exclusion, such as whether it would cover telephone calls to a full voicemail, dropped telephone calls, telephone calls to a disconnected number, and forwarded telephone calls.

The Bureau determines that a person is unlikely to know about, and is not harassed by, a debt collector's telephone call in response to which the debt collector receives a busy signal or a message indicating that the dialed number is not in service. Similarly, a debt collector who places several telephone calls to a person in response to which the debt collector receives a busy signal or out-of-service notification likely places additional telephone calls to the person in an effort to contact the person and not with the intent to annoy, abuse, or harass the person. For these reasons, the Bureau is finalizing the proposed exclusion for telephone calls that do not connect to the dialed number, without additional limits.

The Bureau is finalizing proposed comment 14(b)(3)(iii)–1, with revisions and renumbered as comment 14(b)(3)(ii)–1, in response to a number of the hypothetical questions raised by commenters regarding the operation of the exclusion. With respect to such questions, the Bureau is addressing only the most likely scenarios, as follows. First, commenters asked about debt collectors placing telephone calls to a disconnected telephone number. As in the proposal, final comment 14(b)(3)(ii)–1 covers such scenarios by explaining that a debt collector's telephone call does not connect to the dialed number if, for example, the debt collector receives a busy signal or an indication that the dialed number is not in service.

Final comment 14(b)(3)(ii)–1 also clarifies a number of situations in which a telephone call connects to the dialed number. First, the comment specifies that a telephone call that is answered, even if it subsequently drops, has connected to the dialed number. The Bureau understands that dropped telephone calls pose unique challenges to debt collectors. Although such calls do not fit under the exclusion for telephone calls not connected to the dialed number, dropped calls may be addressed by other provisions in this final rule. For example, if a debt collector, at the outset of the telephone call, seeks consent to place additional telephone calls to a person if the telephone call disconnects, the telephone call placed by the debt collector following a disconnection would be excluded from the § 1006.14(b)(2)(i) telephone call frequencies pursuant to the prior consent exclusion in final § 1006.14(b)(3)(i). Moreover, if a debt collector does not seek consent, or the telephone call disconnects before a debt collector receives a person's prior consent, a debt collector who places another telephone call to the person shortly after the disconnection may be able to rebut the presumption of a violation under § 1006.14(b)(2)(ii), depending on the facts and circumstances surrounding the follow-up telephone call.[458]

Second, commenters presented variations of the scenario where a debt collector places a telephone call to a consumer and then hears nothing. In this scenario, if the telephone call is connected to the dialed number, even if the debt collector hears only silence, the telephone call does not meet the § 1006.14(b)(3)(ii) exclusion criteria. If a debt collector is unsure whether the telephone call connected to the dialed number, the debt collector should treat the telephone call as connected to the dialed number and count the telephone call toward the § 1006.14(b)(2)(i) frequencies.

Lastly, final comment 14(b)(3)(ii)–1 clarifies that a debt collector's telephone

[456] See comment 100(a)–1 for examples of evidence a debt collector could retain. Comment 100(a)–2 explains that a debt collector need not create and maintain additional records, for the sole purpose of evidencing compliance, that the debt collector would not have created in the ordinary course of its business in the absence of the record retention requirement set forth in § 1006.100(a). Comment 100(a)–3 explains that records may be retained by any method that reproduces the records accurately (including computer programs) and that ensures that the debt collector can easily access the records (including a contractual right to access records possessed by another entity).

[457] *See* 84 FR 23274, 23318 (May 21, 2019).

[458] As discussed in the section-by-section analysis of § 1006.14(b)(2)(ii), one factor for rebutting the presumption of a violation as described in comment 14(b)(2)(ii)–2.iv is whether a debt collector placed a telephone call to convey information to the consumer that, as shown through evidence, would provide the consumer with an opportunity to avoid a demonstrably negative effect relating to the collection of the particular debt, where the negative effect was not in the debt collector's control, and where time was of the essence.

call connects to the dialed number if the telephone call is connected to a voicemail or other recorded message, even if the debt collector is unable to leave a voicemail. In situations where a debt collector is unable to leave a voicemail, the debt collector's telephone call may have caused the consumer's telephone to ring or may otherwise leave evidence of the telephone call. The same is not true of telephone calls that do not connect to the dialed number. The comment also specifies that a telephone call has connected to the dialed number if the telephone call is connected to a voicemail or other recorded message even if the call did not cause the telephone to ring.

Based on feedback, another likely scenario involves a debt collector placing a telephone call that is forwarded to another telephone number. Although not clarified in commentary, the Bureau believes that, in this situation, the exclusion for unconnected telephone calls in final § 1006.14(b)(3)(ii) would not apply because the forwarded telephone call is handled by the dialed number; thus, the telephone call connects to the dialed number.

14(b)(3)(iii)

Proposed § 1006.14(b)(3)(iv) would have excluded from the frequency limits telephone calls that a debt collector places to the consumer's attorney, a consumer reporting agency, the creditor, the creditor's attorney, or the debt collector's attorney (*i.e.,* the persons described in proposed and final § 1006.6(d)(1)(ii) through (vi)).[459]

As discussed in the proposal, debt collectors may have non-harassing reasons for calling these persons more often than the § 1006.14(b)(2)(i) telephone call frequencies. For example, during litigation, a debt collector may need to speak frequently with its own attorneys, as well as with the creditor's or the consumer's attorneys. Telephone calls to these persons also are highly unlikely to have the natural consequence of harassing, oppressing, or abusing them for purposes of the FDCPA and final rule.

A consumer advocate and industry commenter supported this proposed exclusion. As described above, one industry commenter recommended that the Bureau place limits on the number of telephone calls permitted per day and per week under the § 1006.14(b)(3) exclusions, while another industry commenter opposed such limits. The Bureau concludes that additional limits are not necessary because these telephone calls are not placed by debt collectors with intent to annoy, abuse, or harass a person, and are highly unlikely to have the natural consequence of which is to harass, oppress, or abuse a person for purposes of the FDCPA and final rule. The Bureau therefore is finalizing proposed § 1006.14(b)(3)(iv) with minor grammatical changes and renumbered as § 1006.14(b)(3)(iii).

14(b)(4) Definition

Proposed § 1006.14(b)(5) would have defined the term particular debt for purposes of proposed § 1006.14(b) to mean each of a consumer's debts in collection, except for student loan debts.[460] With respect to student loan debts, the Bureau proposed the term particular debt to mean all debts that a consumer owes or allegedly owes that were serviced under a single account number at the time the debts were obtained by the debt collector. The Bureau also proposed to clarify how the telephone call frequency limits in proposed § 1006.14(b)(2) would apply when a consumer has multiple debts being collected by the same debt collector at the same time.[461] For the reasons discussed below, the Bureau is finalizing proposed § 1006.14(b)(5) with one minor grammatical change and renumbered as § 1006.14(b)(4). The Bureau is also revising the proposed commentary and adding additional examples of the rule.

Per-Debt Versus Per-Person Telephone Call Frequencies

Industry commenters generally supported the proposed per-debt approach to telephone call frequencies. The Bureau received hundreds of comments from the credit and collections industry stating that a per-debt approach is consistent with current debt collection practices and provides flexibility to use account-specific approaches and strategies for different types of debts, different account balances, and debts in different stages of collection. Some industry commenters explained that different clients have different data privacy requirements for the collection of their debts. Industry commenters warned that current system capabilities may not be able to support per-person telephone call frequencies because the systems are not set up to consolidate information about different debts owed by the same consumer, and any system changes would result in extensive reprogramming and training costs. Consumer and consumer advocate commenters argued that debt collectors' systems should be able to consolidate account information for each consumer, and that debt collectors should be able to identify all debts a consumer owes and discuss them at the same time to prevent harassment through excessive telephone calls placed to consumers with multiple debts in collection.

Some industry commenters cautioned that, if the Bureau adopted a per-person approach to telephone call frequencies, debt collectors' calling practices would be too restricted when collecting on multiple debts owed by the same consumer. These industry commenters warned that the market would respond by selling different debts to different debt collectors or staging and prolonging debt collection—both outcomes that, they asserted, would harm consumers.

On the other hand, consumer, consumer advocate, State Attorneys General, State legislator, and local government commenters, among others, generally urged the Bureau to adopt a per-person approach.[462] Some commenters argued that the proposed per-debt approach permits an unreasonably high number of telephone calls and weakens the FDCPA's consumer protections. Citing data from the CFPB Debt Collection Consumer Survey showing that 75 percent of people with one debt in collection have multiple debts in collection,[463] some of these commenters argued that the proposed per-debt approach would allow debt collectors to harass consumers with multiple debts by potentially placing hundreds of telephone calls per week. Some commenters identified the ineffectiveness of repeated telephone calls as another reason to adopt a per-person approach.[464] A State Attorney

[459] *See* 84 FR 23274, 23318 (May 21, 2019).

[460] *See id.* at 23320.

[461] The Bureau proposed this clarification because most consumers with at least one debt in collection have multiple debts in collection. *See* CFPB Debt Collection Consumer Survey, *supra* note 16, at 13, table 1; *see also* Bureau of Consumer Fin. Prot., *Consumer credit reports: A study of medical and non-medical collections,* at 20 (Dec. 2014), *https://files.consumerfinance.gov/f/201412_cfpb_reports_consumer-credit-medical-and-non-medical-collections.pdf* (CFPB Medical Debt Report) (reporting that most consumers with one collections tradeline have multiple collections tradelines).

[462] The Bureau also received a large number of comments from consumers advocating for a per-person approach.

[463] *See* CFPB Debt Collection Consumer Survey, *supra* note 16, at 13, table 1.

[464] One commenter supported this assertion by pointing to a pilot program focused on servicing defaulted student loans where the Bureau of the Fiscal Service at the U.S. Department of the Treasury placed more than 21,000 telephone calls in an attempt to initiate a dialogue regarding the borrower's debt. Borrowers answered the telephone calls less than 2 percent of the time. U.S. Dep't of

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General commenter stated that debt collectors in a particular State that limits telephone call frequency to three telephone calls per week per consumer have not been hindered in their ability to collect debt responsibly. A number of commenters also argued that the consumer benefits of the proposed limit of one telephone conversation per week will become illusory with a per-debt approach because consumers with multiple debts in collection will continue to receive telephone calls about other debts from debt collectors.

Some industry commenters believed that consumers would be overwhelmed and confused if, under a per-person approach, debt collectors were forced to discuss multiple debts in a single telephone call with a consumer. Consumer and consumer advocate commenters, among others, rejected this assertion, arguing instead that the proposed per-debt approach would overwhelm consumers financially and emotionally. Specifically, these commenters predicted that the proposed per-debt approach would cause an increased use of mobile telephone minutes and data; result in emotional harms such as chronic stress, shame, and anxiety; and manifest physically in the form of stress to the immune system and elevated blood pressure.

The Bureau understands that, if a consumer has multiple debts in collection, either from one creditor or from multiple creditors, sometimes a single debt collector will attempt to collect some or all of them. Debt collectors in this situation typically make distinct efforts to collect each debt rather than, for example, asking the consumer about all debts during a single telephone call. Although some commenters argued that addressing all debts in one telephone call could be more consumer-protective and decrease telephone call frequency, there are legitimate reasons why debt collectors segregate debts. For example, larger debt collectors often collect multiple debts owed by the same consumer to different creditors, and many creditors require these debt collectors to work each account separately (*e.g.,* a large collection firm may have a dedicated group of collectors exclusively working a particular credit card brand). Creditors impose these requirements, among other reasons, to direct and monitor more closely the activities and legal compliance of debt collectors working their accounts to avoid reputational harm to themselves. A consumer's debts also may enter collection at different times and thus be at different stages of the collections process, such that the different debts may be eligible for different types of settlement offers. The Bureau also recognizes that some consumers may not be able or prepared to discuss more than one debt during a single telephone call or may find it overwhelming, confusing, or simply too time consuming to discuss multiple debts, with different terms and offers, during a single telephone call. Debt collection conversations could become even more complicated if, for example, a consumer wanted to dispute one or some, but not all, of the debts.

As discussed in the proposal, the Bureau considered proposing a per-person approach to the telephone call frequencies, but was concerned that creditors could sidestep a per-person limit by placing debts with debt collectors who collect for only one or a limited number of creditors or by assigning only a single debt to any one debt collector; or that debt collectors could sequence collection of a consumer's debts, thereby prolonging the collections process for some debts. Industry commenters affirmed the likelihood of these outcomes if the Bureau were to adopt a per-person approach. So, while technology that would enable debt collectors to consolidate information about different debts owed by the same consumer, including across different creditor-clients, may exist, a per-person approach may not actually alter the overall telephone call frequency experienced by consumers who have multiple debts in collection and may raise other concerns. For this reason, the Bureau declines to adopt a per-consumer approach and is finalizing the per-debt approach as proposed.

Aggregating Student Loan Debts

As noted, the Bureau proposed the term particular debt to mean, for student loan debts, all debts that a consumer owes or allegedly owes that were serviced under a single account number at the time the debts were obtained by the debt collector.

One industry commenter specifically supported this proposal and also recommended that the Bureau adopt the same rule for all debts that are aggregated by a creditor and serviced under a single account-number before assignment to a debt collector. The Bureau declines to do so because the Bureau understands that debts other than student loan debts are often not serviced under the same account number, and therefore such an approach would provide little consumer benefit.

Other industry commenters generally urged the Bureau to adopt a per-debt rule for all debts, including student loan debts. These commenters argued that all debt types should be treated the same in order to not confuse the consumer and to ensure that the debt collector can adequately provide accurate information to the consumer. They stated that because most debtors have more than one debt in collection, aggregating certain debts but not others will cause confusion, and that during some conversations with a debt collector, a consumer will need to distinguish between multiple debts. The Bureau also declines to adopt this approach. With respect to the collection of multiple student loan debts that were serviced under a single account number at the time the debts were obtained by a debt collector, the debt collector and consumer generally interact as if there were only a single debt. Multiple student loan debts are often serviced under a single account number and billed on a single, combined account statement; have a single total amount due; and require a single payment from the consumer. As a result, many consumers already experience multiple student loan debts as a single debt, and the Bureau concludes that adopting such an approach in the final rule is unlikely to confuse consumers or cause consumers to get inaccurate information.

Some industry commenters also cautioned that the proposal to aggregate student loans could be problematic for a debt collector who is collecting on both Federal and private student loan debt. For example, the commenters noted that current regulations governing loans held by the Department of Education prohibit the sharing of information with any other debt collector database as well as the sharing of information with other debt collectors who may be attempting to contact the borrower. The commenters also explained that it would be unworkable for debt collectors to combine student loans that were originated with different lenders, and have different loan agreements, loan types, origination dates, fees, interest rates, and default dates. The Bureau believes that these commenters may have misunderstood the proposal. Because Federal and private student loans, and loans originated by different lenders, would not be serviced under the same account number at the time the debts were obtained by a debt collector, a debt collector would not be required to treat

Treasury, *Report on Initial Observations from the Fiscal-Federal Student Aid Pilot for Servicing Defaulted Student Loan Debt,* at 3 (July 2016), *https://www.treasury.gov/connect/blog/Documents/student-loan-pilot-report-july-2016.pdf.*

those student loan debts as a single debt.

Some commenters stated that the proposed approach was open to abuse by the industry. These commenters were concerned that lenders and servicers would assign different account numbers to student loan debts to prevent aggregation if the student loan debts were to end up in collection later on. One commenter suggested instead that the Bureau measure telephone call frequency by accounts as that term is described for purposes of the student loan servicing market in § 1090.106 of the Defining Larger Participants of Certain Consumer Financial Product and Service Markets regulation (Larger Participant Rule), rather than by particular debt.[465]

The Bureau believes that it is unlikely that its proposed approach will be exploited in the ways these commenters described. Whether a debt collector is required to aggregate student loan debts depends on whether the servicer serviced the student loans under the same account number at the time they were obtained by a debt collector. Servicers have little incentive to incur the cost of replacing their efficient practice of servicing multiple student loan debts under a single account number and billing such debts on a single, combined account statement that has a single total amount due and requires a single payment from the consumer, with the less efficient practice of billing each student loan debt individually, just so a possible future debt collector could place telephone calls in accordance with the § 1006.14(b)(2)(i) telephone call frequencies with respect to each individual student loan debt. In addition, the Bureau declines to use accounts as that term is described in § 1090.106 of the Larger Participant Rule. In the Larger Participant Rule, an individual account is one for which a financial institution is serving a specific borrower for a specific stream of fees from a creditor. As discussed in the preamble to the Larger Participant Rule, if a servicer is paid one fee by a lender for servicing both Federally insured loans and private education loans for a particular student, there would only be one account for the borrower for purposes of determining whether the servicer is considered a larger participant of the student loan servicing market.[466] If implemented as described in the Larger Participant Rule, such an approach could require certain debt collectors to aggregate Federal and private student loan debt information, which, as commenters noted, may be prohibited by Federal law.

Other commenters suggested that, instead of aggregating one type of debt, the Bureau should lower the telephone call frequencies and apply such frequencies on a per-person basis. As discussed in the section-by-section analysis of § 1006.14(b)(2), the Bureau is not finalizing the proposed telephone call frequency limits. Instead, the Bureau is finalizing a rebuttable-presumption approach to telephone call frequencies. The rebuttable-presumption approach contemplates that there may be circumstances in which telephone call frequencies below the limits proposed in § 1006.14(b)(2) may violate § 1006.14(b)(1) and FDCPA section 806(5).[467]

For all these reasons, the Bureau is finalizing the proposed approach to aggregate student loan debts serviced under a single account number at the time the debts were obtained by a debt collector.

Aggregating Medical Debts

Commenters, including consumer advocate commenters, expressed concern about potential excessive telephone call volume with respect to the collection of medical debts specifically. One commenter explained that it is not uncommon for a single medical appointment to result in bills from multiple providers, each of which could end up in collections if the patient is unable to pay. The commenter stated that the per-debt approach to telephone call frequencies would increase the likelihood that a single medical emergency would result in dozens of telephone calls each week, which the Bureau has recognized has a deleterious effect on consumer well-being. Commenters often cited a fact pattern in which a debt collector places 56 telephone calls to an alleged debtor in a week because the debt collector is collecting on eight medical debts stemming from the same medical incident. However, these commenters generally did not advocate for aggregation of medical debt. Instead, they advocated for a per-person approach to telephone call frequencies for all debt.

Some industry commenters asserted that healthcare providers do not typically maintain a rolling total of charges for a general service and instead individually bill each visit, which is further itemized by each provider, facility, and service performed or good provided. The commenters explained that a consumer's medical debt from one creditor may have numerous unique account numbers. Another industry commenter identified the need to maintain compliance with State and Federal medical privacy laws, although the commenter did not identify specific challenges that the proposal or alternatives would create.

According to the CFPB Debt Collection Consumer Survey, medical debt is the most common type of past-due bill or payment for which consumers reported debt collectors contacted them. More than half of consumers who said they were contacted about a debt in collection noted that it was related to medical debt.[468] The Bureau recognizes that consumers do not have control over how medical debt is billed to them and acknowledges that, under current medical debt billing practices, one medical event can result in multiple debts for a consumer.

However, the Bureau also recognizes that there are significant operational challenges with aggregating medical debt. As discussed above, the Bureau has identified concerns with implementing a per-person approach to the § 1006.14(b)(2)(i) telephone call frequencies generally. In addition, in contrast to some student loans, medical debts from one creditor may have numerous unique account numbers. Therefore, the Bureau declines to aggregate medical debts by account number for purposes of the telephone call frequencies in § 1006.14(b)(2)(i). However, as discussed below, the Bureau is committed to monitoring this issue closely after the final rule is implemented and, if necessary, will reconsider how the § 1006.14(b)(2)(i) telephone call frequencies apply to medical debts.

The Bureau also emphasizes that consumers can control when, how, and even if debt collectors can contact them. Section 1006.6(b)(1) prohibits a debt collector from, among other things, communicating or attempting to communicate with a consumer in connection with the collection of any debt at a time or place that the debt collector knows or should know is inconvenient to the consumer. In addition, § 1006.14(h)(1) provides that, in connection with the collection of any debt, a debt collector must not

[465] Section 1090.106 describes an individual account as one where a financial institution is serving a specific borrower for a specific stream of fees from a creditor.

[466] 78 FR 73383, 73388 (Dec. 6, 2013).

[467] See the section-by-section analysis of § 1006.14(b)(2) for a more thorough discussion of the telephone call frequencies.

[468] *See* CFPB Debt Collection Consumer Survey, *supra* note 16, at 21, figure 2.

communicate or attempt to communicate with a person through a medium of communication, including telephone calls, if the person has requested that the debt collector not use that medium to communicate with the person. A consumer may also notify a debt collector in writing that the consumer wants the debt collector to cease further communication with the consumer with respect to a debt, and pursuant to § 1006.6(c)(1), a debt collector must not communicate or attempt to communicate further with the consumer with respect to that debt.

For the reasons discussed above, the Bureau is renumbering § 1006.14(b)(5) as § 1006.14(b)(4) and finalizing it generally as proposed. The Bureau is making one minor grammatical amendment. Specifically, the Bureau is replacing the article ''the'' preceding the phrase ''debt collector'' with ''a'' to account for circumstances in which a debt collector collecting student loan debts is not the same debt collector that obtained such debts from the entity servicing the student loans. Final § 1006.14(b)(4) thus provides that the term particular debt means each of a consumer's debts in collection, except that, in the case of student loan debts, the term means all student loan debts that a consumer owes or allegedly owes that were serviced under a single account number at the time the debts were obtained by a debt collector. The Bureau expects to monitor the market in response to the final rule. If substantial evidence develops that debt collectors who are placing telephone calls in compliance with the per-debt telephone call frequencies are nonetheless harassing consumers, the Bureau could potentially revisit the per-debt approach to telephone call frequencies for all or certain types of debts, such as medical debts, in a future rulemaking.

The Bureau also is revising commentary to proposed § 1006.14(b)(5) in response to requests for clarification from several industry commenters. Some of these commenters asked whether particular types of calls would count toward the proposed telephone calling limits, while others asked how to aggregate or otherwise count such calls. A number of commenters offered suggestions for resolving such hypotheticals while others did not.

In response to commenters' questions, the Bureau is amending proposed comment 14(b)(5)–1, renumbered as comment 14(b)(4)–1, to include additional examples to illustrate the rule. The Bureau also is adding comments 14(b)(4)–1.i and .ii to explain if a debt collector has placed a telephone call for purposes of counting the telephone call frequency under § 1006.14(b)(2)(i)(A) and if a debt collector has engaged in a telephone conversation for purposes of determining whether subsequent telephone calls meet the telephone call frequency under § 1006.14(b)(2)(i)(B).

As provided in comment 14(b)(4)–1.i, if a debt collector places a telephone call to a person and initiates a conversation or leaves a voicemail about one particular debt, the debt collector counts the telephone call as a telephone call in connection with the collection of the particular debt, subject to the exclusions in § 1006.14(b)(3). If a debt collector places a telephone call to a person and initiates a conversation or leaves a voicemail about more than one particular debt, the debt collector counts the telephone call as a telephone call in connection with the collection of each such particular debt, subject to the exclusions in § 1006.14(b)(3). If a debt collector places a telephone call to a person but neither initiates a conversation about a particular debt nor leaves a voicemail that refers to a particular debt, or if the debt collector's telephone call is unanswered, the debt collector counts the telephone call as a telephone call in connection with the collection of at least one particular debt, unless an exclusion in § 1006.14(b)(3) applies.

As provided in comment 14(b)(4)–1.ii, if a debt collector and a person discuss one particular debt during a telephone conversation, the debt collector has engaged in a telephone conversation in connection with the collection of the particular debt, regardless of which party initiated the discussion about the particular debt, subject to the exclusions in § 1006.14(b)(3). If a debt collector and a person discuss more than one particular debt during a telephone conversation, the debt collector has engaged in a telephone conversation in connection with the collection of each such particular debt, regardless of which party initiated the discussion about the particular debts, subject to the exclusions in § 1006.14(b)(3). If no particular debt is discussed during a telephone conversation between a debt collector and a person, the debt collector counts the conversation as a telephone conversation in connection with the collection of at least one particular debt, unless an exclusion in § 1006.14(b)(3) applies.

Final comment 14(b)(4)–2 provides examples of the rules for counting telephone calls under various scenarios.

14(h) Prohibited Communication Media [469]

14(h)(1) In General

The Bureau proposed § 1006.14(h)(1) to prohibit a debt collector from communicating or attempting to communicate with a consumer through a medium of communication if the consumer has requested that the debt collector not use that medium to communicate with the consumer.[470] Pursuant to its authority under FDCPA section 814(d) to write rules with respect to the collection of debts by debt collectors, the Bureau proposed § 1006.14(h)(1) as an interpretation of FDCPA section 806, which prohibits a debt collector from engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. For the reasons discussed below, the Bureau is adopting this proposed interpretation and finalizing § 1006.14(h)(1) largely as proposed, while revising it to apply to a ''person,'' as defined under § 1006.2(k).

Consumer commenters supported the proposal to permit a consumer to limit the communication media used by a debt collector, and consumer advocate, government, and industry commenters generally supported proposed § 1006.14(h)(1) as offering consumers more control over communications received from debt collectors.

Consumer advocates agreed that a debt collector should be required to stop calling specific telephone numbers and sending email, text messages, or other electronic communications upon the consumer's request. Describing proposed § 1006.14(h)(1) as a critical consumer protection, one consumer advocate stated that clarifying this right under the FDCPA will ensure that consumers are not harassed while also allowing them to communicate with debt collectors without requesting that the debt collector stop all communication, thus preventing unnecessary debt collection lawsuits from being filed. Consumer advocates also stated that the Bureau's interpretation is consistent with FDCPA section 806, specifically FDCPA section 806(5) where some courts have found consumers stated a claim for violations of the FDCPA when debt collectors continued to call after being asked to stop. Other consumer advocates

[469] As noted above, § 1006.14(c) through (g) generally mirror the statute, with minor wording and organizational changes for clarity and therefore are not further discussed in this section-by-section analysis.

[470] 84 FR 23274, 23321–22 (May 21, 2019).

suggested that consumers would benefit greatly from being able to specify contact through various communications media, allowing consumers the ability to stop telephone calls, for example, or other types of communication without stopping all communications.

A group of State Attorneys General agreed that consumers should be able to put any limitations on the use of new technology that they desire, and that, because consumers already have an absolute right to demand that debt collection communications cease, they should have the right to place any lesser limitations on communication, such as limitations on medium or frequency of communication. Additionally, one academic commenter explained that people are sensitive to communication methods and that, even when internet access is reliable, many people may prefer to communicate in person, by telephone, or by letter, including some people with mental illness, who may struggle with electronic communication due to confusion about how to use it or concerns about safety and privacy.

A number of industry commenters generally agreed with proposed § 1006.14(h)(1) on the basis that consumer requests must be respected when it comes to their preferred methods of communication. One industry commenter stated that the proposal would allow a debt collector to communicate with a consumer while also providing adequate consumer safeguards by prohibiting the debt collector from communicating with the consumer through communication media that the consumer requested the debt collector not use. And one trade group commenter supported proposed § 1006.14(h)(1) and agreed it is consistent with FDCPA section 806.

Some industry commenters opposed the proposal in § 1006.14(h)(1) as needlessly restrictive and difficult to implement and stated that it would offer few, if any, countervailing consumer benefits. One industry commenter stated that proposed § 1006.14(h)(1) would limit a debt collector on how best to communicate with consumers who may have a preference of one communication method over another. One trade group commenter suggested that proposed § 1006.14(h)(1) impermissibly expands the scope of the FDCPA.

The Bureau determines that § 1006.14(h)(1) affords various consumer benefits and protections. Since the enactment of the FDCPA, the possible media through which communications generally are conducted has expanded beyond telephone, mail, and in-person conversations to include various mobile and portable technologies that were not contemplated in 1977. For example, with the advent of the mobile telephone, a person may receive a telephone call at any time or place. As the Bureau's Consumer Survey indicated, consumers have varied but strong preferences about the media that debt collectors use to communicate with them.[471] Once a person has requested that a debt collector not use a specific medium of communication to communicate with that person, the Bureau believes that the natural consequence of further communications or attempts to communicate from the debt collector to that person using that same medium likely is harassment, oppression, or abuse of that person. Consistent with this interpretation, the Bureau understands that some debt collectors currently refrain from communicating with a person through a medium that the person has requested the debt collector not use to communicate with that person, including, for example, specific telephone numbers that a person has asked the debt collector not to call.

Accordingly, the Bureau is finalizing § 1006.14(h)(1) as proposed and revising it to apply to a ''person.'' Consistent with its authority under FDCPA section 814(d) to write rules with respect to the collection of debts by debt collectors, and because the Bureau is adopting § 1006.14(h)(1) as an interpretation of FDCPA section 806, which prohibits a debt collector from engaging in any conduct the natural consequence of which is to harass, oppress, or abuse ''any person'' in connection with the collection of a debt, the Bureau is finalizing § 1006.14(h)(1) to apply to a person, as defined under § 1006.2(k), and not to limit it as proposed to a consumer as defined under § 1006.6(a).

One consumer advocate suggested that the rule should provide that a consumer's demand to stop any one communication medium should stop all communications, unless the consumer affirmatively specifies otherwise, while a group of consumer advocates similarly suggested that one opt-out request (*e.g.,* in response to an email) be applied to all types of communications from the creditor, debt collector, and debt buyer for a given debt. Two industry commenters, on the other hand, requested that the Bureau clarify that a consumer's request to no longer receive communications through one medium is not to be treated as a blanket cease communication request for purposes of § 1006.6(c).

In response to commenters' requests, the Bureau notes that, as discussed in the section-by-section analysis of § 1006.6(c), FDCPA section 805(c), as implemented by § 1006.6(c), provides that, subject to certain exceptions, if a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt.[472] Separately, the Bureau is finalizing § 1006.14(h)(1) as an interpretation of FDCPA section 806, which, in relevant part, prohibits a debt collector from engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.[473] Therefore, whereas § 1006.6(c)(1) would prohibit a debt collector, subject to certain exceptions, from all further communications or attempts to communicate with a consumer regarding a particular debt, § 1006.14(h)(1) would prohibit a debt collector from communications or attempts to communicate with a person through a medium of communication that the person has requested the debt collector not use to communicate with the person for all debts. Although these provisions are distinct in their reliance on separate FDCPA authorities (FDCPA sections 805(c) versus 806), in principle they are similar in that they both afford an individual greater control over the communications received from a debt collector. However, final § 1006.14(h)(1) is narrower than final § 1006.6(c)(1) in that, depending on the request by the person, final § 1006.14(h)(1) prohibits a debt collector from communicating or attempting to communicate with that person only through a specific communication medium or media and does not constitute a broader communication restriction, whereas final § 1006.6(c)(1) prohibits a debt collector from all further communications or attempts to communicate with a consumer.

One industry commenter requested that the Bureau adopt a safe harbor for up to seven days to allow a debt collector's systems reasonable time to update a consumer request pursuant to proposed § 1006.14(h)(1). For reasons similar to those discussed in the section-by-section analysis of

[471] *See* CFPB Debt Collection Consumer Survey, *supra* note 16, at 36–37.

[472] *See* 15 U.S.C. 1692c(c). *See* the section-by-section analysis of § 1006.6(c) for additional discussion.

[473] *See* 15 U.S.C. 1692d.

§ 1006.6(c)(1), this final rule does not specify the period of time afforded a debt collector to update its systems to reflect a person's request under § 1006.14(h)(1). However, depending upon the circumstances, FDCPA section 813(c)'s bona fide error defense to civil liability may apply where, notwithstanding the maintenance of procedures reasonably adapted to avoid any such error, a debt collector communicates or attempts to communicate with a person through a medium of communication after the person has requested that the debt collector not use that medium but before the debt collector has implemented the person's request.[474]

A group of consumer advocates stated that the Bureau should require all consumer requests to stop a debt collector's communications through a particular medium be noted in the debt collector's file and transferred to the creditor or a subsequent debt collector, and in turn, should provide that future debt collectors would be obligated to honor the consumer's request. Similarly, one local government commenter requested that the Bureau require a debt collector selling or otherwise transferring a debt to another debt collector to share any instructions by the consumer opting out of any medium of communication. One trade group commenter suggested that, if a consumer requested a previous debt collector not use a particular medium, the subsequent debt collector should be granted a safe harbor until the consumer communicates that preference.

The proposal would not have required a debt collector to transfer such information to a creditor or subsequent debt collector, and neither does this final rule.[475] A debt collector thus would not be bound by a request that a person had submitted to a prior debt collector under § 1006.14(h). While this approach may require a person to again request that a medium of communication not be used if an account is transferred from one debt collector to another, the Bureau believes that, as described in the section-by-section analysis of § 1006.6(e), a person who objects to one debt collector's use of a medium of communication might not object to another debt collector's use of that same medium.

A group of consumer advocates requested that the Bureau address how consumers will learn of their right to ask debt collectors not to use certain communication media, suggesting that the Bureau require debt collectors to orally notify consumers in each debt collection call about the right to opt out of receiving telephone calls. Similarly, one local government commenter stated the Bureau should ensure that debt collectors clearly and conspicuously convey to consumers that they have the option to not only opt out of electronic communications, but that they can choose not to receive any telephone calls or telephone calls to a particular number.

The Bureau determines that consumers, without additional disclosures, currently make such requests of debt collectors and will likely continue to do so. In addition, the procedures in § 1006.6(e) require a debt collector to disclose to a consumer the ability to opt out of electronic communications to a particular email address, telephone number, or other electronic-medium address. Accordingly, the Bureau declines to include an additional disclosure requirement related to § 1006.14(h).

For the reasons discussed above, the Bureau is finalizing § 1006.14(h)(1) to provide that, in connection with the collection of any debt, a debt collector must not communicate or attempt to communicate with a person through a medium of communication if the person has requested that the debt collector not use that medium to communicate with the person.

The Bureau also proposed commentary to § 1006.14(h)(1). Proposed comment 14(h)(1)–1 referred to comment 2(d)–1 for examples of communication media. The Bureau received no comments on proposed comment 14(h)(1)–1 and is finalizing it largely as proposed, with certain revisions to include, similar to comment 6(b)(1)–1, that a debt collector may ask follow-up questions regarding preferred communication media to clarify statements by the person.

Proposed comment 14(h)(1)–2 clarified that, within a medium of communication, a consumer may request that a debt collector not use a specific address or telephone number and provided an example. The Bureau received no comments on proposed comment 14(h)(1)–2 and is finalizing it largely as proposed, with certain revisions consistent with § 1006.14(h)(1).

Commenters requested clarification with respect to how a person may invoke the protections that would be afforded under proposed § 1006.14(h)(1). A number of consumer advocates requested that the Bureau clarify that a request pursuant to § 1006.14(h)(1) may be made using any reasonable method, for example orally, whereas two industry commenters asked the Bureau to require that the request must be made in writing. The Bureau declines to adopt a writing requirement. While FDCPA section 805(c), as implemented by § 1006.6(c), requires a consumer to notify a debt collector in writing, that provision applies only if a consumer wishes a debt collector to cease all communication; the Bureau concludes that a similar writing requirement is not necessary or warranted in the context of § 1006.14(h)(1), which provides a person with the opportunity to make a narrower request regarding communication media. As discussed in the section-by-section analysis of § 1006.6(c)(1), the Bureau declines to extend § 1006.6(c)(1) to oral requests but does clarify that, depending on the facts and circumstances, a consumer's oral request to, for example, ''stop calling'' would constitute a request that the debt collector not use that medium of communication (*e.g.,* telephone calls) to communicate with the consumer, and consistent with § 1006.14(h)(1), the debt collector would thereafter be prohibited from placing telephone calls to the consumer.[476] The Bureau is adopting new comment 14(h)(1)–3.i to provide an example illustrating this aspect of the rule.

Additionally, the Bureau is adopting new comment 14(h)(1)–3.ii to provide an example illustrating a consumer's request to opt out in response to receipt of either the opt-out procedures described in final § 1006.6(d)(4)(ii) or the opt-out notice in final § 1006.6(e). Assuming that, in response to receipt of either the opt-out notice described in § 1006.6(d)(4)(ii) or the opt-out instructions in § 1006.6(e), a consumer requests to opt out of receiving electronic communications from a debt collector at a particular email address or telephone number, comment 14(h)(1)–3.ii clarifies that the consumer has requested that the debt collector not use that email address or telephone number to electronically communicate with the consumer for any debt. Thereafter, § 1006.14(h)(1) prohibits the debt collector from electronically communicating or attempting to communicate with the consumer through that email address or telephone number.

14(h)(2) Exceptions

The Bureau proposed § 1006.14(h)(2) to provide two exceptions to the general

[474] *See* the section-by-section analysis of § 1006.6(c)(1).

[475] *See* the section-by-section analysis of § 1006.6(b)(1).

[476] *See* the section-by-section analysis of § 1006.6(c)(1).

prohibition in proposed § 1006.14(h)(1). Specifically, proposed § 1006.14(h)(2)(i) provided that, notwithstanding the prohibition in § 1006.14(h)(1), if a consumer opts out in writing of receiving electronic communications from a debt collector, a debt collector may reply once to confirm the consumer's request to opt out, provided that the reply contains no information other than a statement confirming the consumer's request. And proposed § 1006.14(h)(2)(ii) provided that, if a consumer initiates contact with a debt collector using an address or a telephone number that the consumer previously requested the debt collector not use, the debt collector may respond once to that consumer-initiated communication. The Bureau proposed § 1006.14(h)(2) because a single communication from a debt collector of the types described likely would not have the natural consequence of harassing, oppressing, or abusing the consumer within the meaning of FDCPA section 806.[477] One industry commenter supported the two proposed exceptions as helpful to both consumers and debt collectors and described them as designed to facilitate communications that are reasonable under the circumstances. For the reasons discussed below, the Bureau is finalizing § 1006.14(h)(2)(i) and (ii) as proposed, with certain clarifications, and, in response to comments, is adopting an additional exception under § 1006.14(h)(2)(iii) for legally required communication media.

14(h)(2)(i)

Proposed § 1006.14(h)(2)(i) provided that, notwithstanding the prohibition in § 1006.14(h)(1), if a consumer opts out in writing of receiving electronic communications from a debt collector, a debt collector may reply once to confirm the consumer's request to opt out, provided that the reply contains no information other than a statement confirming the consumer's request. One industry commenter explained that it is fairly common for businesses to send a consumer who opts out of email communication a confirmation message to indicate that the consumer's request has been honored; the commenter stated that debt collectors should be able to continue this practice. Other industry commenters requested that the Bureau clarify the reference to a consumer's written opt-out request in proposed § 1006.14(h)(1)(i), given that proposed § 1006.14(h)(1) does not contain a writing requirement. A group of consumer advocates requested that, in order to protect consumers who have opted out of a workplace communication medium, the Bureau clarify that the exception under proposed § 1006.14(h)(2)(i) does not apply if a debt collector knows or should know that the written opt-out request came from a workplace-provided communication channel, such as an employer-provided email address.[478]

In response to these comments, the Bureau is finalizing § 1006.14(h)(2)(i) as proposed, with certain clarifications and revisions consistent with final § 1006.14(h)(1). The Bureau is striking the reference to ''in writing'' to clarify that a person's request to opt out of receiving electronic communications from a debt collector need not be in writing.[479] Relatedly, consistent with the permission for a debt collector to reply once, a debt collector may send an electronic confirmation of the person's request to opt out. The Bureau believes that a single electronic communication from a debt collector to confirm a person's request to opt out of receiving electronic communications from a debt collector likely would not have the natural consequence of harassing, oppressing, or abusing the person within the meaning of FDCPA section 806. As finalized, § 1006.14(h)(2)(i) also provides that the electronic confirmation may state that the debt collector will honor the person's request. Accordingly, final § 1006.14(h)(2)(i) provides that, notwithstanding the prohibition in § 1006.14(h)(1), if a person opts out of receiving electronic communications from a debt collector, a debt collector may send an electronic confirmation of the person's request to opt out, provided that the electronic confirmation contains no information other than a statement confirming the person's request and that the debt collector will honor it.

14(h)(2)(ii)

Proposed § 1006.14(h)(2)(ii) provided that, if a consumer initiates contact with a debt collector using an address or a telephone number that the consumer previously requested the debt collector not use, the debt collector may respond once to that consumer-initiated communication. One industry commenter supported this proposed exclusion, explaining that it makes sense to allow a business to respond to a consumer-initiated communication using the same medium used by the consumer, even in circumstances where the consumer had previously chosen to opt out from that communication medium. Two trade group commenters suggested that, if a consumer contacts a debt collector using a medium that the consumer requested the debt collector not use, the consumer should be deemed to have waived the protections under proposed § 1006.14(h)(1). One consumer commenter stated that the proposed exclusion for consumer-initiated communications should be modified to exclude employer-provided communication media, and a group of consumer advocates urged the Bureau to exclude addresses and telephone numbers that a debt collector knows or should know are employer-provided, unless the debt collector confirms with the consumer that it is permissible to use them again.

The Bureau is finalizing § 1006.14(h)(2)(ii) largely as proposed, with certain clarifications in response to comments and revisions consistent with final § 1006.14(h)(1). As suggested by the commenter above, and consistent with new comment 6(b)(1)–2, the Bureau is revising § 1006.14(h)(2)(ii) to permit a debt collector to respond once through the same medium of communication used by the person. The Bureau determines that a single communication from a debt collector in response to a communication initiated by a person using that medium of communication likely would not have the natural consequence of harassing, oppressing, or abusing the person within the meaning of FDCPA section 806. The Bureau concludes this is the case even with respect to employer-provided email addresses because, as explained in the section-by-section analysis of § 1006.6(d)(4)(i), consumers are generally better positioned than debt collectors to determine if third parties have access to a particular email account used by a consumer, whether personal or employer provided.[480] Accordingly, final § 1006.14(h)(2)(ii) provides that, notwithstanding the prohibition in § 1006.14(h)(1), if a person initiates contact with a debt

[477] Proposed § 1006.14(h)(2) also is consistent with the regulations implementing the CAN–SPAM Act, which permit senders to send a reply electronic message. *See* 16 CFR 316.5.

[478] For special rules regarding employer-provided email addresses, see § 1006.22(f)(3) and its associated commentary.

[479] As discussed in the section-by-section analysis of § 1006.6(e), the final rule requires a debt collector to provide, in each electronic communication, a clear and conspicuous statement describing a reasonable and simple method by which the consumer can opt out of further electronic communications or attempts to communicate by the debt collector to that address or telephone number. Nothing in § 1006.6(e) prohibits a debt collector from accepting an opt-out request made orally.

[480] *See* the section-by-section analysis of § 1006.6(d)(4)(i).

collector using a medium of communication that the person previously requested the debt collector not use, the debt collector may respond once through the same medium of communication used by the person.

14(h)(2)(iii)

Proposed § 1006.14(h)(2) did not include an exception for legally required communications; however, the Bureau requested comment on whether there are specific laws that require communication with a consumer through a specific medium, and if so, whether additional clarification is needed regarding the delivery of legally required communications through a specific medium of communication required by applicable law if the consumer has requested that the debt collector not use that medium to communicate with the consumer. Two industry commenters explained that court orders as well as certain Federal and State laws, including State laws relating to service of process and contracts, can require communication through a specific medium that could contradict a consumer's request that a debt collector not use that communication medium, including, for example, various notices under State laws that are required to be mailed and in some cases specifically by first-class or certified mail. These commenters requested the Bureau clarify that compliance with a conflicting law and or court order serve as a safe harbor or defense to a claim under the FDCPA. Another industry commenter specifically requested that the Bureau clarify how a debt collector who is also a mortgage servicer could comply with the periodic statement requirement for residential mortgage loans under Regulation Z.

In light of these comments, the Bureau is adopting new § 1006.14(h)(2)(iii), which provides that, notwithstanding the prohibition in § 1006.14(h)(1), if otherwise required by applicable law, a debt collector may communicate or attempt to communicate with a person in connection with the collection of any debt through a medium of communication that the person has requested the debt collector not use to communicate with the person.

The Bureau is also adopting new comment 14(h)(2)–1 to provide an example illustrating the exception adopted under § 1006.14(h)(2)(iii). New comment 14(h)(2)–1 provides that, under § 1006.14(h)(2)(iii), if otherwise required by applicable law, a debt collector may communicate or attempt to communicate with a person in connection with the collection of any debt through a medium of communication that the person has requested the debt collector not use to communicate with the person. For example, assume that a debt collector who is also a mortgage servicer subject to the periodic statement requirement for residential mortgage loans under Regulation Z, 12 CFR 1026.41, is engaging in debt collection communications with a person about the person's residential mortgage loan. The person tells the debt collector to stop mailing letters to the person, and the person has not consented to receive statements electronically in accordance with 12 CFR 1026.41(c). Although the person has requested that the debt collector not use mail to communicate with the person, § 1006.14(h)(2)(iii) permits the debt collector to mail the person periodic statements, because the periodic statements are required by applicable law.

Section 1006.18 False, Deceptive, or Misleading Representations or Means

FDCPA section 807 generally prohibits a debt collector from using any false, deceptive, or misleading representations or means in connection with the collection of any debt and lists 16 non-exhaustive examples of such prohibited conduct.[481] The Bureau proposed § 1006.18 to implement FDCPA section 807.[482] Proposed § 1006.18 generally restated the statute with only minor wording changes for clarity, except for certain organizational changes and interpretations in proposed § 1006.18(e) through (g).

The Bureau proposed to organize § 1006.18 by grouping the 16 non-exhaustive examples of prohibited false or misleading representations in FDCPA section 807 into categories of related conduct. Specifically, the Bureau proposed § 1006.18(a) to implement the general prohibition in FDCPA section 807 against debt collectors using any false, deceptive, or misleading representation or means in connection with the collection of any debt. Proposed § 1006.18(b) restated FDCPA section 807's examples of false, deceptive, or misleading representations.[483] Proposed § 1006.18(c) restated FDCPA section 807's examples of false, deceptive, or misleading collection means.[484] Proposed § 1006.18(d) restated the catch-all prohibition against false representations or deceptive means as described in FDCPA section 807(10). Proposed § 1006.18(e) addressed the disclosures required under FDCPA section 807(11). Finally, proposed § 1006.18(f) addressed the use of assumed names by debt collectors' employees, and proposed § 1006.18(g) addressed misrepresentations of meaningful attorney involvement in debt collection litigation.

A number of individual consumer commenters asked the Bureau to prohibit specific examples of false statements that debt collectors had made to the commenters, such as claims that the consumer would be deported or arrested for failing to pay a debt. While the final rule does not enumerate additional specific false statements, the Bureau notes that § 1006.18's general prohibition on any false, deceptive, or misleading representation or means in connection with the collection of any debt prohibits the false statements described by commenters.

The Bureau also received two overarching comments regarding proposed § 1006.18. One industry commenter asked the Bureau to clarify that a debt collector who makes immaterial false statements orally does not violate § 1006.18.[485] This commenter suggested that the Bureau could develop a warning letter template that consumers could send to a debt collector to clarify any potential misstatements before suing the debt collector for violating the FDCPA's prohibition on false representations. This commenter further suggested that the Bureau provide a list of specific statements that debt collectors could use to inform consumers of the credit reporting status of their debts or of the effect of paying their debts without violating the FDCPA's prohibition on false representations.

The Bureau declines to adopt these suggestions. The FDCPA does not qualify the prohibition on false, deceptive, or misleading representations, and the Bureau did not propose to categorically interpret certain

[481] 15 U.S.C. 1692e.

[482] *See* 84 FR 23274, 23322–24 (May 21, 2019).

[483] Proposed § 1006.18(b)(1)(i) through (viii) would have implemented, respectively, paragraphs (1), (16), (3), (7), (6), (12), (13), and (15) of FDCPA section 807, and proposed § 1006.18(b)(2) would have implemented FDCPA section 807(2). The Bureau explained that restating the statutory language was not intended to suggest any particular interpretation of that language. For example, the omission of the words ''or imply'' from the introductory language to proposed § 1006.18(b)(2) consistent with the statutory language in FDCPA section 807(2) was not intended to suggest that the Bureau would not regard implied false representations as violations of FDCPA section 807 or 807(2) or proposed § 1006.18(b)(2).

[484] Proposed § 1006.18(c)(1) through (4) would have implemented, respectively, paragraphs (5), (8), (9), and (14) of FDCPA section 807.

[485] Other commenters addressed specific provisions within proposed § 1006.18, and these comments are discussed below.

types or methods of statements as compliant with § 1006.18. A consumer's understanding of a statement generally depends both on the statement itself and on the facts and circumstances surrounding the statement. Similarly, although the Bureau encourages communication between consumers and debt collectors, the Bureau did not propose and does not support conditioning a consumer's access to the judicial system on the consumer sending a warning letter to a debt collector. Finally, the Bureau is not creating safe harbor statements regarding credit reporting. The Bureau concludes that safe harbors for general statements about credit reporting are unnecessary for simple statements about a debt collector's actions, and safe harbors may not be accurate or effective for complicated statements about the effects of paying a debt on a consumer's credit report, credit score, creditworthiness, or likelihood of receiving credit because these effects depend on the facts and circumstances of a particular case.[486]

For these reasons, and pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors and to implement and interpret FDCPA section 807, the Bureau is finalizing § 1006.18 largely as proposed, except with respect to the provisions proposed in § 1006.18(d) through (g) as discussed below.

18(d) False Representations or Deceptive Means

FDCPA section 807(10) prohibits debt collectors from using any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer. As noted above, proposed § 1006.18(d) restated this catch-all prohibition. The Bureau is finalizing § 1006.18(d) as proposed but, as discussed below, is adding new comment 18(d)–1 to address feedback received regarding the possibility of debt collectors employing deceptive means to collect debts using social media.

The Bureau received a number of comments from government commenters and others expressing concern about the possibility of deception when debt collectors use social media to collect debts. The commenters explained that if, when debt collectors communicate or attempt to communicate with consumers using social media, debt collectors do not clearly indicate their identity and the fact that they are collecting a debt, consumers will not understand that they are communicating with a debt collector and will be vulnerable to deceptive conduct. For example, commenters highlighted concerns with debt collectors submitting a Facebook ''friend request'' or a LinkedIn ''connection'' while omitting information about the debt collector's true purpose, in order to engage in collection communications or to obtain information about consumers. A group of State Attorneys General stated that all debt collection communications sent using social media should be accompanied by a notice that the purpose of the communication is to collect a debt.[487] Similarly, Federal government agency staff indicated in its comment that the agency has initiated enforcement actions against debt collectors for using false pretenses to engage consumers in conversation through social media.

The Bureau recognizes that there are unique consumer concerns presented by social media interactions with debt collectors, whether through direct messaging or connections generally. To clarify the application of the final rule to the type of conduct described by commenters, the Bureau is adding comment 18(d)–1. Comment 18(d)–1 restates the general rule of § 1006.18(d) and provides two examples.

First, given the purpose of social media platforms marketed for social or professional networking purposes, such as Facebook or LinkedIn, a consumer who receives a ''friend'' or ''connection'' request on such a platform would take away from the request that the requester is interested in a social or professional networking relationship. This consumer takeaway would be false if the request is from a debt collector in connection with the collection of a debt, and this false claim may cause the consumer to accept a request that the consumer otherwise would not have accepted. Such deceptive means of engaging with the consumer violate § 1006.18(d). To address this, comment 18(d)–1.i provides an example of a debt collector who sends a private message to a consumer, in connection with the collection of a debt, requesting to be added as one of the consumer's contacts on a social media platform marketed for social or professional networking purposes. The comment explains that a debt collector makes a false representation or implication if the debt collector does not disclose his or her identity as a debt collector when making a friend or connection request on social media.

Second, the Bureau is including an example to clarify that a debt collector using a social media account for the purpose of engaging with third parties to obtain location information about a consumer must use a profile that accurately identifies the debt collector's individual name. Specifically, comment 18(d)–1.ii provides an example of a debt collector who sends a private communication to a friend or coworker of the consumer on a social media platform for the purpose of obtaining location information. The comment states that, pursuant to § 1006.10(b)(1), the debt collector must identify himself or herself individually by name, and that, pursuant to § 1006.18(d), the debt collector must communicate using a profile that accurately identifies the debt collector's individual name. To clarify that this comment is not intended to prohibit the use of an otherwise permissible assumed name, the comment includes a cross-reference to § 1006.18(f). The comment also states that the debt collector must comply with the other applicable requirements of §§ 1006.6(d)(1), 1006.10, and 1006.22(f)(4) when communicating with third parties.

Because the use of social media by debt collectors is a relatively new practice, the Bureau intends to monitor closely developments in this space. The Bureau also emphasizes that the general prohibition on false, deceptive, or misleading conduct with any person may prohibit social media activities that are not specifically discussed in comment 18(d)–1.

18(e) Disclosures Required

The Bureau proposed § 1006.18(e) to implement FDCPA section 807(11), which requires debt collectors to disclose in their initial communications with consumers that they are attempting to collect a debt and that any information obtained will be used for that purpose, and to disclose in their subsequent communications with consumers that the communication is from a debt collector, except in a formal pleading made in connection with a legal action (the ''mini-*Miranda* disclosure'').[488]

[486] *See* Bureau of Consumer Fin. Prot., CFPB Bulletin 2013–08, Fair Debt Collection Practices Act and the Dodd-Frank Act (July 10, 2013), *https://files.consumerfinance.gov/f/201307_cfpb_bulletin_collections-consumer-credit.pdf.*

[487] Some commenters requested that the Bureau restrict debt collectors from sending private direct messages to consumers on social media platforms. Those comments are discussed in the section-by-section analysis of § 1006.22(f)(4).

[488] 15 U.S.C. 1692e(11). Proposed § 1006.18(e)(1) addressed initial communications, proposed § 1006.18(e)(2) addressed subsequent communications, and proposed § 1006.18(e)(3) provided an exception for legal pleadings.

Proposed comment 18(e)(1)–1 described the circumstances in which debt collectors would be required to provide disclosures in initial communications under proposed § 1008.18(e)(1). Proposed comment 18(e)(1)–1 specified that a debt collector must provide the disclosures in the debt collector's initial communication with the consumer, regardless of whether that initial communication is written or oral, and regardless of whether the debt collector or the consumer initiated the communication. Proposed comment 18(e)(1)–1 also provided an example of the rule regarding required disclosures during initial communications. Proposed comment 18(e)–1 provided general commentary to explain how the disclosure requirements in proposed § 1006.18(e) would interact with the proposal's limited-content message, a message that was not a communication under proposed § 1006.2(d).

For the reasons discussed below, the Bureau is finalizing § 1006.18(e) largely as proposed, with minor changes for clarity, and is adopting new § 1006.18(e)(4) regarding translated disclosures.

The Bureau received a few comments on the proposed implementation of the mini-*Miranda* disclosure requirement. A trade group commenter asked the Bureau to allow debt collectors to modify the mini-*Miranda* disclosure in the bankruptcy context to remove the reference to the collection of a debt and to the use of any information for debt collection purposes. This commenter stated that such language could be construed as an attempt to collect the debt in violation of the automatic stay provisions of the bankruptcy code. The Bureau declines to adopt a specialized bankruptcy version of the mini-*Miranda* disclosure. Removing a reference to the collection of a debt and to the use of any information for debt collection purposes would functionally eliminate the mini-*Miranda* that Congress required debt collectors to provide in FDCPA section 807(11).

One industry commenter asked the Bureau to clarify that caller ID that reveals a debt collector's business name does not constitute the initial communication with a consumer under § 1006.18(e)(1). The Bureau believes that disclosure of a debt collector's business name does not automatically convey information regarding a debt such that a communication, as defined in final § 1006.2(d), has occurred. As discussed in the section-by-section analysis of final § 1006.2(j), the final rule defines a message, the limited-content message, that includes a business name for the debt collector that does not indicate that the debt collector is in the debt collection business, but is not a communication. The Bureau does not determine, however, that caller ID can never constitute a communication because caller ID systems might convey information regarding a debt.

This commenter also asked the Bureau to clarify which communications in a series of email or text messages are the ''subsequent communications'' for purposes of § 1006.18(e)(2), such that a debt collector must again disclose that the communication is from a debt collector. The Bureau currently lacks information showing that the meaning of subsequent communication in FDCPA section 807(11) is a source of serious harm to consumers or burden to debt collectors. Moreover, the Bureau believes that a highly prescriptive approach that attempts to define when the ''initial'' communication ends and a ''subsequent'' communication begins for all communication media would be too rigid to accommodate the various forms that communications between debt collectors and consumers might take. On one hand, communications that occur in different media, such as an email message followed by a text message, or communications that have no inherent connection between them, such as two letters, seem to be exactly the kind of ''subsequent communications'' where a new disclosure would further the purposes of the FDCPA section 807(11) and final § 1006.18(e)(2). On the other hand, some communications, such as a webchat session, may be closer to individual telephone calls where new disclosures throughout the conversation would likely be unnecessary.[489] Other communications exist between these examples and might allow for several reasonable interpretations of when a subsequent communication occurs. Given the diversity of communications and the Bureau's lack of information, the Bureau is finalizing § 1006.18(e)(2) as proposed.

Consumer advocates urged the Bureau to require the mini-*Miranda* disclosure for any voicemail message that deviates from the content required or permitted in a limited-content message, as defined in § 1006.2(j). The Bureau declines to adopt such a requirement. As explained in the section-by-section analysis of final § 1006.2(j), the limited-content message identifies a voicemail message that debt collectors can leave for consumers without conveying information about a debt—and therefore communicating—under the final rule. Final § 1006.2(j) does not attempt to define the exclusive means by which debt collectors would not convey information about a debt. Requiring the mini-*Miranda* disclosure in every voicemail other than a limited-content message would conflict with the FDCPA's definition of communication by treating all such messages as communications even if they do not convey information regarding a debt to any person.

Several commenters addressed language access requirements. Most of these comments addressed non-English language translations of the validation notice in proposed § 1006.34. These comments included recommendations that the Bureau include a non-English language mini-*Miranda* disclosure on the validation notice. As discussed in the section-by-section analysis of § 1006.34, the Bureau intends to finalize certain provisions of the proposal in a disclosure-focused final rule addressing the validation notice and will respond to commenters' suggestions regarding accessibility of the mini-*Miranda* disclosures on the validation notice as part of that rulemaking. However, the Bureau is adopting a requirement that debt collectors make the disclosures required by § 1006.18(e)(1) and (2) in the same language or languages used for the rest of the communication in which the disclosures are conveyed.

Consumers who are unable to communicate in English would benefit from receiving translated versions of the mini-*Miranda* disclosure. At the same time, however, the Bureau determines that requiring debt collectors to identify such consumers and provide accurate translations in the myriad languages that consumers speak may impose a significant burden on debt collectors. If a debt collector chooses to communicate with a consumer in a non-English language, however, this burden is reduced. Such a debt collector will have already identified the consumer's language preference and exhibited a willingness to communicate in that language. In those circumstances, requiring a debt collector who communicates in a non-English language to provide the disclosures in that language would decrease the risk of deception and help ensure that the disclosures are effective for more consumers. Accordingly, final § 1006.18(e)(4) provides that a debt

[489] Comment 6(b)(1)–2 states that, if a consumer initiates a communication with a debt collector at a time or from a place that the consumer previously designated as inconvenient, the debt collector may respond once at that time or place through the same medium of communication used by the consumer. Depending on the circumstances, such a reply by a debt collector may not constitute a subsequent communication and therefore new disclosures would be unnecessary.

collector must make the disclosures required by § 1006.18(e)(1) and (2) in the same language or languages used for the rest of the communication in which the debt collector conveyed the disclosures.

Finally, the Bureau requested comment on whether additional clarification regarding false or misleading representations would be helpful in the decedent debt context, or whether to require any affirmative disclosures when debt collectors communicate in connection with the collection of a debt owed by a deceased consumer. Although the Bureau did not propose specific rules regarding deception in the decedent debt context, the Bureau noted that the FTC expressed concern in its Policy Statement on Decedent Debt that, even absent explicit misrepresentations, a debt collector might violate FDCPA section 807 by communicating with such individuals in a manner that conveys the misleading impression that the individual is personally liable for the deceased consumer's debts, or that the debt collector could seek assets outside of the deceased consumer's estate to satisfy the consumer's debt. The FTC's Policy Statement suggested two possible disclosures that debt collectors generally could use to avoid deceiving individuals who are attempting to resolve the financial affairs of an estate about their liability for the decedent's debts.[490]

Several commenters addressed these issues. Two consumer advocates urged the Bureau to require affirmative disclosures of non-liability. Several industry commenters noted that they affirmatively disclose non-liability and recommended that the Bureau adopt similar disclosures. One trade group commenter supported the creation of safe harbor language that debt collectors could use to avoid deceiving consumers. Another trade group commenter requested certain exceptions from any required disclosure, such as for communications with attorneys.

The Bureau declines to adopt any additional clarifications or affirmative disclosures. The need for required disclosures is diminished by the lack of evidence of deception regarding decedent debt, as noted in the proposal, and by the widespread debt collector practice of disclosing non-liability, as noted by commenters. Moreover, as the FTC explained, the information debt collectors would need to disclose to avoid deception depends on the circumstances. Indeed, even in the abstract, commenters suggested slightly different disclosures, with two commenters supporting the FTC's disclosures and several others offering their own alternative language. Accordingly, the Bureau declines to require in the final rule affirmative disclosures in the decedent debt context.

For the reasons discussed above and pursuant to its authority to implement and interpret FDCPA section 807(11), the Bureau is finalizing § 1006.18(e) largely as proposed, with minor revisions for clarity, and is adopting new § 1006.18(e)(4) regarding translated disclosures. Final § 1006.18(e)(4) provides that a debt collector must make the disclosures required by § 1006.18(e) in the same language or languages used for the rest of the communication in which the disclosures are conveyed. Any translation of the disclosures must be complete and accurate. The Bureau is also adopting new comment 18(e)(4)–1, which provides an illustrative example.

18(f) Assumed Names

Proposed § 1006.18(f) stated that nothing in § 1006.18 prohibits a debt collector's employee from using an assumed name when communicating or attempting to communicate with a person, provided that the employee uses the assumed name consistently and that the employer can readily identify the employee even if the employee is using the assumed name. For the reasons discussed below, the Bureau is finalizing § 1006.18(f) as proposed, with additional clarifying commentary.

As the Bureau explained in the proposal, debt collectors may instruct or permit their employees to use assumed names when interacting with consumers for a variety of reasons. For example, some employees may have privacy or safety concerns about revealing their true name and employer to a potentially large number of consumers or to particular consumers. As the Bureau explained, from a consumer's perspective, it may not be relevant whether employees use true names or assumed names, provided that the name used does not mislead the consumer about the debt at issue and who is attempting to collect it. The Bureau also noted that the FTC previously issued guidance stating that a debt collector's employee does not violate the FDCPA by using an assumed name if the employee uses the assumed name consistently and the debt collector can readily ascertain the employee's identity.

The Bureau requested comment on the use of assumed names by debt collectors' employees in general, as well as on whether and how employers can readily identify their employees who are using assumed names. One industry commenter supported the proposal because the use of assumed names would help ensure the safety of the commenter's employees. A trade group commenter asked whether proposed § 1006.18(f) would require an assumed name to be linked to a specific individual, or if it could be used in other ways, such as by linking certain assumed names to certain letters mailed to consumers.

Consumer advocates opposed the use of assumed names by debt collectors' employees. These commenters argued that assumed names are inconsistent with FDCPA section 806(6)'s prohibition on the placement of telephone calls without meaningful disclosure of the caller's identity. These commenters further argued that permitting assumed names would enable debt collectors to escape accountability for abusing consumers by concealing their identities. If the Bureau were to allow assumed names, these commenters stated that the Bureau must develop a Federal database of aliases, with one alias per employee and no duplicate aliases within the same company, among other requirements, so that consumers could look up the names of any debt collector's employees.

The Bureau is finalizing § 1006.18(f) as proposed with additional clarifying commentary. As explained in the proposal, debt collectors' employees may use assumed names for many legitimate reasons, including for safety and efficiency, and the Bureau does not conclude that assumed names are inherently deceptive. The use of assumed names is consistent with accountability for debt collectors, as long as the debt collector can connect any assumed name to an employee's real identity. The Bureau's creation of a register of assumed names used by debt collectors' employees is outside the scope of this rule, and the Bureau does not believe that such a requirement is necessary or warranted.

In response to a trade group commenter's question about whether an assumed name must be linked to a specific employee, the Bureau finds that any system of managing assumed names must ensure that the employee uses the assumed name consistently and that the employer can readily identify the employee even if the employee is using the assumed name. The Bureau is

[490] FTC Policy Statement on Decedent Debt, *supra* note 157, at 44922. The FTC's suggested disclosures were: ''(1) That the debt collector is seeking payment from the assets in the decedent's estate; and (2) [that] the individual could not be required to use the individual's assets or assets the individual owned jointly with the decedent to pay the decedent's debt.'' *Id.*

adding comment 18(f)–1 to clarify that one way of doing so is for an employer to require an employee to use the same assumed name when communicating or attempting to communicate with any person, and to prohibit any other employee from using the same assumed name. But the Bureau does not believe a one-to-one link is the only way for an employer to comply with the final rule. The Bureau anticipates, however, that a debt collector who permits many employees to use the same assumed name, *e.g.,* for a specific letter campaign, would be unable to readily identify any employee communicating or attempting to communicate with any person.

For the reasons discussed above, the Bureau is finalizing § 1006.18(f) largely as proposed. Final § 1006.18(f) provides that § 1006.18 does not prohibit a debt collector's employee from using an assumed name when communicating or attempting to communicate with a person, provided that the employee uses the assumed name consistently and that the debt collector can readily identify any employee using an assumed name. New comment 18(f)–1 clarifies that a debt collector may use any method of managing assumed names that enables the debt collector to determine the true identity of any employee using an assumed name. For example, a debt collector may require an employee to use the same assumed name when communicating or attempting to communicate with any person and may prohibit any other employee from using the same assumed name.

Proposed Provision Not Finalized

FDCPA section 807 contains certain provisions designed to protect consumers from false, deceptive, or misleading representations made by, or means employed by, attorneys in debt collection litigation. FDCPA section 807(3) prohibits the false representation or implication that any individual is an attorney or that any communication is from an attorney. In addition, debt collection communications sent under an attorney's name may violate FDCPA section 807(10) if the attorney was not meaningfully involved in the preparation of the communication.[491] The meaningful attorney involvement case law also has been applied in the specific context of debt collection litigation submissions.[492]

Proposed § 1006.18(g) would have provided a safe harbor for attorneys and law firms against claims asserting lack of meaningful attorney involvement in debt collection litigation materials signed by the attorney and submitted to the court, provided that the attorneys met the requirements in proposed § 1006.18(g). Proposed § 1006.18(g) provided that an attorney has been meaningfully involved in the preparation of debt collection litigation submissions if the attorney: (1) Drafts or reviews the pleading, written motion, or other paper; and (2) personally reviews information supporting the submission and determines, to the best of the attorney's knowledge, information, and belief, that, as applicable: The claims, defenses, and other legal contentions are warranted by existing law; the factual contentions have evidentiary support; and the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or lack of information.

The Bureau received a large number of comments on the proposed meaningful attorney involvement safe harbor from a variety of commenters, almost all of whom opposed the proposal. As discussed below, the Bureau has decided after considering the comments not to finalize the proposed provision regarding meaningful attorney involvement.

While some debt collectors supported proposed § 1006.18(g), other industry commenters—particularly debt collection attorneys and associations thereof—opposed it. These commenters stated that the meaningful attorney involvement case law discussed above is misguided because FDCPA section 807(3) prohibits only the false representation that any communication is from an attorney and, therefore, any communication that is, in fact, from an attorney does not run afoul of that section. These commenters also stated that the FDCPA does not authorize the Bureau to adopt the meaningful attorney involvement standard through rulemaking, because the standard is not found in the FDCPA and is found only in case law.[493] These commenters also stated that the proposed standard would improperly infringe on the practice of law, which, they said, has historically been regulated by the judicial branch and State governments and would undermine the attorney-client privilege and work-product doctrines. A member of Congress also opposed the proposed meaningful attorney involvement standard on these grounds. Finally, debt collection attorneys stated that the proposed standard would not provide clarity but would instead lead to litigation, which would necessarily result in sharing confidential attorney work product. A few of these commenters stated that they had considered alternatives to the Bureau's proposal and found that none of them were workable.

Consumer advocates stated that the proposed meaningful attorney involvement standard was too lenient and would sanction debt collection attorney practices that these commenters believe to be problematic. The commenters expressed the opinion that the proposed standard was more lenient than some meaningful attorney involvement standards set forth in the Bureau's past enforcement work, State enforcement work, and State laws. Some United States Senators also opposed the proposed meaningful attorney involvement standard for these reasons. Consumer advocates additionally stated that the Bureau did not describe a safe harbor for meaningful attorney involvement in its SBREFA Outline and asserted that the proposed provision therefore harmed the integrity of the Bureau's rulemaking process. These commenters recommended that the Bureau propose a meaningful attorney involvement rule, as opposed to safe harbor, incorporating requirements set forth in Bureau enforcement actions.

Having considered all of the comments on the issue that it received, the Bureau declines to finalize the proposed meaningful attorney involvement safe harbor.[494]

[491] *See, e.g., Nielsen* v. *Dickerson,* 307 F.3d 623, 635 (7th Cir. 2002); *Clomon,* 988 F.2d at 1320. Courts have found violations of other subsections of FDCPA section 807 for similar conduct. *See, e.g., Lesher* v. *Law Offices of Mitchell N. Kay, PC,* 650 F.3d 993, 1002 (3d Cir. 2011); *Avila* v. *Rubin,* 84 F.3d 222, 229 (7th Cir. 1996).

[492] *See Bock* v. *Pressler & Pressler,* 30 F. Supp. 3d 283, 303 (D.N.J. 2014) (''The claimed misrepresentation here does not relate to the ultimate veracity of the numbered factual allegations of the complaint; it concerns the veracity of the implied representation that an attorney was meaningfully involved in the preparation of the complaint. If, in fact, the attorney who signed the complaint is not involved and familiar with the case against the debtor, then the debtor has been unfairly misled and deceived within the meaning of the FDCPA. . . .''), *reaff'd on remand,* 254 F. Supp. 3d 724, 729 (D.N.J. 2017); *Miller* v. *Upton, Cohen & Slamowitz,* 687 F. Supp. 2d 86, 100 (E.D.N.Y. 2009) (applying meaningful involvement liability to, among other actions, filing of complaint in court).

[493] A few of these commenters additionally argued that Dodd-Frank Act section 1027(e)(1) precludes the Bureau from regulating the practice of law by debt collection attorneys.

[494] The Bureau disagrees with commenter assertions that the absence of a meaningful attorney involvement safe harbor from the Bureau's SBREFA Outline represents a shortcoming in the Bureau's rulemaking process. The Bureau thoroughly described the proposed safe harbor and the Bureau's rationale for it in the proposal. The proposed safe harbor therefore raised no concerns from an APA perspective.

As the Bureau noted in the proposal, under existing case law, a debt collection communication sent under an attorney's name may violate FDCPA section 807(10) if the attorney was not meaningfully involved in the preparation of the communication.[495] Further, the meaningful attorney involvement case law has been applied in the specific context of debt collection litigation submissions.[496] The Bureau intended its proposed safe harbor to provide greater clarity for all stakeholders as to the standards law firms and attorneys submitting pleadings, written motions, or other papers to courts in debt collection litigation should meet in order to be in compliance with FDCPA section 807(10). As noted above, however, many industry commenters stated that the proposed safe harbor would not provide the intended clarity, and some of these commenters stated that they had considered various alternatives to the proposed safe harbor and found none to be workable in providing clarity either. And, many consumer advocates felt that the standards proposed were too permissive. Because neither the proposal nor alternatives discussed in comments would provide greater clarity as to the meaning of meaningful attorney involvement, the Bureau has decided not to include a safe harbor in the final rule.

The Bureau anticipates that debt collection attorneys will continue to face lawsuits under this legal theory. As the Bureau described in the proposal, the legal theory underlying these lawsuits is that a debt collection attorney makes an implied false representation, in violation of the prohibition in FDCPA section 807 against misleading representations, when the attorney submits litigation materials without there having been meaningful attorney involvement in the preparation of the materials. As a general matter, the Bureau believes that this legal theory has a valid basis in the text of FDCPA section 807;[497] accordingly, the Bureau expects that the law regarding violations of FDCPA section 807 due to lack of meaningful attorney involvement will continue to evolve case-by-case. The Bureau will monitor these developments and continue to assess whether a future rulemaking in this area to provide clarity and decrease consumer harm would be desirable. In that regard, the Bureau disagrees with commenter assertions that the FDCPA does not authorize the Bureau to adopt a meaningful attorney involvement standard—whether consisting of requirements or a safe harbor or both—through rulemaking.[498] The Bureau believes that the FDCPA provides it with ample authority to adopt a meaningful attorney involvement standard by rule.

Section 1006.22 Unfair or Unconscionable Means

FDCPA section 808 prohibits the use of unfair or unconscionable means in debt collection.[499] The Bureau proposed § 1006.22 to implement FDCPA section 808.[500] Specifically, the Bureau proposed § 1006.22(a) to implement FDCPA section 808's general prohibition against unfairness and § 1006.22(b) through (f)(2) to implement section 808's prohibited conduct examples.[501] These provisions largely restated the statute. The Bureau proposed § 1006.22(f)(3) and (4) to prohibit certain conduct with respect to the use of employer-provided email addresses and social media for debt collection communications and § 1006.22(g) to provide a safe harbor for information contained in certain email messages.

The Bureau did not receive feedback about proposed § 1006.22(a), (c)(2) and (3), (d), or (e). The Bureau therefore does not address them in the section-by-section analysis below and is finalizing them as proposed. After considering feedback, the Bureau is finalizing proposed § 1006.22(b), (c)(1), (f), and (g) as discussed below. Except as otherwise discussed, the Bureau is finalizing § 1006.22 to implement and interpret FDCPA section 808, pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors.

22(b) Collection of Unauthorized Amounts

The Bureau proposed § 1006.22(b) to implement FDCPA section 808(1). The proposed provision generally mirrored the statute, with minor wording and organizational changes for clarity. Specifically, proposed § 1006.22(b) provided that a debt collector ''must not collect any amount unless such amount is expressly authorized by the agreement creating the debt or permitted by law,'' where the term any amount includes ''any interest, fee, charge, or expense incidental to the principal obligation.''[502]

One industry commenter expressed concern about litigation risk under § 1006.22(b) in the context of medical collections in which debt collectors are sued due to inadvertent billing errors caused by healthcare providers, or due to failing to identify if a bankruptcy is involved. The commenter advocated for giving debt collectors fifteen days to investigate and resolve disputes before they are sued by consumers, protection from liability based on reliance on information provided by a creditor, and a mechanism by which debt collectors report corrections caused by medical providers to the Bureau.

The Bureau declines to adopt this suggestion. As discussed elsewhere in this Notice, the Bureau appreciates that the complexity of medical collections may result in inadvertent errors. But FDCPA section 808(1) does not contain any pre-litigation dispute resolution or correction-reporting procedures, and the Bureau did not propose such procedures in § 1006.22(b). As such, they are outside the scope of this rulemaking. Accordingly, the Bureau is finalizing § 1006.22(b) as proposed. The Bureau notes that, as discussed elsewhere in this Notice, under FDCPA section 813(c), debt collectors may have a bona fide error defense to civil liability if they can show that a violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. Depending on the facts and circumstances of a particular case, this defense might apply in certain scenarios.

22(c) Postdated Payment Instruments

22(c)(1)

The Bureau proposed § 1006.22(c)(1) to implement FDCPA section 808(2), which prohibits debt collectors from accepting from any person a check or other payment instrument postdated by more than five days, unless such person is notified in writing of the debt collector's intent to deposit such check or instrument ''not more than ten nor

[495] *See supra* note 491.

[496] *See supra* note 492.

[497] FDCPA section 807 states that ''[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt.''

[498] The Bureau also disagrees with commenter assertions that Dodd-Frank Act section 1027(e)(1) constrains the Bureau's ability to adopt rules regarding meaningful attorney involvement pursuant to its FDCPA authority. *See supra* notes 115 and 116.

[499] 15 U.S.C. 1692f.

[500] 84 FR 23274, 23324–27 (May 21, 2019).

[501] Section 1006.22(b) proposed to implement FDCPA section 808(1), 15 U.S.C. 1692f(1); § 1006.22(c) proposed to implement FDCPA section 808(2) through (4), 15 U.S.C. 1692f(2) through (4); and § 1006.22(d) through (f)(2) proposed to implement FDCPA section 808(5) through (8), 15 U.S.C. 1692f(5) through (8).

[502] 84 FR 23274, 23324, 23403 (May 21, 2019).

less than three business days prior to such deposit.'' Proposed § 1006.22(c)(1) generally mirrored that statute, except that it included the phrase ''days (excluding legal public holidays, Saturdays, and Sundays)'' in lieu of the statutory phrase ''business day.'' [503]

In response to proposed § 1006.22(c)(1), one commenter explained that the proposed language would require debt collectors to monitor State holidays, which can vary significantly. The commenter suggested that the language be revised to state ''three days (excluding federally recognized legal public holidays, Saturdays and Sundays).''

The Bureau is finalizing proposed § 1006.22(c)(1) substantially as proposed, with a minor modification in response to this comment. To address potential ambiguity, final § 1006.22(c)(1) contains the phrase ''excluding legal public holidays identified in 5 U.S.C. 6103(a), Saturdays, and Sundays.''

22(f) Restrictions on Use of Certain Media

22(f)(1)

FDCPA section 808(7) prohibits a debt collector from communicating with a consumer regarding a debt by postcard. The Bureau proposed § 1006.22(f)(1) to implement FDCPA section 808(7). The proposed provision generally mirrored the statutory language.[504]

A consumer advocate suggested that the Bureau revise proposed § 1006.22(f)(1) to prohibit not only communications, as defined in § 1006.2(d), but also attempts to communicate, as defined in § 1006.2(b). The commenter observed that, if § 1006.22(f)(1) prohibited only communications, and if the Bureau finalized the definition of limited-content messages as proposed in § 1006.2(j) as only attempts to communicate, then § 1006.22(f)(1) would permit debt collectors to send limited-content messages by postcard. As discussed in the section-by-section analysis of § 1006.2(j), the definition of limited-content message in the final rule is limited to voicemail and cannot contain either the consumer's name or the consumer's address. Under this definition, limited-content messages cannot be sent by postcard. The Bureau accordingly is finalizing § 1006.22(f)(1) as proposed.

22(f)(2)

The Bureau proposed § 1006.22(f)(2) to implement FDCPA section 808(8). The proposed provision generally mirrored the statute. Specifically, as proposed, § 1006.22(f)(2) would have prohibited debt collectors from using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by mail, but would have permitted a debt collector to use the debt collector's business name on an envelope if the name did not indicate that the debt collector was in the debt collection business.[505]

In response to proposed § 1006.22(f)(2), a consumer advocate commenter stated that the Bureau should clarify that the provision prohibits email message ''from'' or ''subject'' lines that indicate that a communication either is about a debt or is from a debt collector. The Bureau declines to prohibit the inclusion of such information in email message ''from'' or ''subject'' lines. Although the Bureau's proposal made a minor change for clarity from the wording of FDCPA section 808(8) by omitting the term ''by telegram,'' the Bureau did not propose to expand the application of FDCPA section 808(8) beyond mail. In addition, the commentary to final § 1006.42 provides that the inclusion of some such information in an email subject line is a factor in determining whether the debt collector has complied with § 1006.42(a)(1)'s requirement to send required disclosures in a manner that is reasonably expected to provide actual notice.

The Bureau is, however, clarifying how § 1006.22(f)(2) applies in the context of mail. In the Seventh Circuit, the Bureau filed an amicus brief arguing that, while there is no benign language exception in FDCPA section 808(8) that would permit debt collectors to include phrases such as ''time sensitive'' on mailed envelopes, the FDCPA permits debt collectors to include language or symbols on an envelope that facilitate making use of mail. Specifically, because FDCPA section 808(8) expressly recognizes that a debt collector may ''communicat[e] with a consumer by use of the mails,'' the FDCPA permits language and symbols that facilitate mailing an envelope.[506] The Seventh Circuit agreed with the Bureau's analysis. In the final rule, the Bureau is adding comment 22(f)(2)–1, which, consistent with the Bureau's amicus brief, clarifies that, for purposes of § 1006.22(f)(2), the phrase ''language or symbol'' does not include language or symbols that facilitate communications by mail, for example: Postage; language such as ''forwarding and address correction requested;'' and the United States Postal Service's Intelligent Mail barcode.

22(f)(3)

The Bureau proposed § 1006.22(f)(3) to provide that a debt collector violates FDCPA section 808's general prohibition against unfairness, as proposed to be implemented in § 1006.22(a), by communicating or attempting to communicate with a consumer using an email address that the debt collector knows or should know is provided to the consumer by the consumer's employer, unless the debt collector received the consumer's prior direct consent to use that email address or the consumer had sent the debt collector an email from that address. The Bureau proposed § 1006.22(f)(3) on the basis that a debt collector who communicates or attempts to communicate by sending an email message to a consumer's employer-provided email address generally would violate FDCPA section 808 because of the likelihood that the consumer's employer could access and read the message and, in turn, that the consumer could suffer reputational or other harm.[507]

The Bureau received many comments regarding proposed § 1006.22(f)(3) from a wide variety of commenters. Many commenters, including several consumers, consumer advocates, a group of State Attorneys General, Federal government agency staff, a local government agency, a commenter from an academic institution, and a number of industry commenters generally supported proposed § 1006.22(f)(3). Some consumer advocates argued, however, that the Bureau should further restrict, or even prohibit, debt collectors' use of employer-provided email addresses.

By contrast, many industry commenters questioned the Bureau's basis for proposed § 1006.22(f)(3), raising concerns that it was overly restrictive in light of the privacy features of email and citing the potential cost of compliance compared to lack of evidence of consumer harm. Some such commenters argued that the Bureau should not include the provision in the final rule. For example, some industry

[503] *Id.*

[504] *Id.*

[505] *Id.*

[506] *See* Brief for Consumer Financial Protection Bureau as Amicus Curiae, *Preston* v. *Midland Credit Mgmt., Inc.,* 948 F.3d 772 (7th Cir. 2020) (No. 1:18–cv–01532), *https://files.consumerfinance.gov/f/documents/cfpb_amicus-brief_preston-v-midland.pdf.*

[507] *See* 84 FR 23274, 23324–26 (May 21, 2019). The proposal used the terms ''work'' and ''non-work'' email addresses. Consistent with other sections of the final rule, final § 1006.22(f)(3) replaces these terms with ''employer-provided'' and ''personal,'' respectively.

commenters argued that employees are well aware that their employer has the right to view emails sent to email addresses within the employer-provided email domain and thus are aware of the risks of being contacted at such addresses. Several industry commenters believed that debt collectors should be permitted to contact consumers at employer-provided email addresses as long as consumers could opt out. Another argued that debt collectors should be permitted to communicate or attempt to communicate using an email address that is not obviously employer provided unless a consumer expressly states a desire not to be contacted at work.[508]

After considering this feedback, the Bureau is finalizing proposed § 1006.22(f)(3) with revisions, as discussed below, because the Bureau concludes that the provision provides important protections for consumers. As discussed in the proposal, employers often have the right to access, and may monitor, email accounts they provide to employees. And the risks of harm to consumers from debt collectors sending messages to an employer-provided email address are particularly high because of the risk of adverse employment consequences, which can cause economic harm and exacerbate a consumer's financial distress, including by making it more difficult to satisfy outstanding financial obligations. The legislative history of the FDCPA indicates an emphasis on preventing such risks to a consumer's employment from debt collection communications. Final § 1006.22(f)(3) provides protections specific to such harms consumers may face with the use of employer-provided email addresses.

Knows-or-Should-Know Standard

Section 1006.22(f)(3) proposed, in relevant part, to prohibit debt collectors from communicating or attempting to communicate with a consumer using an email address that the debt collector knows or should know is provided to the consumer by the consumer's employer. Proposed comment 22(f)(3)–3 described the know or should know standard and set forth three scenarios in which a debt collector would have met it. Proposed comment 22(f)(3)–3 also stated that, absent contrary information, a debt collector would not know (and should not know) that an email address was employer provided if the domain name in the email address was one commonly associated with a provider of personal email addresses (*e.g.,* gmail.com).[509]

Notwithstanding the examples in proposed comment 22(f)(3)–3, a number of commenters, including many industry and some consumer advocate commenters, expressed concern about the ''should know'' standard, stating that, in many cases, debt collectors may be unable to easily or reliably distinguish between employer-provided and personal email addresses. A number of industry commenters, for example, stated that whether an ''.edu'' email address belongs to a student or employee of an educational institution can be ambiguous. Similarly, several consumer advocate commenters questioned whether debt collectors would be able to rely on domain name alone to distinguish personal from employer-provided email addresses because some consumers use free or low-cost email accounts in connection with their employment. Industry commenters explained that there currently are no systems to scrub email addresses to determine whether they are employer provided and that developing and maintaining such systems would cost the industry millions of dollars and entail privacy risks for consumers. Many industry commenters stated that the lack of clarity regarding ''should know'' would impose significant costs on debt collectors and increase litigation risk, and some stated that it would discourage debt collectors from using email altogether, even if email might potentially benefit some consumers.

Industry commenters suggested a number of revisions to proposed § 1006.22(f)(3) to address their concerns regarding the knowledge standard. A variety of industry commenters suggested that the Bureau should include a presumption that email domain names commonly associated with personal accounts (*e.g.,* gmail, hotmail, yahoo, msn, and other similar products) are personal email addresses, unless the debt collector knows or has reason to know that such email addresses are employer provided. Other industry commenters requested that the Bureau limit § 1006.22(f)(3) to situations in which the debt collector knows an email address is employer provided. Other industry commenters asked the Bureau to clarify that debt collectors are not required to impute knowledge that one consumer's email address is employer provided to other consumers who are employees of the same employer. On the other hand, a consumer advocate commenter and a law firm commenter argued that finalizing § 1006.22(f)(3) to include an actual knowledge standard would make it too difficult for consumers to establish a violation.

The Bureau appreciates that, under a ''should know'' standard, debt collectors may have difficulty determining, for example, whether certain email addresses are employer provided and that such uncertainty may cause some debt collectors to refrain from communicating through any email address, even if email might be beneficial and preferable for at least some consumers. As discussed elsewhere in part V, the final rule clarifies the FDCPA's application to electronic communication media and such clarity is intended, in part, to permit those consumers and debt collectors who prefer to use such newer communication technologies to do so while also establishing important consumer protections.

The Bureau also understands concerns raised by consumer advocate commenters about an actual knowledge standard. However, in light of the difficulties identified regarding a ''should know'' standard, and because the Bureau finds that consumers will benefit from a clear prohibition in the final rule against the use of employer-provided email addresses, the Bureau is finalizing § 1006.22(f)(3) to generally prohibit debt collectors from communicating or attempting to communicate with a consumer by sending an email to an email address that the debt collector knows is provided to the consumer by the consumer's employer.[510] The standard is consumer-specific; that is, a debt collector does not necessarily know that a consumer's email address is employer provided merely because the domain name for that email address is the same as the domain name for an email address that a different consumer has told the debt collector is employer provided.

Consent and Prior Use Exceptions

Proposed § 1006.22(f)(3) provided that a debt collector could communicate or attempt to communicate with a consumer using an employer-provided email address if the debt collector had received directly from the consumer either prior consent to use that email address or an email from that email address. Proposed comments 22(f)(3)–1 and –2 clarified these exceptions.

[508] As discussed further below, many industry commenters also expressed significant compliance concerns with the ''should know'' aspect of the proposed knowledge standard.

[509] *See* 84 FR 23274, 23325 (May 21, 2019).

[510] The Bureau notes that debt collectors remain subject to the general prohibition on third-party disclosure in § 1006.6(d)(1) and that consumers may set communication limits according to their preferences under §§ 1006.6(b)(1) and 1006.14(h).

Several industry commenters supported the consent provision as proposed, but many requested that debt collectors be able to rely on evidence of consent provided to the creditor, such as an employer-provided email address included in a loan application or an email recently used by a creditor.[511] One industry commenter asked that debt collectors be able to rely on a documented specific request by a consumer to be contacted at an employer-provided email address. Other industry commenters asked the Bureau to clarify how the rule applies if a consumer withdraws consent for the debt collector to use an employer-provided email address after the debt collector has sent an email to that address. Two industry commenters recommended that consumers be required to provide debt collectors an alternative email address if they withdraw their consent to be contacted at their employer-provided address.

Consumer advocate commenters generally argued that the Bureau should limit how a debt collector could obtain a consumer's prior consent. A number of consumer advocate commenters requested that consent be provided in conformity with the requirements of the E–SIGN Act. One consumer advocate commenter requested that the Bureau prohibit debt collectors from soliciting employer-provided email addresses. Another consumer advocate commenter requested that the Bureau narrow the scope of the consent exception by only allowing, in some circumstances, the debt collector to respond by sending a single follow-up email to confirm the consumer's consent.

Regarding industry commenters' suggestion that prior consent cover email addresses the consumer provided to a creditor, the Bureau finds that, as discussed in the section-by-section analysis of § 1006.6(d)(4), consumers might not appreciate the risks of sharing an email address with a creditor at the time of initiating an account relationship, when the prospect of defaulting on a financial obligation is remote. The Bureau also declines to require consumers who are withdrawing their prior consent for debt collectors to use an employer-provided email address to provide an alternative email address to debt collectors. Such a requirement does not have a basis in the FDPCA and is not necessary or warranted for debt collectors to avoid a third-party disclosure violation. As to the request for clarification about what to do if a consumer withdraws consent to communicate using an employer-provided address, the Bureau notes that § 1006.14(h) prohibits debt collectors from using that email address again.[512]

The Bureau finds that it is not necessary to limit the prior consent exception in the ways that consumer advocates suggested in light of other revisions to the final rule addressing consent for and prior use of particular email addresses. As discussed in the section-by-section analysis of § 1006.6(d)(4)(i) and (iii), the procedures described in those sections are tailored to minimize the risk of third-party disclosures, including disclosures to employers. Specifically, § 1006.6(d)(4)(i) outlines procedures based on whether the consumer used the email address to communicate with the debt collector or directly consented to the debt collector's use of the address. These procedures permit the consumer to assess the risk of a third-party disclosure, including to an employer, before deciding whether to communicate by email. Section 1006.6(d)(4)(iii) outlines procedures based on communication by a prior debt collector and limits a debt collector to using email addresses that, among other things, were obtained by a prior debt collector under § 1006.6(d)(4)(i) or (ii).[513]

The Bureau also declines to adopt consumer advocates' recommendation to prohibit debt collectors from soliciting employer-provided email addresses. While the Bureau appreciates the risk that a debt collector could engage in abusive, deceptive, or unfair conduct to obtain a consumer's consent to use an employer-provided email address, a per se prohibition on soliciting a consumer's permission would be overbroad because debt collectors need not engage in such conduct to obtain consumer consent. And, to the extent a debt collector does so, the debt collector will have violated one or more of FDCPA sections 806 through 808 and §§ 1006.14(a), 1006.18(a), and 1006.22(a). For these reasons, the Bureau is finalizing § 1006.22(f)(3) to provide, as proposed, prior consent and consumer use exceptions to the general prohibition. For ease of compliance, however, the Bureau is finalizing the exceptions by replacing them with a cross-reference to § 1006.6(d)(4)(i) and (iii), which, as described above, are generally consistent with the proposed exceptions.

For the reasons discussed above, the Bureau is finalizing § 1006.22(f)(3) to prohibit a debt collector from communicating or attempting to communicate with a consumer by sending an email to an email address that the debt collector knows is provided to the consumer by the consumer's employer, unless the email address is one described in § 1006.6(d)(4)(i) or (iii).[514] The Bureau is adopting new comment 22(f)(3)–1 to further clarify that a debt collector who sends an email to an email address described in § 1006.6(d)(4)(i) or (iii) does not violate the prohibition in § 1006.22(f)(3), even if the debt collector knows the email address is employer provided. New comment 22(f)(3)–1 also clarifies that a debt collector who sends an email to an email address described in § 1006.6(d)(4)(ii) complies with § 1006.22(f)(3) because a debt collector who follows § 1006.6(d)(4)(ii) does not, by definition, send an email to an email address that the debt collector knows is provided by a consumer's employer. In effect, therefore, comment 22(f)(3)–1 clarifies that a debt collector who sends an email to an email address described in § 1006.6(d)(4) does not violate § 1006.22(f)(3).

22(f)(4)

The FDCPA does not specifically address newer technologies, including social media. The Bureau proposed to provide that certain communications and communication attempts, when made using social media, represent unfair or unconscionable means to collect a debt in violation of FDCPA section 808, as proposed to be implemented in § 1006.22(a).[515] Specifically, proposed § 1006.22(f)(4) provided that a debt collector must not

[511] The proposal stated that a consumer may consent to receiving emails from a creditor on their work account based on the characteristics of that particular creditor; in contrast, consumers generally have no ability to choose which debt collector attempts to collect their debts. 84 FR 23274, 23326 (May 21, 2019). Some industry commenters disagreed. They stated that most contracts specify that the creditor may hire a third-party debt collector if the consumer fails to uphold the agreement and that, in the commenters' view, the debt collector should therefore be able to use an email address provided by the consumer to the creditor.

[512] The Bureau notes that one commenter asked that debt collectors be able to rely on a documented specific request by a consumer to be contacted at an employer-provided email address. A consumer who specifically requested to be contacted at an employer-provided email address would qualify as prior direct consent under the final rule.

[513] An additional requirement of § 1006.6(d)(4)(iii) is that the consumer did not opt out of the immediately prior debt collector's use of the particular email address. This requirement, when satisfied, suggests that the risk of third-party disclosure is low if the later debt collector uses the email address, even if that debt collector knows the email address is employer provided.

[514] In light of the changes the Bureau is making to § 1006.22(f)(3), proposed comments 22(f)(3)–1 through –3 are no longer necessary, and the Bureau is not finalizing them.

[515] *See* 84 FR 23274, 23326–27 (May 21, 2019).

communicate or attempt to communicate with a consumer in connection with the collection of a debt through a social media platform that is viewable by a person other than the persons described in § 1006.6(d)(1)(i) through (vi) (*i.e.,* the consumer; the consumer's attorney; a consumer reporting agency, if otherwise permitted by law; the creditor; the creditor's attorney; or the debt collector's attorney).[516] Proposed comment 22(f)(4)–1 provided certain clarifications regarding the proposed prohibition. As discussed below, the Bureau is finalizing proposed § 1006.22(f)(4) with revisions in response to feedback and for clarity.

Public-Facing Social Media Communications and Attempts to Communicate

No commenters objected to the general concept of restricting publicly viewable social media communications as an unfair means of debt collection. Several industry commenters supported the proposed concept, as did a Federal government commenter, consumer advocate commenters, and individual consumer commenters.

Some commenters were uncertain whether the proposal would have prohibited communications or attempts to communicate that might be viewable by social media platform providers, given that such providers were persons other than those specified in § 1006.6(d)(1)(i) through (vi). The Bureau clarifies in the final rule that the prohibition applies to communications or attempts to communicate that can be viewed by members of the general public or a person's social media contacts,[517] not to messages that could be accessible in some form by a social media platform provider but that are otherwise not viewable by the general public or a person's social media contacts.[518]

Similarly, one industry commenter believed that the proposal's use of the word ''viewable'' would create compliance risk for messages inadvertently viewed by a third party on a shared device. The Bureau confirms that the prohibition in § 1006.22(f)(4) applies to public-facing communications and attempts to communicate, not to private messages (*i.e.,* social media messages that cannot be viewed by members of the general public or a person's social media contacts) that might be inadvertently accessed by a third party.[519]

One consumer advocate commenter stated that, instead of prohibiting communications or attempts to communicate through a social media platform that is viewable by a person other than the persons described in § 1006.6(d)(1)(i) through (vi), the rule should prohibit social media communications or attempts to communicate that are viewable by anyone other than the consumer as defined in FDCPA section 803(3) (*i.e.,* by anyone other than the person who owes or is alleged to owe the debt). The commenter explained that it was unaware of any social media platform that would allow for communications to be viewable only by the persons described in § 1006.6(d)(1)(i) through (vi) and nobody else. The Bureau agrees that a debt collector's communications or attempts to communicate through a social media platform are unlikely to be limited in that way and is finalizing § 1006.22(f)(4) without that language.

One consumer advocate commenter stated that the scope of proposed § 1006.22(f)(4) should be expanded to include not just public-facing social media communications and communication attempts, but any public-facing electronic communication or attempt to communicate, *e.g.,* comments to a blog post, group text, or chatroom discussions. The Bureau declines to expand the scope of § 1006.22(f)(4) in this way. The Bureau notes that, even if not specifically prohibited by § 1006.22(f)(4), any public-facing communication (whether online or otherwise) may well violate one or more other prohibitions, such as the prohibition against third-party communications in FDCPA section 805(b) (as implemented by § 1006.6(d)(1)); the prohibition against harassing, oppressive, or abusive conduct in FDCPA section 806 (as implemented by § 1006.14(a)); and the prohibition against unfair or unconscionable collection means in FDCPA section 808 (as implemented by § 1006.22(a)).

Private Social Media Communications and Attempts To Communicate

Although proposed § 1006.22(f)(4) would not have prohibited private communications or attempts to communicate by social media, most commenters who addressed proposed § 1006.22(f)(4) addressed this topic.

Some industry commenters noted that communicating privately through social media could benefit both consumers and debt collectors, but some also indicated that they do not currently use social media due to data security and privacy concerns.[520] A few commenters noted that consumers do not provide their social media contact information to creditors and therefore do not expect to be contacted through that channel about financial matters, although one industry commenter noted that consumers might post about their collection experiences in a social media forum and companies might monitor social media for such mentions.[521] One group of consumer advocates stated that some consumers might be advantaged by private social media communications. But this commenter, along with many consumer, consumer advocate, government, and other commenters, expressed concerns about such communications, as discussed further below. One member of Congress expressed particular concern regarding private social media debt collection communications about consumers' medical debts, which, this commenter stated, could include consumers' protected health-care information. In light of those concerns, some of these commenters argued that the Bureau should either expand § 1006.22(f)(4) to also ban private social media communications and attempts to communicate or to require debt collectors to obtain prior consent directly from consumers before communicating privately through social media.[522] The Bureau declines to do so for the reasons discussed below.

[516] These individuals are those with whom a debt collector may communicate about a debt, even in the absence of an exception such as prior consent, without violating the FDCPA's prohibition against third-party communications. *See* the section-by-section analysis of § 1006.6(d)(1).

[517] In this way, § 1006.22(f)(4) is similar to other provisions of the FDCPA and Regulation F that focus on protecting consumers from public disclosure of information regarding their debts. *See* FDCPA sections 806(3) (§ 1006.14(e)) and 808(7) and (8) (§ 1006.22(f)(1) and (2)).

[518] For further discussion of electronic communications and access by providers, see the section-by-section analysis of § 1006.6(d)(4)(ii)(E).

[519] Other commenters argued that the Bureau should prohibit private social media messages because of the risks involved in sending such messages, including the risk that they might be inadvertently accessed by third parties. Those comments are discussed in the section-by-section analysis below regarding private social media communications and attempts to communicate.

[520] A few industry commenters noted the possibility of inbound private social media messages from consumers. In response to a request for clarification, the Bureau notes that nothing in the FDCPA or the final rule requires a debt collector to communicate using a social media platform merely because a consumer sends the debt collector a message using that platform.

[521] The Bureau notes that debt collectors can respond to such posts privately, as discussed below, and that the prohibition in § 1006.22(f)(4) applies only to communications and attempts to communicate in connection with the collection of a debt.

[522] Many commenters in support of a prior consent requirement recommended that consent be

Continued

One common area of concern among commenters regarding private social media messages was the risk of third-party disclosures, which commenters observed could occur if, for example, debt collectors accidentally sent messages to the wrong person (*e.g.,* to a person with a similar name as the consumer) or if social media platform providers accessed private communications for advertising or other purposes. As to sending messages to the wrong person, debt collectors remain subject to § 1006.6(d)(1) when communicating through social media and, accordingly, should exercise caution to avoid violating FDCPA section 805(b) and § 1006.6(d) by communicating with the wrong consumer.[523] For example, a debt collector would violate FDCPA section 805(b) and § 1006.6(d) if, as suggested in one hypothetical, the debt collector communicated by private social media message with the wrong person because the debt collector merely identified a person with the same or similar name as the consumer.[524] As to social media platform providers accessing private communications, the Bureau discusses this concern in § 1006.6(d)(4)(ii)(E). Accordingly, the Bureau declines to prohibit private social media communications and attempts to communicate.

Other commenters expressed concern about consumers' ability to communicate effectively about a debt over social media. Several consumer advocates explained that some consumers would inadvertently miss important information, such as the validation notice, if it were sent using social media, due to difficulty accessing information online or managing a high number of electronic communications. The Bureau notes that, as discussed in the section-by-section analysis of § 1006.42, it is finalizing standards that a debt collector must meet to send required disclosures electronically, including that the disclosure must be sent in a manner that is reasonably expected to provide actual notice to the consumer, and, with respect to the validation notice that is not the initial communication, that the disclosure be sent in accordance with section 101(c) of the E–SIGN Act. The Bureau notes that communications over social media may be less likely to reach consumers and therefore, under the final rule, debt collectors may be less likely to meet these standards by sending validation notices to consumers through private social media messages.

Some commenters worried about the potential for deception from private social media messages. Consumer commenters expressed concern that consumers would have difficulty verifying the identity of a debt collector over social media. Relatedly, a group of State Attorneys General, a Federal government commenter, and a member of Congress identified risks from potentially deceptive acts or practices, such as ''friending'' someone in connection with the collection of the debt in a way that omits material information about the debt collector's identity and motives. One member of Congress expressed particular concern regarding this conduct in connection with collection of medical debts. In response to commenters' concerns, the Bureau notes that the specific conduct described above likely would violate FDCPA section 807 and final § 1006.18's prohibition against false or deceptive representations, as discussed in the section-by-section analysis of § 1006.18(d).

Some commenters observed that consumers might find private social media communications from debt collectors unwelcome or harassing, particularly because consumers do not provide social media contact information to creditors and generally are not accustomed to being contacted about financial matters in this way. While the Bureau recognizes this concern, the Bureau also notes that private messages are subject to all of the provisions of the FDCPA and the final rule, including all of the provisions designed to empower consumers to communicate with debt collectors in the manner that they prefer (*i.e.,* the time and place restrictions in FDCPA section 805(a) and § 1006.6(b)(1),[525] the opt-out instructions for electronic communications in § 1006.6(e), and the limitations on use of certain communications media in § 1006.14(h)). They also are subject to the FDCPA's general prohibitions against unfair, deceptive, and abusive conduct in sections 806 through 808 (final §§ 1006.14, 1006.18, and 1006.22).[526]

Some consumer advocates recommended that consumers be able to opt out of private social media messages, among other types of electronic communications, such as by allowing consumers to reply simply with ''stop.'' Others suggested that consumers should be allowed to opt out of all social media platforms because opting out of individual platforms would be burdensome. The Bureau notes that, under the final rule, debt collectors will be required to include, in any private social media message, a reasonable and simple method by which the consumer can opt out of receiving further messages. Consumers also will have the option to opt out of all social media communications, or communications through a particular platform.[527]

Coverage

As proposed, § 1006.22(f)(4) would have applied only to communications or attempts to communicate with a consumer, as defined in FDCPA section 803(3) and proposed § 1006.2(e) (*i.e.,* the person obligated or allegedly obligated to pay the debt). A consumer advocate commenter stated that the Bureau should broaden § 1006.22(f)(4) to apply to consumers as defined in FDCPA section 805(d) and proposed § 1006.6(a) (*i.e.,* to the person obligated or allegedly obligated to pay the debt and that person's spouse, parent (if the person is a minor), or guardian, or the executor or administrator of the person's estate), as well as to deceased consumers. The commenter explained that debt collectors should not be able to post

express and provided directly to the debt collector or conform with the E–SIGN Act's consumer consent provisions. *See* 15 U.S.C. 7001(c)(1).

[523] For the reasons discussed in the section-by-section analysis of § 1006.6(d)(3), although the Bureau is outlining procedures that, when followed, may provide a debt collector a safe harbor from civil liability for a third-party disclosure when sending emails and text messages, the Bureau is not outlining such procedures for sending private social media messages.

[524] Commenters also expressed concern that third-party disclosures of private social media messages might occur as the result of identity theft or a data breach; inadvertently (*e.g.,* if the consumer shares a device with another person); or if consumers give permission to a third party. The Bureau notes that these types of risks are present in any type of electronic debt collection communication and that debt collectors must take care not to violate the general prohibition against third-party disclosures in FDCPA section 805(b) (§ 1006.6(d)(1)).

[525] One industry commenter requested that the Bureau clarify whether private messages on social media platforms would be subject to time and place restrictions under the FDCPA; the Bureau clarifies that they would be. Section 1006.6, and specifically final comments 6(b)(1)–1 and –2 and 6(b)(1)(i)–1, provide guidance about how the time and place restrictions apply in the case of electronic communications, which include private social media messages.

[526] Several groups of consumer advocate commenters argued that private social media messages should be subject to a frequency limit like the one the Bureau proposed in § 1006.14 with respect to telephone calls. For the reasons discussed in the section-by-section analysis of § 1006.14, electronic communications, including private social media messages, are not subject to the telephone call frequencies in final § 1006.14(b). However, as noted, they are subject to the general prohibition in FDCPA section 806 and final § 1006.14(a) against conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. *See* the section-by-section analysis of § 1006.14(a) and (b).

[527] *See* the section-by-section analyses of §§ 1006.6(e) and 1006.14(h), respectively.

publicly about a deceased consumer's alleged debt on the person's social media account because a debt collector's only reason for doing so would be to pressure surviving relatives to pay the debt, either to protect the deceased consumer's reputation or out of a sense of moral obligation. Other commenters raised concerns about debt collectors contacting persons other than consumers, such as family members, by social media and as discussed above, many commenters supported a broad ban on public-facing social media communications.

The Bureau is finalizing § 1006.22(f)(4) with revisions to the scope of coverage. Specifically, final § 1006.22(f)(4) prohibits a debt collector from communicating or attempting to communicate with a person, in connection with the collection of a debt, through a social media platform if the communication or attempt to communicate is viewable by the general public or the person's social media contacts. The definition of person includes a consumer. FDCPA section 803(3) defines a consumer as any natural person obligated or allegedly obligated to pay any debt. As noted in the section-by-section analysis of § 1006.2(e), the Bureau received a number of comments regarding its proposal to interpret the term consumer to include deceased natural persons. The Bureau plans to address comments received regarding that interpretation, and to determine whether to finalize that interpretation, as part of the Bureau's disclosure-focused final rule.

For the reasons discussed above, the Bureau is finalizing § 1006.22(f)(4) to provide that a debt collector must not communicate or attempt to communicate with a person in connection with the collection of a debt through a social media platform if the communication or attempt to communicate is viewable by the general public or the person's social media contacts.[528] The Bureau is finalizing proposed comment 22(f)(4)–1 with revisions to conform to the text of the final rule.[529]

22(g) Safe Harbor

Proposed § 1006.22(g) provided that a debt collector who communicates with a consumer using an email address, or telephone number for text messages, and follows the procedures described in § 1006.6(d)(3) does not violate § 1006.22(a) by revealing in the email or text message the debt collector's name or other information indicating that the communication relates to the collection of a debt. The procedures in proposed § 1006.6(d)(3) were designed to ensure that a debt collector who uses a particular email address or telephone number to communicate with a consumer by email or text message does not have a reason to anticipate that an unauthorized third-party disclosure may occur. As the Bureau explained in the proposal, if the proposed procedures work as designed, there would not be a reason to anticipate that a third party would see the debt collector's name or other debt-collection-related information included in a communication sent to such an email address or telephone number. Some consumer advocate commenters stated that the Bureau should not finalize the proposed safe harbor for emails and text messages in § 1006.22(g) because the commenter believed the procedures in proposed § 1006.6(d)(3) were inadequate.[530]

The Bureau is finalizing § 1006.22(g) substantially as proposed. For the reasons discussed in the section-by-section analysis of § 1006.6(d)(3) through (5), the Bureau believes the safe harbor procedures at § 1006.6(d)(3) will provide appropriate consumer protections and that debt collectors using those procedures would not have reason to anticipate a third-party disclosure would occur. If a debt collector is using those procedures, the Bureau concludes that a safe harbor for § 1006.22(a) is necessary and warranted. Accordingly, the Bureau is finalizing § 1006.22(g) substantially as proposed, with technical revisions for clarity.

Section 1006.26 Collection of Time-Barred Debts

Proposed § 1006.26(a) and (b) would have defined the terms statute of limitations and time-barred debt and would have interpreted FDCPA section 807 to prohibit debt collectors from suing and threatening to sue consumers to collect time-barred debts.[531] In addition, proposed § 1006.26(c), as set forth in the Bureau's February 2020 proposal,[532] would have required a debt collector collecting a debt that the debt collector knows or should know is time barred to disclose: (1) That the law limits how long the consumer can be sued for a debt and that, because of the age of the debt, the debt collector will not sue the consumer to collect it; and (2) if the debt collector's right to bring a legal action against the consumer to collect the debt can be revived under applicable law, the fact that revival can occur and the circumstances in which it can occur. The February 2020 proposal also included model language and forms that debt collectors could use to comply with the proposed time-barred debt and revival disclosures.

The Bureau is not finalizing proposed § 1006.26 at this time. As noted in part III, the comment period for the February 2020 proposal closed on August 4, 2020, and the Bureau is now completing its review and evaluation of all comments received regarding proposed § 1006.26. As discussed in the section-by-section analysis of § 1006.34, the Bureau intends to issue a disclosure-focused final rule to address the Bureau's proposed validation notice, and the Bureau intends to address § 1006.26 at that time, as well. For this reason, the Bureau is reserving § 1006.26.

Section 1006.30 Other Prohibited Practices

The Bureau proposed in § 1006.30 several measures designed to protect consumers from certain harmful debt collection practices. Specifically, the Bureau proposed in § 1006.30(a) to regulate debt collectors' furnishing practices under certain circumstances; in § 1006.30(b) to limit the transfer of certain debts; and in § 1006.30(c), (d), and (e) to generally restate statutory provisions regarding allocation of payments, venue, and the furnishing of certain deceptive forms, respectively. The Bureau received no comments specifically addressing proposed § 1006.30(e) regarding the furnishing of deceptive forms and is finalizing it as

[528] As proposed, § 1006.22(f)(4) provided, in relevant part, that a debt collector must not communicate or attempt to communicate ''by a social media platform that is viewable'' by the public. The Bureau is finalizing § 1006.22(f)(4) to provide, in relevant part, that a debt collector must not communicate or attempt to communicate ''through a social media platform if the communication or attempt to communicate is viewable'' by the general public, to clarify that the relevant question is whether the communication or attempt to communicate is viewable, not whether the platform itself is viewable.

[529] Among other conforming changes, final comment 22(f)(4)–1 omits references to limited-content messages. As discussed in the section-by-section analysis of § 1006.2(j), final § 1006.2(j) defines a limited-content message to mean a voicemail message for a consumer. Accordingly, under the final rule, it will not be possible for debt collectors to leave limited-content messages using social media. In light of this change, the Bureau does not further address comments received regarding the use of limited-content messages in publicly viewable social media messages.

[530] A few industry commenters stated that the safe harbor in proposed § 1006.22(g) should be expanded to include voicemails. As to voicemails, final § 1006.2(j) defines a limited-content message that debt collectors can leave for consumers without communicating under the FDCPA.

[531] 84 FR 23274, 23327–29 (May 21, 2019).

[532] The Bureau proposed the time-barred debt disclosures in the February 2020 proposal. 85 FR 12672 (Feb. 21, 2020).

proposed.[533] Accordingly, the Bureau does not address § 1006.30(e) further in the section-by-section analysis below.

30(a) Communication Prior To Furnishing Information

Proposed § 1006.30(a) would have prohibited a debt collector from furnishing to a consumer reporting agency, as defined in section 603(f) of the Fair Credit Reporting Act (FCRA),[534] information regarding a debt before communicating with the consumer about the debt.[535] The Bureau is not finalizing proposed § 1006.30(a) at this time. As discussed in the section-by-section analysis of § 1006.34, the Bureau intends to issue a disclosure-focused final rule to address the Bureau's proposed validation notice, and the Bureau intends to address proposed § 1006.30(a) at that time, as well. For this reason, the Bureau is reserving § 1006.30(a).

30(b) Prohibition on the Sale, Transfer for Consideration, or Placement for Collection of Certain Debts

30(b)(1) In General

The Bureau proposed in § 1006.30(b)(1) to prohibit a debt collector from selling, transferring, or placing for collection a debt if the debt collector knows or should know that the debt has been paid or settled, discharged in bankruptcy, or that an identity theft report has been filed with respect to the debt (''transfer ban'').[536] The Bureau proposed § 1006.30(b)(1) pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors, and pursuant to its authority to interpret FDCPA section 808 regarding unfair or unconscionable debt collection practices. The Bureau proposed to prohibit the sale, transfer, or placement of such debts as unfair under FDCPA section 808 on the basis that, because consumers do not owe or cannot lawfully be subject to collections on alleged debts that have been paid or settled or discharged in bankruptcy, and likely do not owe alleged debts that are subject to identity theft reports, the sale, transfer, or placement of such debts is unfair or unconscionable. The Bureau also proposed § 1006.30(b)(1) pursuant to its authority under section 1031(b) of the Dodd-Frank Act to prescribe rules to identify and prevent unfair acts or practices by Dodd-Frank Act covered persons.

The Bureau received numerous substantive comments addressing the proposed transfer ban. Some industry commenters, including creditors and associations thereof, as well as the U.S. SBA Office of Advocacy, expressed concern about the Bureau's proposed adoption of the transfer ban through reliance on its authority under section 1031(b) of the Dodd-Frank Act in addition to its FDCPA authority. These commenters stated that use of authority under section 1031(b) of the Dodd-Frank Act creates uncertainty and legal risk for creditors without increasing consumer protections because a ban might be imputed to creditors even if they are not FDCPA debt collectors. These commenters urged the Bureau to adopt the transfer ban using only its FDCPA authority. These commenters further commented that, if the Bureau retained the use of its authority under section 1031(b) of the Dodd-Frank Act, the Bureau should take other steps to provide clarity, such as explicitly excluding debt sales by creditors from the transfer ban, adding a safe harbor for sale or transfer of accounts by creditors subject to a repurchase agreement, or permitting creditors to invoke the bona fide error defense in FDCPA section 813(c) in the context of the transfer ban.

Some industry commenters stated that the ''should know'' aspect of the proposed ''knows or should know'' standard is unclear and argued that the rule should reflect a ''knows'' standard, or, if ''should know'' is retained, include safe harbors for certain practices. For example, some of these commenters stated that the rule should provide a safe harbor for the bankruptcy prong of the ban to a debt collector who ''scrubs'' a debt against commercially available databases 30 days before the debt's sale, transfer, or placement to ascertain whether the debt has been discharged in bankruptcy.

Industry commenters also suggested changes to the proposed transfer ban's application to a debt for which an identity theft report has been filed. These commenters asserted that the proposed transfer ban would increase consumers' incentives to make false identity theft claims in order to avoid repaying their debts. These commenters requested that the rule permit a debt collector to investigate a consumer's identity-theft claim—within a prescribed time period of, for example, 30 days—and to sell, transfer, or place the debt if, pursuant to its investigation, the debt collector determines that the claim is not valid. Some of these commenters noted that the FCRA prohibits a person from selling, transferring for consideration, or placing for collection a debt after being notified that a consumer reporting agency identified that debt as having resulted from identity theft. They also noted that the FCRA includes provisions designed to ensure that consumer reporting agencies and furnishers are able to conduct reasonable investigations of consumers' identity-theft claims and to prevent consumers and credit repair companies from abusing the FCRA's identity-theft related consumer protections.

Industry commenters also provided comments seeking other modifications and clarifications to the proposed transfer ban. One industry commenter stated that the ban should apply to disputed debts if the debt collector does not have access to original account-level documentation; other industry commenters said that the ban should not encompass any additional debt types beyond those set forth in the proposal. Finally, one industry commenter stated that the Bureau should clarify that the transfer ban does not prohibit the return of an assignment, a file of data being sent for analytics, or a file sent for ''scrubbing.'' Instead, commenters argued the transfer ban should apply only when the transferring entity intends the receiving entity to undertake collection activity for receiving payment from the debtor.

Consumer advocates suggested that the Bureau expand the transfer ban's coverage in proposed § 1006.30(b)(1) to encompass several additional types of debt beyond, as proposed, debts that have been paid or settled, discharged in bankruptcy, or that are subject to an identity theft report. They suggested that the ban also prohibit the sale, transfer, or placement of time-barred debt, disputed debt, debt lacking ownership documentation, debt subject to litigation, and debt that has been extinguished pursuant to State law. They also suggested that the Bureau clarify that the proposed ban of the sale, transfer, or placement of ''debt that has been paid or settled'' would apply if a consumer has entered into an uncompleted settlement agreement, as opposed to being limited to a completed repayment agreement. They also suggested that the rule explicitly prohibit the collection of these types of debt (in addition to banning their transfer, placement, or sale). Further, they suggested that, if an identity-theft

[533] The Bureau proposed § 1006.30(e) to implement FDCPA section 812, 15 U.S.C. 1692j. 84 FR 23274, 23333 (May 21, 2019). FDCPA section 812 addresses the furnishing of deceptive forms and applies to any person, not just to debt collectors. As noted in the proposal, § 1006.30(e), like the rest of the rule, applies only to FDCPA debt collectors. FDCPA section 812 continues to prohibit other persons from furnishing deceptive forms. *Id.* at 23286 n.137.

[534] 15 U.S.C. 1681 *et seq.* FCRA section 603(f) is codified at 15 U.S.C. 1681a.

[535] *See* 84 FR 23274, 23329–30 (May 21, 2019).

[536] *See id.* at 23330–32.

report has been filed regarding a debt, the rule should prohibit a debt collector from reporting the debt to a credit reporting agency (in addition to banning its transfer, placement, or sale).

A comment letter from Federal government agency staff did not address expanding the proposed transfer ban to encompass the above-mentioned types of debt but did recommend that the Bureau prohibit the sale, transfer, or placement of debts that are counterfeit or fictitious. This letter also observed that the FCRA currently prohibits a person from selling, transferring, or placing for collection any debt after being notified that the debt resulted from identity theft.

Consumer advocates suggested that the transfer ban in proposed § 1006.30(b)(1) be modified in several additional respects. Some suggested that the rule prohibit the sale, transfer, or placement of debt unless the prior debt collector represents in writing that the debt has not been paid, settled, or otherwise discharged; is not time barred; and whether the debt is subject to a dispute. Some suggested that the rule clarify that a debt collector may not require a consumer to file an identity-theft report with the police or to complete a specific identity-theft report form required by the debt collector for the prohibition to apply. Instead, they said, the rule should require a debt collector to accept from a consumer the FTC identity-theft report form, thereby furthering the FTC's goal of reducing the need for police reports. They also suggested that the rule require debt collectors to perform a search of PACER or of another commercially available database to screen for bankruptcy discharges prior to a debt's sale, transfer, or placement for collection.

Taking into consideration all the comments regarding the proposed transfer ban in § 1006.30(b)(1), the Bureau is finalizing the ban and its commentary with substantial revisions, as follows.

Subject to the exceptions in § 1006.30(b)(2), final § 1006.30(b)(1) prohibits a debt collector from selling, transferring for consideration, or placing for collection a debt if the debt collector knows or should know that the debt has been paid or settled or discharged in bankruptcy. The Bureau is finalizing § 1006.30(b)(1) pursuant solely to its FDCPA authority. The Bureau has determined that the sale, transfer for consideration, or placement for collection of a debt that a debt collector knows or should know has been paid or settled or discharged in bankruptcy constitutes an unfair or unconscionable means to collect or attempt to collect the debt under FDCPA section 808 because consumers do not owe or cannot legally be subject to collections on alleged debts that have been paid or settled or discharged in bankruptcy, and yet the debt collector receives or expects to receive compensation for the sale, transfer, or placement of such debt.[537]

Because the Bureau is finalizing § 1006.30(b)(1) pursuant solely to its FDCPA authority, the Bureau determines it is clear, as the Bureau intended and stated in the proposal, that § 1006.30(b)(1) of the final rule does not apply to creditors, except to the extent the creditor is an FDCPA debt collector. Accordingly, the Bureau concludes it is not necessary or warranted for final § 1006.30(b)(1) to include a safe harbor or other requested clarifications for accounts that creditors sell or transfer as part of a portfolio subject to a repurchase agreement.

As to concerns about the breadth of the ''know or should know'' language, the Bureau notes that the prohibition in § 1006.30(b)(1) is limited to specific account circumstances. These account circumstances will, in general, be within the debt collector's ability to know or obtain the necessary knowledge. For example, whether a debt has been paid or settled is a fact that a debt collector knows or should know because it should be within the debt collector's account management system. Although bankruptcy may not be within the debt collector's own system in the same manner as paid or settled debts, a debt collector should be able to utilize a commercial database or publicly available records to reasonably assess whether a debt has been discharged in bankruptcy.[538] Because of the limited nature of the transfer ban as finalized, the Bureau believes the ''know or should know'' standard is appropriate but will monitor this issue for any potential consumer harm or compliance concerns and revisit at a later time if needed.

The Bureau declines to apply the prohibition in final § 1006.30(b)(1) to debts for which the consumer has reported identity theft. The Bureau believes that transfer of these debts is a consumer protection concern but recognizes that commenters identified several complexities with respect to the Bureau's incorporation of identity-theft-related debt in proposed § 1006.30(b)(1). Moreover, because FCRA section 615(f) prohibits a person from selling, transferring for consideration, or placing for collection a debt after such person has been notified in accordance with the FCRA that the debt resulted from identity theft, the Bureau believes that these consumer protection concerns can be addressed by adding new comment 30(b)(1)–2, which states that nothing in § 1006.30(b)(1) alters a debt collector's obligation to comply with the prohibition set forth in FCRA section 615(f)(1) (15 U.S.C. 1681m(f)(1)).[539]

The Bureau also declines to expand the prohibition in § 1006.30(b)(1) to encompass other types of debt beyond debt that has been paid or settled or discharged in bankruptcy. The Bureau concludes that the transfer of time-barred debt, disputed debt, debt lacking ownership documentation, debt subject to litigation, debt in which the consumer has an uncompleted settlement agreement, or other types of debt suggested by commenters do not present the same unfairness and unconscionability concerns of the same prevalence and magnitude as the debt types to which the prohibition in § 1006.30(b)(1) applies. The prohibition in § 1006.30(b)(1) applies to debts that are extinguished or uncollectible or that consumers do not owe. For the reasons discussed above, the sale, transfer for consideration, or placement for collection of the debts described in § 1006.30(b)(1) is unfair or unconscionable collection activity under FDCPA section 808 because the consumer does not owe or cannot legally be subject to collection of such debt. While the debt types listed above in this paragraph may present consumer protection concerns, and while their collection remains subject to the FDCPA's general prohibitions on harassment or abuse, false or misleading statements, and unfair or unconscionable practices, the Bureau declines to expand the prohibition in § 1006.30(b)(1) to encompass them.

The Bureau declines to finalize a prohibition regarding the sale, transfer for consideration, or placement for collection of debt that a debt collector

[537] The Bureau has not determined in connection with this final rule whether the sale, transfer for consideration, or placement for collection of such debts constitutes an unfair act or practice under section 1031 of the Dodd-Frank Act.

[538] Depending on the circumstances, FDCPA section 813(c)'s defense against civil liability may also apply where a debt collector utilizes a commercial database to reasonably assess whether a debt has been discharged in bankruptcy.

[539] The Bureau considered the comments it received regarding prohibiting a debt collector from reporting an identity-theft debt to a credit reporting agency and from requiring a consumer to use a specific identity-theft report form. The FCRA provides a private right of action and places liability on ''any person'' for failure to comply with the FCRA. *See* FCRA sections 616 through 618, 15 U.S.C. 1681n–1681p. As a result, the Bureau concludes it is unnecessary for the prohibition in § 1006.30(b)(1) to address debt collector practices in the area of credit reporting.

knows or should know has been extinguished pursuant to State law or is counterfeit or fictitious. It clearly is an unfair or unconscionable practice under FDCPA section 808 for a debt collector to sell, transfer for consideration, or place for collection a debt that the debt collector knows or should know has been extinguished pursuant to State law or is counterfeit or fictitious.

As noted above, some commenters stated that the term ''transfer'' should be clarified. The Bureau agrees, and final § 1006.30(b)(1) therefore states that ''a debt collector must not sell, transfer *for consideration,* or place for collection a debt if the debt collector knows or should know. . . .'' (emphasis added). In addition, the Bureau is adopting new comment 30(b)(1)–1 to clarify that a debt collector transfers a debt for consideration if the debt collector receives or expects to receive compensation for the transfer. A debt collector does not transfer a debt for consideration if the debt collector sends information about the debt, as opposed to the debt account itself, to another party. For example, a debt collector does not transfer a debt for consideration if the debt collector sends a file with data about the debt to another person for analytics, ''scrubbing,'' or archiving. A debt collector also does not transfer a debt for consideration if the debt collector reports to a credit reporting agency information that a debt has been paid or settled or discharged in bankruptcy.

30(b)(2) Exceptions

Proposed § 1006.30(b)(2) set forth four narrow exceptions to proposed § 1006.30(b)(1) to accommodate circumstances in which allowing the sale, transfer, or placement of the debts described in proposed § 1006.30(b)(1) for certain bona fide business purposes other than debt collection may not create a significant risk of unfair collections activity. The Bureau proposed in § 1006.30(b)(2)(i) to allow a debt collector to transfer a debt described in proposed § 1006.30(b)(1) to the debt's owner. The Bureau proposed in § 1006.30(b)(2)(ii) through (iv) three additional exceptions that paralleled the FCRA's exceptions to its prohibition on the sale, transfer for consideration, or placement for collection of debt caused by identity theft.[540] Specifically, (1) the Bureau proposed in § 1006.30(b)(2)(ii) to allow a debt collector to transfer a debt described in proposed § 1006.30(b)(1) to a previous owner if the transfer is authorized under the terms of the original contract between the debt collector and the previous owner; (2) proposed in § 1006.30(b)(2)(iii) to permit a debt collector to securitize such debt, or to pledge a portfolio of such debt as collateral in connection with a borrowing; and (3) proposed in § 1006.30(b)(2)(iv) to allow a debt collector to transfer such debt as a result of a merger, acquisition, purchase and assumption transaction, or a transfer of substantially all of the debt collector's assets.

With respect to the exceptions set forth in proposed § 1006.30(b)(2), industry commenters stated that the proposed ban of the sale, transfer, or placement of a debt that has been discharged in bankruptcy should treat secured debt differently. Specifically, these commenters said, if the discharged debt is a secured debt, including but not limited to a residential mortgage, the transfer ban should not impede a creditor's ability to maintain and exercise its security interest in the collateral that secures the discharged debt. Industry commenters suggested several approaches through which the rule might accomplish this objective, such as by including an exemption from the transfer ban for secured claims for residential mortgage loans and other secured debts.

Consumer advocates also suggested changes to the proposed exceptions set forth in § 1006.30(b)(2). Like industry commenters, consumer advocates suggested that the ban be modified with respect to mortgage debt. They observed that, after a bankruptcy discharge, the owner of the loan (or a debt collector acting on the owner's behalf) may nevertheless conduct a foreclosure sale if the borrower defaults on payments due under the loan obligation. Citing 11 U.S.C. 524(j), consumer advocates also observed that the bankruptcy code includes an exception to the discharge order that allows post-discharge debt collection limited to seeking or obtaining periodic payments due under a mortgage when the creditor seeks the payments as an alternative to exercise of its right to foreclose. Consumer advocates suggested including an additional exception under § 1006.30(b)(2) to address these concerns and requested that the additional exception include a requirement that the transferring debt collector identify the debt as one for which the personal liability of the debtor has been discharged in bankruptcy.

In addition, consumer advocates suggested other changes to the proposed exceptions to the transfer ban set forth in § 1006.30(b)(2). These commenters stated that the exception in proposed § 1006.30(b)(2)(iii), for securitizations or pledges as collateral of portfolios of debts, should be eliminated because the debt types in proposed § 1006.30(b)(1) cannot legally be collected and therefore should not be securitized or pledged as collateral. These commenters also stated that the other proposed exceptions (in § 1006.30(b)(2)(i), (ii), and (iv)) should be limited to transfers of debt, because those exceptions do not involve sales or placements for collection. Finally, these commenters stated that, if a debt collector transfers an account to the owner or to a prior owner, per the exceptions in proposed § 1006.30(b)(2)(i) and (ii), the rule should require the transferring collector to clearly disclose the applicable category of debt being transferred (*e.g.,* discharged, paid, or settled debt).

In light of both industry and consumer advocates' comments, the final rule includes a new exception in § 1006.30(b)(2)(ii) for secured debts. The exception states that a debt collector may sell, transfer for consideration, or place for collection a debt that has been discharged in bankruptcy if the debt is secured by an enforceable lien and the debt collector provides notice to the transferee that the consumer's personal liability for the debt was discharged in bankruptcy. The Bureau determines that the notice requirement will help ensure that the transfer of the discharged, secured debt is not an unfair or unconscionable practice because the compensation that the transferring debt collector receives (or expects to receive) for the transfer will not be related to the consumer's personal liability on the debt. In addition, the notice requirement will help ensure that the transferee debt collector does not engage in a deceptive debt collection practice by trying to collect on the debt as a personal liability of the consumer.

With respect to consumer advocates' other suggested changes to the exceptions set forth in proposed § 1006.30(b)(2), the Bureau notes as follows. Proposed § 1006.30(b)(2)(i), (ii), and (iv) were limited to ''transfers'' and did not encompass sale or placement for collection; final § 1006.30(b)(2)(i) includes a revision to clarify this point. The Bureau declines to eliminate the exception in § 1006.30(b)(2)(iii) for securitizations and pledges of debt because the Bureau concludes, as noted in the proposal,[541] that a debt collector who securitizes or pledges a portfolio of debt may be unable to exclude the debts described in § 1006.30(b)(1) from the portfolio. Finally, the Bureau declines to require a debt collector who transfers for

[540] *See* 15 U.S.C. 1681m(f)(3).

[541] 84 FR 23274, 23332 (May 21, 2019).

consideration a debt to the owner or a previous owner (pursuant to the exceptions in § 1006.30(b)(2)(i)(A) and (B)) to disclose the applicable category of debt being transferred (*i.e.,* paid, settled, or discharged debt). The Bureau concludes that such disclosure is not necessary or warranted to avoid an unfair or unconscionable practice.

The Bureau adopts the prohibition set forth in § 1006.30(b)(1) and the exceptions set forth in § 1006.30(b)(2) pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors. As stated above, the Bureau has determined that the sale, transfer for consideration, or placement for collection of a debt that a debt collector knows or should know has been paid or settled or discharged in bankruptcy constitutes an unfair or unconscionable means to collect or attempt to collect the debt under FDCPA section 808. Therefore, pursuant to FDCPA section 814(d), the Bureau prescribes the rules in § 1006.30(b) with respect to that unfair or unconscionable means of collection of debts by debt collectors.

30(c) Multiple Debts

The Bureau proposed § 1006.30(c) to implement FDCPA section 810 [542] regarding multiple debts.[543] The proposed provision generally restated the statutory text, with only minor revisions for clarity. Two industry commenters addressed proposed § 1006.30(c) and asked the Bureau to provide an exception to the prohibition that would permit debt collectors to apply, at the consumer's request, a single payment made with respect to multiple debts to a debt that the consumer had disputed. The Bureau is not aware of confusion or concerns regarding this issue and the minor revisions for clarity are not intended to change the meaning of the statute. The Bureau therefore declines to adopt such an exception.

30(d) Legal Actions by Debt Collectors

The Bureau proposed § 1006.30(d) to implement FDCPA section 810 [544] regarding legal actions by debt collectors.[545] The proposed provision generally restated the statutory text, with only minor revisions for clarity. The Bureau received a few comments asking the Bureau to clarify whether specific practices related to the filing of legal actions either are unfair or unconscionable or do not violate the prohibition. The Bureau concludes that it is not advisable to finalize such clarifications, which the Bureau did not propose, without the benefit of public notice and comment on the specific clarifications requested. Accordingly, the Bureau is finalizing § 1006.30(d) as proposed.

Section 1006.34 Notice for Validation of Debts

FDCPA section 809(a) generally requires a debt collector to provide certain information to a consumer either at the time that, or shortly after, the debt collector first communicates with the consumer in connection with the collection of a debt. The required information—*i.e.,* the validation information—includes details about the debt and about consumer protections, such as the consumer's rights to dispute the debt and to request information about the original creditor.[546] The Bureau proposed § 1006.34 to require debt collectors to provide certain validation information to consumers and to specify when and how the information must be provided. In addition, the Bureau proposed Model Form B–3 in appendix B as a model validation notice form that debt collectors could use to comply with certain disclosure requirements in proposed § 1006.34.[547]

The Bureau is not finalizing proposed § 1006.34 at this time. The Bureau is completing its review and evaluation of comments regarding proposed § 1006.34, including the form and content of validation information. The Bureau also is conducting additional, qualitative disclosure testing that may be used to further validate proposed Model Form B–3 and to inform statements about the quality of the validation notice in the final rulemaking.[548] For instance, the Bureau seeks insight through the consumer testing into how consumers would interact with the proposed model form, if finalized. The Bureau plans to address comments received regarding proposed § 1006.34 and proposed appendix B as part of the Bureau's disclosure-focused final rule. The Bureau intends to issue a report about the ongoing qualitative testing in connection with that final rule. For these reasons, the Bureau is reserving § 1006.34 and appendix B.

Section 1006.38 Disputes and Requests for Original-Creditor Information

FDCPA section 809(b) requires debt collectors to take certain actions and to refrain from taking certain actions if a consumer either disputes the debt in writing or requests the name and address of the original creditor in writing during the 30-day period after the consumer receives the written notice described in FDCPA section 809(a). In turn, FDCPA section 809(c) states that a consumer's failure to dispute a debt under FDCPA section 809(b) may not be construed by any court as an admission of liability.[549] The Bureau proposed § 1006.38 to implement and interpret FDCPA section 809(b) and (c), pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors.[550] Pursuant to this same authority, the Bureau is finalizing § 1006.38 as discussed below.

Proposed comment 38–1 would have clarified the applicability of § 1006.38 in the decedent debt context. As described in the section-by-section analysis of § 1006.2(e), the Bureau proposed to interpret the term consumer in FDCPA section 803(3) to include deceased consumers. The Bureau proposed that interpretation, in large part, to facilitate the delivery of validation notices under proposed § 1006.34 when the consumer obligated, or allegedly obligated, on the debt has died. The Bureau plans to address comments received regarding that interpretation, as well as whether and how to finalize proposed comment 38–1, as part of the Bureau's disclosure-focused final rule.[551]

The Bureau proposed comment 38–2 to interpret the applicability of the E–SIGN Act as it relates to FDCPA section 809(b)'s writing requirement for consumers' submission of disputes or requests for original-creditor information. Section 101(a)(1) of the E–SIGN Act generally provides that a record relating to a transaction in or affecting interstate or foreign commerce may not be denied legal effect, validity, or enforceability solely because it is in electronic form. However, section 101(b)(2) of the E–SIGN Act (15 U.S.C. 7001(b)(2)) does not require any person to agree to use or accept electronic records or electronic signatures (other than a governmental agency with respect to a record other than a contract

[542] 15 U.S.C. 1692h.

[543] 84 FR 23274, 23333 (May 21, 2019).

[544] 15 U.S.C. 1692i.

[545] 84 FR 23274, 23333 (May 21, 2019).

[546] *See* 15 U.S.C. 1692g(a).

[547] *See* 84 FR 23274, 23333–52 (May 21, 2019).

[548] Dodd-Frank Act section 1032(b)(1) provides that ''any final rule prescribed by the Bureau under this section requiring disclosures may include a model form that may be used at the option of the covered person for provision of the required disclosures.'' 12 U.S.C. 5532(b)(1). Dodd-Frank Act section 1032(b)(3) provides that any such model form ''shall be validated through consumer testing.'' 12 U.S.C. 5532(b)(3).

[549] 15 U.S.C. 1692g(b)–(c).

[550] 84 FR 23274, 23352–55 (May 21, 2019).

[551] *See* the section-by-section analysis of § 1006.34.

to which it is a party). The Bureau proposed in comment 38–2 that FDCPA section 809(b)'s writing requirement is satisfied when a consumer submits a dispute or request for original-creditor information using a medium of electronic communication through which a debt collector accepts electronic communications from consumers, such as email or a website portal. Thus, under the proposal, a debt collector was required to give legal effect to an electronic consumer dispute or request for original-creditor information only if the debt collector agreed to accept electronic communications from consumers. The Bureau proposed to codify this E–SIGN Act interpretation in proposed comment 38–3.

The comments the Bureau received on comments 38–2 and –3 expressed support. The Bureau finalizes this commentary as proposed, renumbered as comments 38–1 and –2, respectively. E–SIGN Act section 104(b)(1)(A) (15 U.S.C. 7004(b)(1)(A)) authorizes a Federal agency with rulemaking authority under a statute (here, the FDCPA) to interpret by regulation E–SIGN Act section 101 with respect to such statute. Pursuant to E–SIGN Act section 104(b)(1)(A), the Bureau has determined that the final rule as reflected in final comments 38–1 and –2 does not contravene E–SIGN Act section 101(b)(2) (15 U.S.C. 7001(b)(2)) because the comments do not require a debt collector to agree to use or accept consumers' electronic notices of disputes or requests for original-creditor information if the debt collector does not otherwise accept electronic communications from consumers. Further, if a debt collector agrees to accept these notices or requests electronically from consumers, the comments do not prohibit the debt collector from requesting consumers to send these electronic communications through online portals or to email addresses designated by the debt collector.[552]

38(a) Definitions

38(a)(1) Duplicative Dispute

The Bureau is finalizing the definition of duplicative dispute as proposed. The Bureau's reasoning is discussed below under § 1006.38(d)(2)(ii) in this section-by-section analysis.

38(a)(2) Validation Period

The Bureau's proposed definition of validation period in § 1006.38(a)(2) cross-referenced the definition of that term in proposed § 1006.34(b)(5). The Bureau expects to address comments received on proposed § 1006.34(b)(5) as part of its disclosure-focused final rule. Therefore, at the present time, the Bureau is finalizing the definition in § 1006.38(a)(2) with revised wording to refer to the 30-day period described in FDCPA section 809 (rather than the definition in proposed § 1006.34(b)(5)) as defined by Bureau regulation. The Bureau will consider revising the definition of validation period in § 1006.38(a)(2) to cross-reference any such definition of that term that the Bureau adopts in the disclosure-focused final rule.

38(b) Overshadowing of Rights To Dispute or Request Original-Creditor Information

FDCPA section 809(b) provides that, for 30 days after the consumer receives the validation notice information described in FDCPA section 809(a), a debt collector must not engage in collection activities or communications that overshadow or are inconsistent with the disclosure of the consumer's right to dispute the debt or request information about the original creditor.[553] The Bureau proposed in § 1006.38(b) to implement this prohibition and generally restate the statute, with only minor changes for style and clarity.

The Bureau received a few substantive comments addressing proposed § 1006.38(b).[554] Two industry commenters requested that the final rule define the term ''overshadowing.'' These commenters observed that debt collectors' communications of validation notice information almost always expressly advise the consumer of the right to dispute the debt and to request the name and address of the original creditor. These commenters asserted that overshadowing claims are nonetheless some of the most common allegations in FDCPA lawsuits. These commenters also requested clarity as to whether the safe harbor in proposed § 1006.34(d)(2) for debt collectors who use proposed Model Form B–3 in proposed appendix B also precludes suits for violations of the overshadowing prohibition in proposed § 1006.38(b). One industry commenter requested that the final rule clarify that credit reporting during the validation period does not constitute overshadowing.

At this time, the Bureau is finalizing proposed § 1006.38(b) as § 1006.38(b)(1) and is reserving § 1006.38(b)(2). As noted above, proposed § 1006.38(b) generally restated the statute, with only minor changes for style and clarity, and final § 1006.38(b)(1) does the same. The Bureau expects to address the comments it received requesting further clarity about the extent of the safe harbor that would be provided by proposed § 1006.34(d)(2) as part of its disclosure-focused final rule. The Bureau is reserving § 1006.38(b)(2) for the purpose of providing any such safe harbor.

38(c) Requests for Original-Creditor Information

FDCPA section 809(b) provides that, if a consumer requests the name and address of the original creditor in writing within 30 days of receiving the validation notice information described in FDCPA section 809(a), the debt collector must cease collection of the debt until the debt collector obtains and mails that information to the consumer. The Bureau proposed in § 1006.38(c) to implement and interpret this requirement. In general, proposed § 1006.38(c) mirrored the statute, with minor changes for style and clarity. To accommodate electronic media through which a debt collector could send original-creditor information under proposed § 1006.42, proposed § 1006.38(c) interpreted FDCPA section 809(b) to require debt collectors to ''provide,'' rather than to ''mail,'' original-creditor information to consumers in a manner consistent with the delivery provisions in proposed § 1006.42.

The Bureau received a number of comments addressing proposed § 1006.38(c).[555] Three industry

[552] The final rule's prohibitions on harassing, deceptive, and unfair practices in §§ 1006.14, 1006.18, and 1006.22 continue to apply such that a debt collector should not ignore a consumer's dispute or request for original-creditor information received through an online portal or to an email address not designated by the debt collector for receiving such disputes or requests.

[553] This language was added to the FDCPA by the Financial Services Regulatory Relief Act of 2006, Public Law 109–351, sec. 802(c), 120 stat. 1966, 2006 (2006), after an FTC advisory opinion on the same subject. *See* Fed. Trade Comm'n, Advisory Opinion to American Collector's Ass'n (Mar. 31, 2000) (opining that the 30-day period set forth in FDCPA section 809(a) ''is a *dispute* period within which the consumer may insist that the debt collector verify the debt, and not a *grace* period within which collection efforts are prohibited'' but that ''[t]he collection agency must ensure, however, that its collection activity does not overshadow and is not inconsistent with the disclosure of the consumer's right to dispute the debt specified by [s]ection 809(a).'').

[554] In addition, one industry representative stated that it generally agrees with proposed § 1006.38, and a group of consumer advocates that addressed proposed § 1006.38(b) did not object to the proposal.

[555] A few of these comments asked the Bureau to define the term original creditor. These commenters' requests are largely related to clarifications for purposes of the notice required by FDCPA section 809(a), so the Bureau will address

commenters requested that the final rule provide that, if a debt collector's communication of the validation notice information to a consumer identifies the original creditor, the debt collector need not give the consumer the option of requesting original-creditor information from the debt collector. These commenters stated that, if the original creditor has already been identified to a consumer, it would be confusing to the consumer to provide the option to request the name and address of the original creditor. Further, they stated, consumers could use unnecessary requests for original-creditor information as a tactic to delay or avoid collection. One industry commenter requested that the final rule clarify that a debt collector is not required to include original-creditor information in its communication of validation notice information to a consumer. This commenter stated that lawsuits are often filed alleging that the FDCPA is violated if the communication does not identify the original creditor.

A group of consumer advocates who addressed proposed § 1006.38(c) generally noted the importance of original-creditor information to consumers in helping them recognize the debt in question. One commenter stated that the rule should require debt collectors to identify the original creditor in the validation notice information.[556]

The Bureau is finalizing § 1006.38(c) generally as proposed.[557] In the final rule, the Bureau has changed the word ''provides'' to ''sends.'' The reason for this change is discussed in the section-by-section analysis of § 1006.42(a)(1).

The Bureau declines to provide that a debt collector's communication of the validation notice information may omit the option to request original-creditor information if the debt collector has already identified the original creditor to the consumer. The FDCPA expressly provides a consumer the right to request original-creditor information from a debt collector. FDCPA section 809(a)(5) states that the validation notice information must include ''a statement that, upon the consumer's written request within the 30-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.'' [558] Further, FDCPA section 809(b) states that ''[a]ny collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of *the consumer's right to* dispute the debt or *request the name and address of the original creditor*.'' [559]

However, the Bureau also believes that FDCPA section 809(a)(5) contemplates that a debt collector may respond differently to the consumer's request for original-creditor information when the original creditor is *not* ''different from the current creditor.'' Because the question of how a debt collector may respond to a request for original-creditor information when the original creditor is the same as the current creditor implicates the proposed § 1006.34 provisions regarding disclosure of validation notice information, which are not being finalized at this time, the Bureau is not at the present time providing in § 1006.38(c) an alternative response mechanism for this situation. The Bureau expects to address further the comments received on this topic as part of its disclosure-focused final rule and may provide by regulation for alternative procedures when the original creditor is the same as the current creditor.

For the same reason—that the Bureau is not presently finalizing the proposed § 1006.34 provisions for how validation notice information must be disclosed—the Bureau is not at the present time addressing (in response to comments from both industry commenters and consumer advocates, as noted above) whether a debt collector must include original-creditor information in its communication of validation notice information to a consumer. The Bureau expects to address these comments in its disclosure-focused final rule and may provide by regulation for alternative procedures when the original creditor is the same as the current creditor.

38(d) Disputes

38(d)(1) Failure To Dispute

The Bureau proposed § 1006.38(d)(1) to implement FDCPA section 809(c), which states that the failure of a consumer to dispute the validity of a debt may not be construed by any court as an admission of liability by the consumer. Proposed § 1006.38(d)(1) generally restated the statute, with non-substantive changes for style. The Bureau received one comment generally supporting proposed § 1006.38(d)(1) and one comment arguing that § 1006.38(d)(1) is inconsistent with FDCPA section 809(a)(3), which requires a debt collector to disclose that, unless a consumer disputes the validity of the debt within thirty days of receiving the validation notice, the debt collector will assume the debt is valid.[560] The Bureau disagrees that there is an inconsistency. FDCPA section 809(a)(3) addresses a debt collector's assumption regarding the validity of the debt; § 1006.38(d)(1) addresses whether a consumer's failure to dispute is a legal admission of liability. Accordingly, the Bureau is finalizing § 1006.38(d)(1) as proposed.

38(d)(2) Response to Disputes

FDCPA section 809(b) provides that, if a consumer disputes a debt in writing within 30 days of receiving the information or notice described in FDCPA section 809(a), the debt collector must cease collection of the debt, or any disputed portion of the debt, until the debt collector obtains verification of the debt or a copy of a judgment and mails it to the consumer. Section 1006.38(d)(2) implements and interprets this requirement.

38(d)(2)(i)

The Bureau proposed in § 1006.38(d)(2)(i) to implement FDCPA section 809(b)'s general requirements regarding disputes and verification. Proposed § 1006.38(d)(2)(i) generally mirrored the statute, with minor changes for style and clarity. To accommodate various electronic media through which a debt collector could send a copy of verification or a judgment under proposed § 1006.42, proposed § 1006.38(d)(2)(i) interpreted FDCPA section 809(b) to require debt collectors to provide, rather than to mail, such information to consumers in a manner consistent with the delivery provisions in proposed § 1006.42.

The Bureau received no comments objecting to proposed § 1006.38(d)(2)(i) and is finalizing it generally as proposed.[561] In the final rule, the Bureau has changed the word ''provides'' to ''sends.'' The reason for this change is discussed in the section-by-section analysis of § 1006.42(a)(1).

these comments as part of its disclosure-focused final rule.

[556] Consumer advocates also addressed the proposal's provisions regarding electronic delivery of original-creditor information (and other information) in proposed § 1006.42. These comments regarding electronic delivery are addressed in the section-by-section analysis of § 1006.42.

[557] The Bureau is renumbering § 1006.38(c) as § 1006.38(c)(1) and is reserving § 1006.38(c)(2) for any alternative procedures that the Bureau finalizes in its disclosure-focused final rule.

[558] 15 U.S.C. 1692g(a)(5).

[559] 15 U.S.C. 1692g(b) (emphasis added).

[560] 15 U.S.C. 1692g(3).

[561] The Bureau received numerous comments regarding the proposed electronic delivery requirements in proposed § 1006.42. Those comments are addressed in the section-by-section analysis of § 1006.42.

38(d)(2)(ii)

The Bureau proposed in § 1006.38(d)(2)(ii) to establish an alternative way for debt collectors to respond to disputes that they reasonably conclude are duplicative disputes as that term is defined in § 1006.38(a)(1). The Bureau proposed in § 1006.38(a)(1) to define the term ''duplicative dispute'' to mean a dispute submitted by the consumer in writing within the validation period that satisfies two criteria. The first criterion was that the dispute is substantially the same as a dispute previously submitted by the consumer in writing within the validation period to which the debt collector has already responded in accordance with the requirements of § 1006.38(d)(2)(i). The second criterion was that the dispute does not include new and material supporting information.

Proposed § 1006.38(d)(2)(ii) provided that, upon receipt of a duplicative dispute, a debt collector must cease collection of the debt, or any disputed portion of the debt, until the debt collector either: Notifies the consumer in writing or electronically in a manner permitted by § 1006.42 that the dispute is duplicative, provides a brief statement of the reasons for the determination, and refers the consumer to the debt collector's response to the earlier dispute; or satisfies § 1006.38(d)(2)(i).[562]

The Bureau received numerous substantive comments on the Bureau's proposal regarding duplicative disputes, including the proposed definition of duplicative dispute.

With respect to the definition of duplicative dispute in § 1006.38(a)(1), industry commenters stated that the Bureau should provide more clarity about the meaning of ''substantially the same.'' These commenters stated that the lack of clarity might result in the threat of additional disputes and litigation, which might make it not worthwhile for debt collectors to use the proposed alternative response mechanism for duplicative disputes.

Consumer advocates observed that it is unlikely that a consumer would submit a dispute that meets the proposed duplicative dispute definition, because it is rare that a consumer submits a dispute, a debt collector responds to the dispute, and the consumer resubmits the dispute, all within the 30-day validation period. They also stated that the proposed definition would give too much discretion to debt collectors to determine if a dispute is duplicative. They stated that the Bureau should either limit collector discretion by including additional criteria in the ''duplicative dispute'' definition or eliminate the alternative response to duplicative disputes set forth in § 1006.38(d)(2)(ii). Finally, some consumer advocates stated that the definition of duplicative dispute should include an additional criterion under which a consumer's dispute is duplicative only if the consumer submits the second dispute to the same debt collector who provided a copy of the debt verification or judgment to the consumer in response to the consumer's first dispute.

With respect to the proposed alternative response to duplicative disputes in § 1006.38(d)(2)(ii), industry commenters generally suggested substantial changes to make it easier for debt collectors to address disputes that they determine to be duplicative. Some industry commenters stated that the duplicative dispute provision should permit debt collectors to disregard all disputes submitted by debt-relief companies. Others stated that the provision should permit debt collectors to disregard all disputes that meet the definition of duplicative dispute in § 1006.38(a)(1). Others stated that the provision should permit debt collectors to disregard all disputes (whether or not duplicative) submitted by consumers outside of the 30-day validation period. Finally, others stated that, by defining what it means for a debt collector to ''verify'' a debt—and by also requiring consumers to include specific information when they dispute a debt—the Bureau could reduce burden by making it easier for debt collectors to identify and dispose of disputes that are duplicative.

Some industry commenters suggested more minor changes with respect to how the rule should permit debt collectors to address disputes that they determine to be duplicative. Specifically, some of these commenters suggested that, if a debt collector receives a consumer's dispute electronically, then the rule should permit the debt collector to respond to the dispute electronically, irrespective of whether the debt collector has the consumer's E–SIGN consent. Others suggested that the rule permit debt collectors to respond to duplicative disputes through a telephone call. Finally, in their comments on proposed § 1006.42(b) (discussed below), some industry commenters stated that debt collector responses to consumer disputes as required by § 1006.38(d)(2) are not written ''disclosures'' (but are instead, in these commenters' view, documents substantiating the debt) and, therefore, the rule should not require debt collectors to obtain consumers' E–SIGN consent before providing dispute responses electronically.

Consumer advocates, as noted above, expressed concern that the definition of duplicative dispute in § 1006.38(a)(1) gives too much discretion to debt collectors to determine if a dispute is duplicative. But, they said, taking that definition as given, the alternative response mechanism for a duplicative dispute set forth in proposed § 1006.38(d)(2)(ii) should be eliminated from the final rule, because the proposed treatment of disputes would not reduce the number of duplicative disputes because it would not mandate that debt collectors review and provide copies of original, account-level documentation in response to consumer disputes and would not prohibit debt collectors from responding to disputes by providing summary data found in the debt collector's database.

The Bureau is finalizing as proposed the definition of duplicative dispute in § 1006.38(a)(1). The Bureau also is finalizing largely as proposed the optional alternative response mechanism for a duplicative dispute in § 1006.38(d)(2)(ii), but with one change intended to reduce burden for debt collectors who choose to use the alternative response mechanism. This change will thus also benefit consumers by allowing debt collectors to devote more resources to non-duplicative consumer disputes, as follows.

Regarding the duplicative dispute definition, the Bureau believes that the meaning of ''substantially the same'' is sufficiently clear and is a concept that is already present in other regulations. For example, Regulation V, 12 CFR 1022, § 1022.43(f)(1)(ii) addresses direct disputes to a furnisher that are ''substantially the same as a dispute previously submitted by or on behalf of the consumer.'' And, Regulation X, 12 CFR 1024, § 1024.35(g)(1)(i) addresses consumer-asserted errors to a mortgage servicer that are ''substantially the same as an error previously asserted by the borrower for which the servicer has previously complied with its obligation to respond.'' Similarly, Regulation X § 1024.36(f)(1)(i) addresses a request for information to a mortgage servicer that ''is substantially the same as

[562] The Bureau did not propose to address duplicative requests for original-creditor information. As the Bureau noted in its proposal, some members of the debt collection industry have described being overwhelmed by the number of repeat disputes they receive. Industry members have not described any similar concerns about duplicative requests for original-creditor information. 84 FR 23274, 23354 (May 21, 2019).

information previously requested by the borrower for which the servicer has previously complied with its obligation to respond.'' The Bureau therefore declines to provide examples in the commentary about the meaning of ''substantially the same'' because doing so is unnecessary and unwarranted.

The Bureau acknowledges that it is possible that consumers might infrequently submit disputes that meet the duplicative dispute definition, because it might be unusual for a consumer to submit a dispute, a debt collector to respond, and the consumer to resubmit the dispute all within the 30-day validation period. With respect to both the meaning of ''substantially the same'' and the frequency with which consumers submit duplicative disputes as defined, the Bureau expects to monitor consumers' and debt collectors' responses to and implementations of the duplicative dispute aspect of the Bureau's rule to ensure that the definition is not resulting in consumer harm and to ascertain the extent to which the duplicate dispute provisions allow debt collectors to devote more resources to non-duplicative disputes.

Regarding the alternative response mechanism for a duplicative dispute in § 1006.38(d)(2)(ii), the Bureau declines to adopt the substantial changes to the proposal that industry commenters suggested and declines to eliminate the mechanism from the final rule as consumer advocates suggested. With respect to industry commenters' suggestion that the duplicative dispute provision permit debt collectors to disregard all disputes submitted by debt-relief companies, the Bureau declines to adopt a categorical approach because the Bureau cannot say that every such dispute is duplicative. As to the suggestion that the rule permit debt collectors to disregard all disputes that meet the definition of duplicative dispute, the Bureau determines that a debt collector's notice to a consumer that the debt collector has determined that a dispute is a duplicative dispute, and the reasons for that determination, may nevertheless be informative to the consumer and is consistent with the statutory requirement to provide a response to disputes. Finally, the Bureau's proposal did not define what it means to verify a debt, and the Bureau declines to do so in this final rule. The Bureau concludes that it is not necessary or warranted to provide such a definition because the Bureau generally expects that debt collectors will respond to non-duplicative disputes by providing verifications of debts (or copies of judgments) as they do today.

The Bureau has determined that debt collectors' responses to consumer disputes are disclosures of information relating to a transaction or transactions, as E-SIGN Act section 101(c)(1) uses that phrase.[563] And the Bureau interprets the requirement in FDCPA section 809(b) that ''a copy'' of a verification of the debt or a judgment, or the name and address of the original creditor be ''mailed'' requires a writing. Nonetheless, the FDCPA does not explicitly address debt collectors' responses to duplicative disputes and, as a result, does not specify that responses to such disputes must involve mailing another copy of the verification or judgment. Rather, the statute says that only ''a'' copy of the verification or judgment must be ''mailed.'' Accordingly, the Bureau finds that the statute is ambiguous as to whether responses to duplicative disputes must be mailed if a copy of the verification or judgment previously has been mailed. The Bureau therefore has discretion to determine whether the E-SIGN Act's consumer-consent provisions apply if a debt collector responds electronically to a duplicative dispute. For the policy reasons set forth below, the Bureau has determined to permit debt collectors to respond electronically to disputes that they determine to be duplicative without obtaining the relevant consumers' E-SIGN consent.

In the final rule, the Bureau has effected this change in § 1006.42(b)(1), which, as revised from the proposal, now provides that consumers' E-SIGN consent is necessary only for debt collectors to respond electronically to consumers' initial, non-duplicative disputes (pursuant to § 1006.38(d)(2)(i)). As proposed, § 1006.42(a)(1) applies to debt collectors' responses to all disputes, including to duplicative disputes. Thus, debt collectors' responses to duplicative disputes (and to initial disputes) must be provided in a manner that is reasonably expected to provide actual notice and in a form the consumer may keep and access later, while debt collectors' electronic responses to initial disputes must also comply with § 1006.42(b).

The Bureau believes there may be scenarios in which debt collectors respond to consumers' initial disputes in paper form because the debt collectors do not have consumers' E-SIGN consent, but in which the debt collectors nonetheless can respond to consumers' duplicative disputes electronically, because the debt collectors have consumers' email addresses or mobile telephone numbers for text messages. By adopting the duplicative dispute provision largely as proposed, but modified as described above, the Bureau intends to provide a method of delivery that allows debt collectors the option to respond to duplicative disputes in a less burdensome way, which may permit collectors to apply more resources to responding to non-duplicative disputes, while also appropriately balancing consumer protections, because those electronic communications remain subject to § 1006.42(a)(1). The Bureau will monitor industry implementation of the final rule's duplicative-disputes provision to assess its impact on all stakeholders.

The Bureau declines to permit collectors to respond to duplicative disputes orally. The Bureau concludes that FDCPA section 809(b) requires responses to consumers' disputes in a form that consumers may keep and access later for the reasons discussed in the section-by-section discussion of § 1006.42.[564]

The Bureau is finalizing the alternative procedure in § 1006.38(d)(2)(ii) for responding to duplicative disputes as an interpretation of FDCPA section 809(b) and pursuant to its rulemaking authority provided by FDCPA section 814(d). In particular, § 1006.38(d)(2)(ii) interprets what it means for a debt collector to ''obtain[ ] verification of the debt or any copy of a judgment'' and to provide ''a copy of such verification or judgment'' to the consumer when the debt collector reasonably determines that a dispute is a duplicative dispute. In some cases a consumer might submit a timely written dispute that is duplicative of an earlier dispute for which the debt collector already obtained and mailed to the consumer a copy of verification of the

[563] *See* 15 U.S.C. 7001(c)(1) (stating that ''if a statute, regulation, or other rule of law requires that *information relating to a transaction or transactions* in or affecting interstate or foreign commerce be provided or made available to a consumer in writing, the use of an electronic record to provide or make available (whichever is required) such information satisfies the requirement that such information be in writing if (A) the consumer has affirmatively consented to such use and has not withdrawn such consent. . . .'') (emphasis added). *See also* E-Sign Act sections 106(7) and (13) (15 U.S.C. 7006(7) and (13)), which, respectively, define ''information'' and ''transaction'' quite broadly.

[564] FDCPA section 809(b) states that, when a debt collector receives a consumer's dispute, ''the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment . . . and a copy of such verification or judgment . . . is mailed to the consumer by the debt collector.''

debt or a judgment. In those cases, the Bureau interprets FDCPA section 809(b)'s requirement to provide ''a copy of such verification or judgment'' to the consumer to mean that a debt collector must provide the consumer either with another copy of the materials the debt collector provided in response to the earlier dispute, or with a notice explaining the reasons for the debt collector's determination that the dispute is duplicative and referring the consumer to the materials the debt collector provided in response to the earlier dispute.

The Bureau also is finalizing the notice requirement of § 1006.38(d)(2)(ii) pursuant to the Bureau's authority under Dodd-Frank Act section 1032(a). As discussed above, Dodd-Frank Act section 1032(a) provides that the Bureau may prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.

The Bureau is finalizing the notice requirement in § 1006.38(d)(2)(ii) on the basis that a debt collector's decision to treat a dispute as a duplicative dispute under § 1006.38(d)(2)(ii) is a feature of debt collection. A debt collector's notice to a consumer that the debt collector has determined that a dispute is a duplicative dispute, and the reasons for that determination, may help the consumer understand the costs, benefits, and risks associated with filing additional disputes and deciding whether to pay a debt.

Section 1006.42 Sending Required Disclosures

Section 1006.42 sets forth requirements for sending the disclosures required by the FDCPA and Regulation F. Proposed § 1006.42(a)(1) set forth a general standard for providing the required disclosures in writing or electronically. Proposed § 1006.42(b) provided that, to meet that standard when delivering the required disclosures electronically, a debt collector needed to either obtain a consumer's E-SIGN consent directly from the consumer or comply with alternative procedures in proposed § 1006.42(c), and needed to take certain additional steps regarding the format and delivery of the communication.[565] For the reasons discussed below, final § 1006.42 focuses on the general standard and on clarifying that a debt collector who sends the required written disclosures electronically must do so in accordance with the E-SIGN Act. At this time, the Bureau declines to interpret whether, and if so when, the E-SIGN Act requires a debt collector to obtain E-SIGN consent directly from the consumer and declines to finalize the alternative procedures in proposed § 1006.42(c). The Bureau is finalizing § 1006.42 to implement and interpret FDCPA section 809(a) and (b) and pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors. In addition, the Bureau is finalizing the general standard in § 1006.42(a)(1) as an interpretation of FDCPA section 808's prohibition on using unfair or unconscionable means to collect a debt.[566]

42(a) Sending Required Disclosures

42(a)(1) In General

The Bureau proposed § 1006.42(a)(1) to require a debt collector who provides disclosures required by Regulation F in writing or electronically to do so: (1) In a manner that is reasonably expected to provide actual notice to the consumer; and (2) in a form that the consumer may keep and access later. Commenters generally supported this standard, and the Bureau is finalizing it largely as proposed, with minor edits for clarity.

Specifically, final § 1006.42(a)(1) uses the term sends, rather than the proposed term provides, to clarify that a debt collector's obligation under the rule—and as the Bureau intended under the proposal—is to send required disclosures in a manner reasonably expected to provide actual notice.[567] Final § 1006.42(a)(1) also clarifies that the general standard applies when debt collectors send disclosures required either by the FDCPA or Regulation F.[568] With these revisions, final § 1006.42(a)(1) provides that a debt collector who sends disclosures required by the FDCPA and Regulation F in writing or electronically must do so in a manner that is reasonably expected to provide actual notice, and in a form that the consumer may keep and access later.

In response to feedback, the Bureau is revising the proposed commentary for § 1006.42(a)(1) in several ways, including by renumbering proposed comment 42(a)(1)–1 as new comment 42(a)(1)–2 and by adding three new comments (final comments 42(a)(1)–1, –3, and –4) to incorporate text from proposed § 1006.42(b)(2) and (3), (e)(1), and comment 42(c)(1)–1. The Bureau is not otherwise finalizing proposed § 1006.42(b)(2) or (3), (e)(1), or comment 42(c)(1)–1 and, therefore, addresses comments received in response to those provisions in this section-by-section analysis.

Final Comment 42(a)(1)–1

Proposed § 1006.42(b)(2) would have required the debt collector to identify the purpose of an electronic communication transmitting a required disclosure by including in the email subject line or the first line of a text message the name of the creditor to whom the debt is owed and one additional piece of information identifying the debt, other than the amount.[569] Consumer advocates expressed concern that proposed § 1006.42(b)(2) would be unlikely to lead many consumers to open or read emails or text messages from debt collectors and could lead some consumers or their email providers to mark the messages as spam. Consumer advocates suggested that the Bureau eliminate proposed § 1006.42(b)(2) and replace it with more robust monitoring to ensure consumers' actual receipt of electronic communications containing required disclosures.

Proposed § 1006.42(b)(3) would have required a debt collector sending required disclosures electronically to permit receipt of notifications of undeliverability from communications providers, monitor for any such notifications, and treat any such notifications as precluding a reasonable expectation of actual notice for that delivery attempt. Some industry commenters stated that the general standard in § 1006.42(a)(1) should be deemed to be satisfied if a debt collector emails required disclosures to the consumer email address that the creditor provided to the debt collector and the debt collector does not receive a notice that the email was returned as undeliverable. Consumer advocates

[565] *See* 84 FR 23274, 23355–67 (May 21, 2019).

[566] The proposal explained the Bureau's basis for citing to FDCPA section 808. *See id.* at 23356. The Bureau addresses feedback about this basis at the end of the section-by-section analysis of § 1006.42.

[567] For simplicity, the Bureau uses ''send'' throughout this section-by-section analysis, including when describing what proposed provisions would have required.

[568] Proposed § 1006.42 referred in certain places to the disclosures required by proposed § 1006.34. Final § 1006.42 instead refers in those places to the disclosures required by the FDCPA, as implemented by Bureau regulation, because the Bureau is not finalizing § 1006.34 at this time. The Bureau expects that, in the Bureau's disclosure-focused final rule, these references will be updated to refer to § 1006.34.

[569] Proposed comment 42(b)(2)–1 provided examples of the types of information that a debt collector might include.

stated that proposed § 1006.42(b)(3) would be inadequate to provide debt collectors with a reasonable expectation of actual notice. These commenters stated that the rule should provide that a debt collector does not have a reasonable expectation of actual notice if the debt collector's records do not indicate that the electronic message was opened by the consumer.

The Bureau determines that the actions described in proposed § 1006.42(b)(2) and (3) are relevant to the analysis regarding whether a debt collector has a reasonable expectation of actual notice but that these factors may be viewed in light of any other relevant facts and circumstances. The Bureau therefore finalizes the text of proposed § 1006.42(b)(2) and (3) as new comments 42(a)(1)–1.i and .ii, respectively, to instead set forth relevant factors in determining whether a debt collector has complied with the § 1006.42(a)(1) general standard. The Bureau also is finalizing new comment 42(a)(1)–1.iii to provide an additional factor.

Specifically, final comment 42(a)(1)–1.i incorporates the text of proposed § 1006.42(b)(2) and comment 42(b)(2)–1 to provide that a relevant factor in determining whether the debt collector has met the general standard in § 1006.42(a)(1) is whether the debt collector identified the purpose of an electronic communication transmitting a required disclosure by including in the subject line the name of the creditor and one additional piece of information identifying the debt, such as a truncated account number; the name of the original creditor; the name of any store brand—that is, the merchant—associated with the debt; the date of sale of a product or service giving rise to the debt; the physical address of service; and the billing or mailing address on the account.

Final comment 42(a)(1)–1.ii incorporates the text of proposed § 1006.42(b)(3) to provide that a relevant factor in determining whether the debt collector has met the general standard in § 1006.42(a)(1) is whether the debt collector permitted receipt of and monitored for notifications of undeliverability from communications providers and treated any such notifications as precluding a reasonable expectation of actual notice for that delivery attempt.

Final comment 42(a)(1)–1.iii provides that a relevant factor is whether the debt collector identified itself as the sender of the communication by including a business name that the consumer would be likely to recognize, such as the name included in the notice described in § 1006.6(d)(4)(ii)(C) or in a prior limited-content message left for the consumer or in an email message sent to the consumer. The Bureau adds this comment because the consumer's ability to recognize the sender as a legitimate business is a factor in whether the debt collector has a reasonable expectation of actual notice. Particularly if the consumer has been alerted that a specific debt collector may be sending a communication to the consumer, as in the case of the notice described in § 1006.6(d)(4)(ii)(C), then the debt collector is unlikely to satisfy § 1006.42(a)(1) unless the debt collector uses the same name that was included in the notice.

Final Comment 42(a)(1)–2

The Bureau is finalizing proposed comment 42(a)(1)–1 as new comment 42(a)(1)–2 and, apart from renumbering it, is finalizing it largely as proposed with minor wording changes for consistency with the text of final § 1006.42(a)(1). Final comment 42(a)(1)–2 thus states that a debt collector who sends a required disclosure in writing or electronically and who receives a notice that the disclosure was not delivered has not sent the disclosure in a manner that is reasonably expected to provide actual notice under § 1006.42(a)(1). One industry commenter stated that, when a debt collector attempts to deliver a required disclosure electronically and the attempt is returned as undeliverable, the debt collector should be able to rely on the previously sent delivery attempt. The Bureau believes this commenter was primarily concerned with whether a debt collector violates the five-day validation notice timing requirement set forth in FDCPA section 809(a) and proposed § 1006.34(a)(1)(i)(B)—*i.e.,* that the notice be sent within five days of the initial communication—if the debt collector's first attempt to deliver the notice is returned as undeliverable. The Bureau expects to address this issue as part of its disclosure-focused final rule. The Bureau also expects that rulemaking to address how a debt collector should redeliver the validation notice if it is returned as undeliverable. *See* proposed comment 34(b)(5)–1.

Final Comment 42(a)(1)–3

Proposed § 1006.42(e)(1) described a safe harbor for required disclosures sent by mail. Specifically, proposed § 1006.42(e)(1) provided that a debt collector satisfied the general standard in § 1006.42(a)(1) if the debt collector mailed a printed copy of a required disclosure to the consumer's residential address, unless the debt collector received notification from the entity or person responsible for delivery that the disclosure was not delivered.[570] Proposed comment 42(e)(1)–2 specified that a debt collector did not mail a disclosure to a consumer's residential address if the debt collector knew or should have known at the time of mailing that the consumer did not reside at that location. The Bureau is finalizing proposed § 1006.42(e)(1) and its accompanying commentary as new comment 42(a)(1)–3, for the reasons and with the revisions discussed below.

Some industry commenters stated the safe harbor for mail set forth in proposed § 1006.42(e)(1) should be revised to encompass mail to a post office box or a consumer's ''last known address.'' These commenters observed that a consumer might move without advising the creditor or debt collector of the consumer's new address. They also observed that some consumers use post office boxes or commercial addresses to receive mail (*e.g.,* if a consumer is a small business owner).

Some consumer advocates recommended that the Bureau withdraw the safe harbor for mail delivery set forth in proposed § 1006.42(e)(1). These commenters stated that a debt collector may have multiple mail addresses for a consumer and stated that the Bureau's proposed safe harbor did not provide sufficient guidance on how the debt collector should determine the consumer's residential address. They further stated that the proposed safe harbor was arbitrary and that a debt collector could use it to claim compliance with § 1006.42(a)(1) without doing any due diligence to ensure that a consumer was likely to receive the disclosure at the residential address to which the debt collector mailed it.

After considering these comments, and because the safe harbor illustrates how a debt collector may comply with § 1006.42(a)(1), the Bureau is finalizing the proposed safe harbor with revisions in new comment 42(a)(1)–3.

Regarding industry's concerns about the proposed requirement that mail be sent to a consumer's residential address, the Bureau does not believe that consumer harm will result from including post office boxes in the safe harbor because post office boxes are generally secure and private. Further, some consumers may benefit from

[570] Proposed § 1006.42(e) set forth two safe harbors, the first, § 1006.42(e)(1), covering provision of disclosures by mail and the second, § 1006.42(e)(2), covering provision of the validation notice within the body of an email that is a debt collector's initial communication with the consumer. The Bureau addresses proposed § 1006.42(e)(2) in the section-by-section analysis regarding proposed provisions not finalized, below.

providing post office box addresses to creditors and debt collectors because a consumer can maintain a post office box address for receiving mail even as the consumer moves and thereby changes his or her residential address. The final safe harbor set forth in comment 42(a)(1)–3 therefore encompasses a consumer address that is a post office box, unless the debt collector knows or should know that the consumer does not currently receive mail at that post office box. However, the safe harbor does not encompass an address that is a commercial address (*e.g.,* if a consumer is a small business owner) because the Bureau is concerned that including such addresses in the safe harbor could result in consumers inappropriately receiving debt collection mail at their places of employment. Nonetheless, while a commercial address is not covered by the final safe harbor, mail sent to such an address could satisfy the requirements of § 1006.42(a)(1) and be otherwise compliant with the FDCPA and Regulation F, depending on the facts and circumstances.

The Bureau determines that it is unnecessary for the final safe harbor to clarify how debt collectors should ascertain the address at which a consumer actually receives mail. Debt collectors already should have methods to ascertain correct addresses for consumers since mailing disclosures is not free and debt collectors generally may want consumers to receive such disclosures. In addition, the safe harbor only applies to a debt collector who mails a disclosure to the consumer's last known address, and it does not cover a debt collector who knows or should know that the consumer does not currently reside at, or receive mail at, that location at the time of mailing.

For these reasons, final comment 42(a)(1)–3 states that, subject to comment 42(a)(1)–2 regarding receipt of a notice of undeliverability, a debt collector satisfies § 1006.42(a)(1) if the debt collector mails a printed copy of a disclosure to the consumer's last known address, unless the debt collector, at the time of mailing, knows or should know that the consumer does not currently reside at, or receive mail at, that location.

Final Comment 42(a)(1)–4

The Bureau is finalizing proposed comment 42(c)(1)–1 as new comment 42(a)(1)–4. Proposed comment 42(c)(1)–1 clarified that a debt collector could not deliver a required disclosure to an email address or telephone number if a consumer had opted out of receiving communications to that address or telephone number. The Bureau received no comments objecting to proposed comment 42(c)(1)–1 [571] and, apart from renumbering it, is finalizing it as proposed, with wording changes only to reconcile its text to the Bureau's overall approach in final § 1006.42. Final comment 42(a)(1)–4 thus states that, if a consumer has opted out of debt collection communications to a particular email address or telephone number by, for example, following the instructions provided pursuant to § 1006.6(e), then a debt collector cannot use that email address or telephone number to send required disclosures.

42(a)(2) Exceptions

Proposed § 1006.42(a)(2) excepted the disclosures that would have been required by proposed §§ 1006.6(e) and 1006.18(e) from the requirements of proposed § 1006.42(a)(1), unless the disclosure was included on a notice required by FDCPA section 809(a) or § 1006.38(c) or (d)(2). The Bureau proposed to except these disclosures because they do not arise under FDCPA section 809 and generally do not implicate FDCPA section 808's prohibition on using unfair or unconscionable means to collect or attempt to collect any debt. The Bureau received no comments objecting to § 1006.42(a)(2) and is finalizing it as proposed, with revisions only to conform its text to the Bureau's overall approach in final § 1006.42.

One industry commenter who addressed proposed § 1006.42(a)(2) requested that the final rule provide that the intent-to-deposit letter described in proposed § 1006.22(c)(1) (implementing FDCPA section 808(2)) is not subject to the E-SIGN Act's consumer-consent requirements. Under the proposal, the Bureau did not take a position on E-SIGN coverage of the intent-to-deposit letter and, accordingly, the Bureau does not take a position on E-SIGN's applicability to the letter in this final rule. The Bureau is not aware that these notices are currently being delivered electronically or, if they are, that there are concerns or questions about compliance with the E-SIGN Act when sending them. The Bureau notes, however, that the intent-to-deposit letter is subject to the notice and form requirements of § 1006.42(a)(1).

[571] Consumer advocates objected to proposed § 1006.42(c) overall and stated that the consumer's opt-out right referred to in proposed comment 42(c)(1)–1 was insufficient to resolve their objections.

42(b) Requirements for Certain Disclosures Sent Electronically

In its proposal, the Bureau preliminarily determined that the E-SIGN Act's consumer-consent requirements apply to certain FDCPA-required disclosures. The proposal would have provided debt collectors with a choice between two general delivery options for providing required disclosures electronically. The first option, set forth in proposed § 1006.42(b)(1), was to, among other requirements, comply with the E-SIGN Act after the consumer provided affirmative consent directly to the debt collector. The second option was to, among other requirements, comply with the alternative procedures described in proposed § 1006.42(c)(1). The Bureau responds to comments regarding the proposed alternative procedures in the section-by-section analysis regarding proposed provisions that the agency is not finalizing, below. In this section-by-section analysis, the Bureau addresses comments regarding whether and how the E-SIGN Act's consumer-consent requirements apply to certain FDCPA-required disclosures.

Some industry commenters argued that the E-SIGN Act's consumer-consent requirements do not apply to the disclosures that the FDCPA and Regulation F require. Some of these commenters based this argument on an assertion that debt collection disclosures are not disclosures regarding a ''transaction'' as the E-SIGN Act defines that term. Others based it on an assertion that the FDCPA does not require the validation notice to be provided in writing, because the FDCPA permits the notice to be provided orally when it is contained in the initial communication.

Consumer advocates stated that the rule should require a debt collector to obtain a consumer's E-SIGN consent before using any method of communication with the consumer other than mail or a telephone call. These commenters observed that many consumers whose debts enter collection are lower-income or elderly consumers who may not be familiar with internet-based financial transactions. Further, these commenters said, even if these consumers have and can use an email address or smartphone, they may not have reliable, high-bandwidth home internet service, such that they might prefer to receive important financial information through the mail. These commenters stated that the E-SIGN Act's consumer-consent requirements were purposefully designed to ensure that consumers, including lower-income and

elderly consumers, have access to a computer and the internet such that they can access written disclosures electronically.

Within the E-SIGN Act's consumer-consent requirements, E-SIGN Act section 101(c)(1) states that, if a statute, regulation, or other rule of law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing, the use of an electronic record to provide or make available (whichever is required) such information satisfies the requirement that such information be in writing if (A) the consumer has affirmatively consented to such use and has not withdrawn such consent . . . .[572] In turn, E-SIGN Act section 106(13) defines the term ''transaction'' quite broadly.[573] The Bureau concludes that transaction—as E-SIGN Act section 101(c)(1) uses that term and as E-SIGN Act section 106(13) defines it—includes the collection of debts by debt collectors.

Further, FDCPA section 809(a) states that ''a debt collector shall . . . send the consumer a written [validation] notice'' unless it is contained in the initial communication. Under the above terms of E-SIGN Act section 101(c)(1), the E-SIGN Act consumer-consent requirements apply when a law requires a written disclosure to a consumer. And the Bureau has determined that FDCPA section 809(a) sets forth a requirement that a debt collector provide a written disclosure of information to a consumer; *i.e.,* the Bureau has determined that the validation notice required by FDCPA section 809(a) is a disclosure of information to a consumer and that FDCPA section 809(a) requires the validation notice to be in writing when it is not contained in the initial communication. Accordingly, when a debt collector provides the required, written validation notice electronically and does so other than within the initial communication, the E-SIGN Act's consumer-consent requirements apply to the debt collector's electronic provision of the notice. The same conclusion applies to the disclosures that FDCPA section 809(b) requires to be mailed, which are debt collectors' responses to consumers' requests for original-creditor information (see the section-by-section analysis of § 1006.38(c)) and debt collectors' responses to consumers' disputes (see the section-by-section analysis of § 1006.38(d)(2)(i)). The Bureau thus is finalizing proposed § 1006.42(b)(1) as § 1006.42(b) to provide that a debt collector who sends the required, written validation notice, or the disclosures required by § 1006.38(c) or (d)(2)(i),[574] electronically, must do so in accordance with the consumer-consent requirements in E-SIGN Act section 101(c).[575]

As noted above, proposed § 1006.42(b)(1) would have required a debt collector to obtain E-SIGN consent directly from consumers when the debt collector provided electronically the validation notice or the disclosures required by § 1006.38(c) and (d)(2). Some industry commenters recommended that the Bureau take a different approach and interpret E-SIGN Act section 101(c) to permit a consumer's E-SIGN consent obtained by a creditor to pass from the creditor (or a prior debt collector) to the debt collector. Consumer advocates, by contrast, supported the Bureau's proposed approach. In these commenters' view, a consumer's E-SIGN consent applies only ''during the course of the parties' relationship'' per E-SIGN Act section 101(c)(1)(B)(ii). Further, these commenters stated, collection activity by third-party debt collectors to which the FDCPA applies is not within the relationship between the consumer and the original creditor.

The Bureau is not finalizing in § 1006.42(b) the proposed E-SIGN Act interpretation that a debt collector who provides electronically the written disclosures required by the FDCPA and Regulation F must obtain a consumer's affirmative consent directly from the consumer. That is to say, the Bureau is not taking a position in this rulemaking on whether a consumer's E-SIGN consent provided to a creditor (or to a prior debt collector) transfers to a debt collector, and, as a result, is not addressing feedback received regarding the Bureau's proposed interpretation. The Bureau intends to monitor debt collectors' practices for sending required debt collection disclosures in accordance with the consumer-consent requirements in E-SIGN Act section 101(c), including debt collectors' practices for obtaining that consent.

Proposed Provisions Not Finalized

Proposed § 1006.42(b)(4) and (c) through (e) would have set forth additional requirements, alternative procedures, notice-and-opt-out processes, and a safe harbor for a debt collector providing a validation notice electronically. Collectively, these provisions, along with proposed § 1006.42(b) in general, prescribed various methods for a debt collector to deliver a validation notice either in the body of an email or through a hyperlink, in the initial communication with the consumer or within five days of the initial communication.

The Bureau received thousands of comments concerning both the overall approach and details of these provisions. While many industry commenters supported the Bureau's attempt to provide clarity, such commenters were also concerned about what they considered to be the prescriptive and burdensome nature of the proposal. These commenters suggested that, if finalized, the proposed procedures would not lead to the clarity or increased use of electronic delivery that the Bureau expected. Consumer and consumer advocate commenters objected to the Bureau's proposal, arguing that, even with prescriptive procedures, the Bureau's proposal failed to adequately safeguard consumers from threats present in electronic communications and to ensure that consumers would have a reasonable likelihood of receiving such communications.

For the reasons discussed below, the Bureau is not finalizing the following specific procedures and safe harbors. The Bureau emphasizes, however, that it concludes that consumers may benefit from electronic communications in debt collection, including the delivery of required notices, as consumers may be able to exert greater control over such communications than over non-electronic communications and those communications may be more easily retained and referenced by consumers. The Bureau also concludes that debt collectors may find electronic delivery of required notices to be a more effective

[572] As discussed elsewhere in part V, E-SIGN Act section 104(b)(1) grants Federal agencies authority to interpret E-SIGN Act section 101, including section 101(c).

[573] E-SIGN Act section 106(13) defines transaction as ''an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons, including any of the following types of conduct—(A) the sale, lease, exchange, licensing, or other disposition of (i) personal property, including goods and intangibles, (ii) services, and (iii) any combination thereof; and (B) the sale, lease, exchange, or other disposition of any interest in real property, or any combination thereof.'' *See* 15 U.S.C. 7006(13).

[574] As discussed in the section-by-section analysis of § 1006.38(d)(2), the Bureau has determined not to apply the E-SIGN Act's consumer-consent requirements when a debt collector responds electronically to a dispute that the debt collector has determined is duplicative. Thus, final § 1006.42(b) refers to the disclosures required by ''§ 1006.38(c) or (d)(2)(i)'' rather than ''§ 1006.38(c) or (d)(2)'' as proposed.

[575] As discussed elsewhere in the section-by-section analysis of § 1006.42, the Bureau is moving proposed § 1006.42(b)(2) and (3) into commentary to final § 1006.42(a)(1) and is not finalizing proposed § 1006.42(b)(4). The Bureau therefore is finalizing proposed § 1006.42(b)(1) as § 1006.42(b).

and efficient means of communicating with consumers.

Nevertheless, because debt collectors do not presently engage in widespread use of electronic communications, as discussed in the section-by-section analysis of § 1006.6(d)(3) through (5), and in light of commenters' concerns, the Bureau concludes that it does not, at this time, have sufficient information to properly weigh the risks to consumers and benefits to debt collectors to finalize specific procedures for electronic delivery of required disclosures. The Bureau determines that finalizing other communications provisions will encourage both debt collectors and consumers to communicate electronically when they prefer to do so. The Bureau intends to actively monitor the market and gather information on these electronic communications in general so that it may, in the future, revisit specific procedures for electronic delivery of required disclosures.

Responsive format for validation notices sent electronically. Proposed § 1006.42(b)(4) would have required a debt collector who provides a validation notice electronically to do so in a responsive format that is reasonably expected to be accessible on a screen of any commercially available size and via commercially available screen readers.

Those industry commenters who addressed the proposed responsive format requirement in proposed § 1006.42(b)(4) generally stated that it would be too burdensome and prescriptive. A few industry commenters supported the proposed requirement.

Consumer advocates generally supported proposed § 1006.42(b)(4). They stated that responsive formats for required disclosures serve an important goal of readability on mobile devices. These commenters encouraged the Bureau to follow through on its proposal to release source code that collectors could use to provide electronically sent validation notices in a responsive format. While a group of State Attorneys General supported the responsive-format requirement, they stated that, if a responsive disclosure is magnified on a small screen, a consumer can read only one small section of the disclosure at a time, which can result in information being overlooked or taken out of context notwithstanding that the disclosure includes the requisite information.

As discussed above, the Bureau is not finalizing many of the proposed requirements or safe harbors related to electronic delivery of required disclosures because the Bureau currently lacks sufficient information to properly balance the risks and benefits of rules for electronic delivery of required disclosures. Accordingly, the Bureau is declining at this time to finalize the proposal to require that the validation notice be provided in a responsive format.

Alternative procedures to the E-SIGN Act for providing certain disclosures electronically. As noted in the section by-section analysis of § 1006.42(b), proposed § 1006.42(c) provided alternative procedures that debt collectors sending certain required disclosures electronically could have used in lieu of sending the disclosures in accordance with E-SIGN Act section 101 and obtaining affirmative consent directly from the consumer, as proposed § 1006.42(b)(1) otherwise would have required. In the context of those alternative procedures, proposed § 1006.42(c)(2) provided two methods from which debt collectors could choose for placing a required disclosure in an electronic communication. The first method, as described in proposed § 1006.42(c)(2)(i), was to place the disclosure in the body of an email. The second method, described in proposed § 1006.42(c)(2)(ii), was to place the disclosure on a secure website that is accessible by clicking on a hyperlink included within an electronic communication, provided certain other conditions were met. Among those conditions was that the consumer receive notice and an opportunity to opt out of hyperlinked delivery as set forth in proposed § 1006.42(d).

Proposed § 1006.42(d) described two processes for providing consumers with notice and an opportunity to opt out of hyperlinked delivery of required disclosures. Proposed § 1006.42(d)(1) required a debt collector to inform the consumer, in a communication with the consumer before providing the required disclosure, of certain information which included requiring the debt collector to inform the consumer of the consumer's ability to opt out of hyperlinked delivery of disclosures and to provide instructions for doing so within a reasonable period of time.[576] Under proposed § 1006.42(d)(2), the notice-and-opt-out process would have relied on a communication between the creditor and the consumer.[577]

As noted above, some industry commenters argued that the E-SIGN Act's consumer-consent requirements should not apply to the written disclosures required under the FDCPA and Regulation F. Some industry commenters suggested that, if the Bureau were to determine that the E-SIGN Act's consumer-consent requirements do apply, then the Bureau should use its exemption authority, provided by E-SIGN Act section 104(d)(1), to exempt from the E-SIGN Act's consumer-consent requirements the disclosures that the FDCPA requires to be in writing. E-SIGN Act section 104(d)(1) states that a Federal agency may exempt required written disclosures from the E-SIGN Act's consumer-consent requirements if the agency determines that ''such exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers.'' Industry commenters stated that the E-SIGN Act's consumer-consent requirements impose a substantial burden on electronic commerce in the debt collection industry because it is infeasible for a debt collector to obtain a consumer's E-SIGN consent prior to electronically delivering the validation notice to the consumer.

Industry commenters generally based this position on the same rationale that underpinned the Bureau's proposal to exempt from the E-SIGN Act's consumer-consent requirements required disclosures sent pursuant to the alternative procedures in proposed § 1006.42(c). Specifically, these commenters stated, it is not practicable to obtain a consumer's E-SIGN consent

[576] Proposed comment 42(d)(1)–3 would have clarified how the proposed requirement to communicate with the consumer before providing a hyperlinked disclosure worked together with the proposed requirement to provide the consumer a reasonable period within which to opt out. The proposed comment explained that, in an oral communication with the consumer, such as a telephone or in-person conversation, the debt collector may require the consumer to make an opt-out decision during that same communication. However, in a written or electronic communication, a debt collector would have had to allow a consumer more than five days to make an opt-out decision in order to grant sufficient time for the consumer to see and respond to the opt-out notice. And because, under FDCPA section 809(a), no more than five days may elapse between an initial debt collection communication and when the debt collector sends the validation notice, under proposed comment 42(d)(1)–3, a debt collector who wished to obtain consumer consent in an initial communication to hyperlinked delivery of the validation notice would have been required to obtain the consumer's consent to such delivery orally.

[577] Under proposed § 1006.42(d)(2), a debt collector would have been required, no more than 30 days before the debt collector's electronic communication containing the hyperlink to the disclosure, to confirm that the creditor: (1) Communicated with the consumer using the email address or, in the case of a text message, the telephone number to which the debt collector intends to send the electronic communication, and (2) informed the consumer of the information set forth in proposed § 1006.42(d)(2).

through the mail or during a telephone call, which are the primary methods by which debt collectors make initial communications to consumers. Further, these commenters stated, it is difficult or impossible to obtain consumers' E-SIGN consent in the five days between when the debt collector makes an initial communication in a telephone call and when FDCPA section 809(a) provides that the debt collector must provide the validation notice (unless the validation notice is contained in the initial communication). Finally, these commenters stated, debt collectors generally do not have ongoing customer relationships with the consumers from whom the debt collectors seek debt repayment, such that it is difficult or impossible for debt collectors to use the practices for obtaining E-SIGN consent that creditors typically use.

While some industry commenters argued that the Bureau should use its exemption authority, some also expressed concern with the specifics of the Bureau's proposed exemption, arguing that the proposal in § 1006.42(c) to permit debt collectors to use email addresses or telephone numbers that the creditor could have used in accordance with section 101(c) of the E-SIGN Act was not sufficient. These commenters stated that, in many cases, a creditor would not have a consumer's E-SIGN consent but would have the consumer's email address or telephone number (for text messages). For example, these commenters said, the creditor might use the email address or telephone number to provide non-required messages and notifications to consumers, for which the consumers' E-SIGN consent is not required. To enable debt collectors to interact efficiently with consumers in these situations, these commenters said, the Bureau should provide an E-SIGN Act exemption and revise the alternative procedures in proposed § 1006.42(c) to permit a debt collector to send required disclosures electronically to the consumer's email address or telephone number (for text messages) that the creditor provided to the debt collector, irrespective of whether the creditor or the debt collector obtained the consumer's E-SIGN consent.

Industry commenters also stated that the requirements in proposed § 1006.42(c)(2)(ii) and (d) regarding provision of required disclosures through hyperlinks in emails or text messages were far too prescriptive and burdensome and would not be used. They generally did not, however, suggest alternatives to those procedures because, as noted above, their main argument was that the E-SIGN Act's consumer-consent requirements do not apply or that the Bureau should establish a blanket exemption from those requirements.

Consumer advocates objected to the E-SIGN Act exemption in proposed § 1006.42(c). These commenters stated that the proposal failed to satisfy the two conditions that E-SIGN Act section 104(d)(1) requires an agency to meet when establishing an exemption from the E-SIGN Act's consumer-consent provisions. Specifically, consumer advocates stated that the proposal failed to show that (i) electronic commerce is substantially burdened by requiring debt collectors to obtain E-SIGN consent and that (ii) the proposed exemption would not materially increase the risk of harm to consumers.

Regarding hyperlinks, consumer advocates observed that Federal agencies have advised consumers against clicking on hyperlinks in electronic communications from unrecognized senders. They stated that the proposed procedures for hyperlinked delivery of required disclosures failed to provide reasonable assurance that an electronic debt collection communication with a hyperlink would not be sent to spam or that the consumer would recognize the communication and be comfortable clicking on a hyperlink within it. They stated that the Bureau's rule should not permit required debt collection disclosures to be sent through hyperlinks in emails or text messages. For all of these reasons, consumer advocates recommended that the Bureau withdraw proposed § 1006.42(c).

After considering feedback, the Bureau believes that it currently lacks sufficient information to properly assess the risks and benefits of the alternative procedures in proposed § 1006.42(c) vis-à-vis the exemption criteria in E-SIGN Act section 104(d)(1), which, as noted above, are that ''such exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers.'' For the reasons the Bureau set forth in its proposal,[578] the Bureau concludes that the E-SIGN Act's consumer-consent requirements do pose a substantial burden on electronic commerce in the debt collection context. The Bureau also concludes, however, that it does not have sufficient evidence to establish that the proposed exemption and alternative procedures would not increase the material risk of harm to consumers.[579] The Bureau also lacks evidence to assess and finalize other possible alternative procedures. Accordingly, the Bureau is not finalizing proposed § 1006.42(c) or otherwise establishing an exemption from the E-SIGN Act's consumer-consent requirements at the present time. As discussed above, the final rule—as reflected in § 1006.42(b)—thus requires a debt collector who provides electronically the written disclosures required by the FDCPA and Regulation F to do so in accordance with the E-SIGN Act's consumer-consent requirements.

The Bureau also declines to finalize at the present time the requirements for hyperlinked delivery of required disclosures that were proposed as part of the alternative procedures. The Bureau believes that the consumer risks from clicking on hyperlinks in electronic communications from senders that consumers might not recognize warrant additional consideration by the Bureau[580] and the Bureau intends to continue to monitor and gather information on electronic communications use in debt collection and, if applicable, use of hyperlinks in debt collection communications. In the absence of the proposed requirements, the final rule does not prohibit a debt collector from sending required disclosures electronically through hyperlinks (or with accompanying hyperlinks), provided that the debt collector complies with the requirements of the FDCPA and Regulation F and other applicable law. However, the final rule also does not provide a safe harbor for a debt collector to use hyperlinks to provide required disclosures electronically.[581] As noted above, § 1006.42(a)(1) provides, in part, that a debt collector who sends disclosures required by the FDCPA or

[578] 84 FR 23274, 23361 (May 21, 2019).

[579] Moreover, quantitative testing completed by the Bureau after publication of the proposal shows consumer preference for receiving validation notices through the mail and less consumer willingness to receive validation notices by email or text message. *See* CFPB Quantitative Testing Report, *supra* note 33, at 32–33.

[580] As the Bureau noted in the proposal, the FTC advises consumers not to clink on links or attachments in unsolicited electronic communications from senders they do not recognize, in order to prevent phishing and malware. *See* 84 FR 23274, 23363 (May 21, 2019); Fed. Trade Comm'n, *How to Recognize and Avoid Phishing Scams* (July 2017), *https://www.consumer.ftc.gov/articles/how-recognize-and-avoid-phishing-scams;* Fed. Trade Comm'n, Malware (Nov. 2015), *https://www.consumer.ftc.gov/articles/0011-malware.* The FDIC offers consumers similar guidance. *See* Fed. Deposit Ins. Corp., *Beware of Malware: Think Before You Click, https://www.fdic.gov/consumers/consumer/news/cnwin16/malware.html* (last updated Mar. 8, 2016).

[581] In this regard, see the discussion of *Lavallee* v. *Med-1 Solutions* in the section-by-section analysis below addressing the Bureau's decision not to finalize a safe harbor for validation notices sent in the body of an electronic initial communication.

Regulation F in writing or electronically must, among other things, do so in a manner that is reasonably expected to provide actual notice. Final comment 42(a)(1)–1 provides relevant factors for determining whether a debt collector has met this requirement.

Safe harbor for validation notices sent in the body of an electronic initial-communication. Proposed § 1006.42(e)(2) provided that a debt collector satisfied the notice and retainability requirements of § 1006.42(a) if the debt collector delivered a validation notice in the body of an email that was the debt collector's initial communication with the consumer and satisfied certain other conditions. The debt collector could either (i) satisfy the requirements of proposed § 1006.42(b) for delivering validation notices electronically, which included obtaining the consumer's E-SIGN consent; or (ii) satisfy the requirements of the proposed alternative procedures in § 1006.42(c) discussed above (except that proposed § 1006.42(e)(2) would have permitted debt collectors to send the validation notice to a potentially broader set of email addresses than proposed § 1006.42(c) would have permitted).

Some industry commenters suggested that the safe harbor set forth in proposed § 1006.42(e)(2) be expanded in certain ways, while others criticized it as being overly complicated and burdensome.[582] Industry commenters generally stated that the safe harbor should be expanded through changes to the procedures for selecting an email address in proposed § 1006.6(d)(3). For example, these commenters stated that the safe harbor should include any email address or telephone number that the consumer has provided to, or confirmed with, the creditor, debt collector, or other person for purposes of receiving communication about the account, including a consumer's employer-provided email address if that is the email address that the consumer provided to the creditor.[583]

With respect to the form of the communication, some industry commenters stated that the safe harbor should include delivery of the validation notice in the initial communication through a text message. Others stated that the safe harbor should include initial communication emails that have the validation notice as a portable document format (PDF) attachment. And others stated that the safe harbor should expressly permit the body of initial communication emails to include both the validation notice and hyperlinks to debt collector websites.

Consumer advocates recommended that the Bureau withdraw the email safe harbor set forth in proposed § 1006.42(e)(2). These commenters stated that the proposed procedures for obtaining consumers' email addresses set forth in proposed § 1006.6(d)(3) would not reliably result in the validation notice information, contained within the emailed initial communication, actually reaching the consumer and could result in disclosure of sensitive information to third parties. These commenters stated that the proposal failed to provide a rational explanation of whether consumers would reliably receive the emailed initial communication.

Having considered the comments, the Bureau declines to finalize the safe harbor for email delivery of the validation notice information within the initial communication. The Bureau has determined that the FDCPA does not require the validation notice information to be provided in writing when it is contained in the initial communication.[584] The Bureau has therefore also determined that the E-SIGN Act's consumer-consent requirements do not apply to a debt collector's electronic delivery of the validation notice information within the debt collector's initial communication to a consumer.[585] Accordingly, a debt collector may electronically deliver the validation notice information within the debt collector's initial communication to a consumer without obtaining the consumer's E-SIGN consent.[586]

The Bureau also has determined that the validation notice information (whether or not contained in the initial communication) is a disclosure required by the FDCPA. Accordingly, the general standard in final § 1006.42(a)(1)—that a required disclosure be sent in a manner that is reasonably expected to provide actual notice and in a form that the consumer may keep and access later—applies when a debt collector sends the validation notice information electronically within the initial communication. The commentary discussed in the section-by-section analysis of § 1006.42(a)(1) clarifies the general standard.

However, because email communications in general are not widely used in debt collection currently, the Bureau lacks evidence to show that a debt collector sending an email pursuant to the proposed safe harbor would have a reasonable expectation of actual notice to the consumer. The Bureau is thus declining to finalize the proposed safe harbor.

The absence of the proposed safe harbor from the final rule does not preclude debt collectors from using email to deliver the validation notice information electronically within the initial communication if the debt collector is able to satisfy the requirements of the FDCPA and Regulation F, in particular the requirement that the communication be

[582] Some industry commenters did object to the safe harbor, but these commenters misunderstood the proposal as requiring a debt collector to obtain a consumer's E-SIGN consent when the debt collector delivers the validation notice in the body of an email that was the debt collector's initial communication with the consumer. Instead, as noted above, the proposed safe harbor included delivery without E-SIGN consent (per the alternative procedures set forth in proposed § 1006.42(c)) of an email to an email address that the debt collector selected through the procedures described in proposed § 1006.6(d)(3)).

[583] As also discussed in the section-by-section analysis of § 1006.22(f)(3), these commenters stated that, while it may be true that a consumer's employer can access emails sent to the consumer's employer-provided email addresses, consumers understand that they do not have an expectation of privacy from their employers for their employer-provided email account when they provide employer-provided email addresses to creditors.

[584] FDCPA section 809(a) permits the validation notice information to be contained in the initial communication. In turn, FDCPA section 807(11) indicates that the initial communication with the consumer may be oral. Accordingly, the Bureau interprets the FDCPA as not requiring that the validation notice information be provided in writing when it is contained in the initial communication.

[585] The E-SIGN Act's consumer-consent requirements apply only when a ''statute, regulation, or other rule of law'' requires that a disclosure be provided in writing. *See* E-SIGN Act section 101(c)(1) (15 U.S.C. 7001(c)(1)). Because the Bureau has determined that the FDCPA does not require that the validation notice information be provided in writing when it is contained in the initial communication (*see* previous footnote) and the Bureau is not imposing such a requirement through Regulation F, the Bureau has also determined that the E-SIGN Act's consumer-consent requirements do not apply to electronic delivery of the validation notice information when it is contained in the initial communication.

[586] In *Lavallee* v. *Med-1 Solutions,* the United States Court of Appeals for the Seventh Circuit held that the emails sent by Med-1 Solutions to Lavallee did not meet the FDCPA's requirements for electronic delivery of the validation notice information within an initial communication because the emails did not ''contain'' the validation notice information. *Lavallee* v. *Med-1 Solutions, LLC,* 932 F.3d 1049 at 1055 (7th Cir. 2019). The court observed that, to access the validation notice information, the consumers receiving the emails had to complete multiple, discrete tasks and ''[a]t best, the emails provided a digital pathway to access the information.'' *Id.* at 1055–56. Under the specific facts of that case, the Bureau agrees with the Seventh Circuit that the electronic delivery procedures used by Med-1 Solutions did not satisfy the requirement in FDCPA section 809(a) that the initial communication ''contain'' the validation notice information. Nonetheless, the Bureau believes that a debt collector may properly provide the validation notice information to a consumer within the debt collector's electronic initial communication with the consumer, provided that the communication ''contains'' the validation notice information.

sent in a manner that is reasonably expected to provide actual notice and in a form that the consumer may keep and access later. The Bureau will monitor whether debt collectors who electronically provide validation notice information within initial communications do so in a manner that does not violate these requirements.

As noted above, the Bureau is finalizing § 1006.42, including § 1006.42(a)(1), to implement and interpret FDCPA section 809(a) and (b) and pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors.

The Bureau is also finalizing § 1006.42(a)(1) to implement and interpret FDCPA section 808's prohibition on using unfair or unconscionable means to collect a debt. A few industry commenters objected to the proposal's initial conclusion that it may be unfair or unconscionable under FDCPA section 808 for a debt collector to deliver a disclosure using a method that is not reasonably expected to provide actual notice to the consumer or that does not allow the consumer to retain the disclosure and access it later.[587] These commenters argued that it is not unfair or unconscionable to send an electronic notice to a consumer that the debt collector has no reason to believe is addressed incorrectly or will be returned.

The Bureau concludes that the proposal's analysis under FDCPA section 808 is consistent with these commenters' position. Whether a debt collector has a reasonable expectation of actual notice depends upon the specific facts and circumstances, which may include the debt collector's knowledge concerning the accuracy of the electronic address used or knowledge regarding the likelihood that the electronic communication will be returned. As proposed, therefore, the Bureau is finalizing § 1006.42(a)(1) as, among other things, an interpretation of FDCPA section 808's prohibition on using unfair or unconscionable means to collect a debt.

Subpart C—Reserved

Subpart D—Miscellaneous

Section 1006.100 Record Retention

For the purpose of promoting the effective and efficient enforcement and supervision of Regulation F, the Bureau proposed in § 1006.100 to require a debt collector to retain evidence of compliance with Regulation F. Specifically, the Bureau proposed in § 1006.100(a) to require a debt collector to retain evidence of compliance with Regulation F starting on the date that the debt collector begins collection activity on a debt and ending three years after: (1) The debt collector's last communication or attempted communication in connection with the collection of the debt; or (2) the debt is settled, discharged, or transferred to the debt owner or to another debt collector. The proposed commentary would have clarified certain details, including that nothing in the proposed record retention provision required a debt collector to record telephone calls, but that, if a debt collector recorded telephone calls, the debt collector needed to retain the recordings if the recordings were evidence of compliance with Regulation F.[588] To address feedback received, the Bureau is finalizing § 1006.100(a) with revisions and is adding new § 1006.100(b) to create a special rule regarding retention of telephone call recordings.

100(a)

Industry commenters expressed concern regarding the potential burden of a retention requirement, especially for smaller debt collectors. Both industry and consumer advocate commenters offered suggestions on how the proposed requirement should be modified, as follows.

Trigger To Begin Retaining Records

As proposed, the final rule's record retention provision would have required a debt collector to begin retaining records ''on the date that the debt collector begins collection activity on a debt.'' Most commenters who addressed the issue stated that that requirement provides sufficient clarity. Some consumer advocate commenters suggested that the retention period begin as soon as a debt collector obtains a debt from a creditor (or prior debt collector)—as opposed to, as proposed, when collection activity begins—so that the debt collector retains evidence relevant to disparate impacts in who the debt collector targets for collection or for particular types of collection. The Bureau declines to start the record retention requirement at the time the debt collector obtains the debt.[589] The Bureau therefore is finalizing § 1006.100(a) to provide, as proposed, that a debt collector must begin to retain records on the date that collection activity begins on a debt.

Running of Retention Period

Industry commenters suggested a number of alternatives to, or requested clarity regarding, the Bureau's proposal to tie the running of the retention period to (at the debt collector's option) either the date of the debt collector's last communication or attempted communication regarding the debt or the date that the account was settled, transferred, discharged or otherwise closed.[590] First, some industry commenters suggested that the proposed retention period should run from the debt collector's last communication or attempted communication with the consumer rather than, as proposed, with anyone. These commenters asserted that the purpose of the FDCPA is to protect consumers from unfair, deceptive, and abusive debt collection practices by debt collectors and that a record retention requirement based on a debt collector's last communication or attempted communication with a consumer would be more consistent with this statutory purpose than the proposed approach of the last communication with anyone. Other industry commenters stated that the definitions of ''communication'' and ''attempted communication'' should be clarified for purposes of the rule's record retention requirement.

Second, industry commenters stated that, with respect to many accounts, a debt collector will undertake initial collection activity soon after receiving the account, but the account might then sit dormant for months or years before being settled, transferred, discharged, or otherwise closed on the debt collector's books.[591] These commenters stated that, as proposed, there would be uncertainty and burden associated with maintaining records for dormant accounts for time periods potentially well beyond three years from the last collection activity on the accounts because the accounts have not been closed. To alleviate this problem, some industry commenters suggested that the final rule's record retention requirement should require debt collectors to retain records for three years from the *earlier* of the date of the last communication or the date on which the account is closed.

Third, some industry commenters, as well as the U.S. SBA Office of

[587] *See* 84 FR 23274, 23356 (May 21, 2019).

[588] *See* 84 FR 23274, 23367–68 (May 21, 2019).

[589] Regulation B, 12 CFR 1002, which implements the Equal Credit Opportunity Act, imposes its own record retention requirements.

[590] In addition to the comments discussed in this section-by-section analysis, commenters raised concerns about the unique record retention burdens associated with telephone call recordings. The Bureau discusses those comments in the section-by-section analysis of § 1006.100(b) below, and addresses retention of all other types of records here.

[591] Some commenters suggested that the record retention provision in the regulation refer to the date on which an account is ''closed'' rather than ''transferred.''

Advocacy, requested more clarity as to when the three-year retention clock would start to run. Some of these commenters noted that, for discharged debts, it was not clear from the proposal whether the retention requirement would run from the date of the discharge or of some later terminal event. Others stated that the proposal was unclear whether, if there is a judgment, the three-year period runs from the final court order, the date that the judgment is paid, or the date the account is closed. Separately, some industry commenters stated that the date of initiating collection activity sufficiently set forth the expectation for when debt collectors should start retaining records with respect to an account.

Some consumer advocates likewise requested that the date on which the three-year retention clock starts to run be more definitive. These commenters suggested that the three-year period run from the time at which a debt collector sends a notice to the consumer stating that the debt has been fully paid or settled, or extinguished, or that the debt collector has ceased all collection activities related to the debt. These commenters stated their belief that most debt collectors do not currently provide such final notices today and suggested that the Bureau require such notices to provide clarity to consumers and to trigger the start of the three-year record retention clock.

The Bureau agrees that, as proposed, the record retention requirement could have imposed an unintended burden as a result of the variability of the length of the life cycles of various debt collection accounts and the long dormancy of many accounts after the first communication (and related initial activity). The Bureau, however, declines to address these concerns by taking the suggested approach of making the three-year retention period run from the *earlier* of the last communication or the closure of the debt file. If debt file closure occurred prior to the last communication, such an approach could result in the debt collector not being required to retain the record of the last communication for a sufficient time to permit effective supervision and enforcement, because the three-year retention period would have begun to run upon closure of the debt file. The Bureau also declines to require, as suggested by some consumer advocate commenters, a debt collector to provide a notice to a consumer that the debt collector has ceased all collection activity with respect to a debt. The Bureau did not propose such a requirement and therefore did not receive comments on the benefit or burden of such a requirement. For these reasons, the Bureau is finalizing § 1006.100(a) to provide that, except for telephone call recordings (as discussed in the section-by-section analysis of § 1006.100(b)), the retention period begins to run on the date of the last collection activity on the account. Final comment 100(a)–4 provides clarity regarding when the last collection activity on an account occurs and, thus, when the three-year record retention clock starts to run. The Bureau determines that having the retention period begin to run with the last collection activity on the account strikes the right balance between encompassing the activities and documents necessary to adequately supervise and enforce the requirements of the FDCPA and Regulation F, providing sufficient clarity for compliance, and not being overly burdensome.

The Bureau declines to base the running of the retention period, as suggested by industry commenters, on the debt collector's last communication with the consumer. Nothing in the statute's statement of its purposes in FDCPA section 802(e) suggests that the statute's protections are limited to debt collectors' communications with consumers. Further, the FDCPA's protections against harassment or abuse (FDCPA section 806), false or misleading representations (section 807), and unfair practices (section 808) are *not* limited to communications or activities directed to the consumer alleged to owe a debt. For example, FDCPA section 806 states that a debt collector may not harass, oppress, or abuse ''any person'' in connection with the collection of a debt. Finally, the FDCPA's limitations on acquisition of location information (FDCPA section 804) and communication with third parties (section 805(b)) are specifically targeted at communications with persons other than the consumer.

Length of Retention Period

Industry commenters expressed differing views as to the proposed three-year record retention period. Some commenters stated that the proposed period strikes the right balance between cost and burden on the one hand and the need to ensure adequate supervision and enforcement on the other. Some stated that the period should be one year, consistent with the FDCPA's one-year statute of limitations. Other industry commenters recommended that the retention period be two years, consistent with Regulation X, 12 CFR 1024, and Regulation Z, 12 CFR 1026. Others suggested that the proposed three-year period should be amended to be ''at least'' or ''no less than'' three years to clarify that maintaining records for more than three years would not be a violation.

Many consumer advocates stated that the record retention period should be longer than three years. Some consumer advocates stated that the retention period should last at least as long as a debt collector might continue collection attempts. Others said that it should be seven years, paralleling the length of time that information generally may stay in consumer credit reports under the FCRA and the time periods for actions under certain State laws. Others recommended that the rule clarify that debt collectors who furnish information to consumer reporting agencies pursuant to the FCRA also must comply with the recordkeeping requirements of the FCRA.

For the reasons discussed below, the Bureau has decided to finalize a three-year record retention period, as proposed. First, as to comments about the FDCPA's ''one-year statute of limitations,'' the Bureau notes that that timeframe refers to FDCPA section 813(d), which applies only to private actions brought under the FDCPA. FDCPA section 814(b) and (c) set forth the basis for Federal agencies, including the Bureau, to bring administrative enforcement actions for violations of the FDCPA. The Bureau also declines to make the Regulation F retention period match the period set forth in Regulations X and Z (two years), because those regulations implement statutes (respectively, RESPA and the Truth in Lending Act [592]) that serve different purposes than the FDCPA. The Bureau also declines to adopt a record retention time period longer than three years because retention for such a time period is unnecessary for effective supervision and enforcement and is not typical under the consumer financial services laws.

A three-year retention period will provide the Bureau and other Federal and State enforcement agencies with a sufficient but limited amount of time to examine and conduct enforcement investigations. In addition, it will facilitate effective supervisory examinations, which depend critically on having access to the information necessary to assess operations, activities, practices, and legal compliance. If the record retention period were reduced, it could be considerably more difficult to ensure that the necessary information and records would remain routinely

[592] 15 U.S.C. 1601 *et seq.*

available for proper supervisory oversight of debt collectors. The Bureau is in a position to evaluate such issues from its near-decade of experience exercising supervision and enforcement authority over the debt collection industry.[593] That experience supports the conclusion that a three-year record retention period is necessary and warranted.

The Bureau also concludes that a three-year retention period will not impose an undue cost or burden on debt collectors, particularly when viewed in light of the marginal difference in cost or burden between, for example, a two-year period and a three-year period. Based on the comments received and its own experience in supervision and law enforcement, the Bureau concludes that many debt collectors have already incorporated record retention policies and procedures into their budgets and daily operations and already maintain records for a sufficient length of time to comply with the time period in the final rule. The Bureau also determines that a three-year retention period is unlikely to impose undue burden on debt collectors because it is increasingly common, even for smaller entities, to maintain records electronically either on their own computers or using ever cheaper cloud storage options.

The Bureau agrees with consumer advocate commenters that debt collectors who are furnishers under the FCRA must also, in addition to complying with the Regulation F record retention requirement, comply with the recordkeeping requirements of the FCRA. In particular, Regulation V, 12 CFR part 1022, requires furnishers to incorporate its guideline to ''maintain[ ] records for a reasonable period of time, not less than any applicable recordkeeping requirement, in order to substantiate the accuracy of any information about consumers it furnishes that is subject to a direct dispute.'' [594] Records reasonably substantiating a debt collector's claims that a consumer owes a debt are records that are evidence of the debt collector's compliance or noncompliance with the FDCPA's prohibition against unfair or deceptive debt collection practices, as discussed in more detail below. Accordingly, if a debt collector is also a furnisher under Regulation V, a three-year Regulation F record retention requirement would be the minimum amount of time for purposes of the Regulation V record retention guideline, since that guideline specifically incorporates ''any applicable recordkeeping requirement.'' Under the final rule, there are no consumer debts or record types associated with those debts for which the rule requires record retention for more than three years beyond the last collection activity. The final rule therefore does not preclude debt collectors from adopting policies and procedures under which records are deleted three years after the last collection activity on an account. However, if a debt collector deletes an account's records (other than call recordings, which are discussed below) at that time, then a violation of the record retention provision would occur if the debt collector undertook any further collection activity with respect to that account.[595] Moreover, the Bureau concludes it is clear that a debt collector must have (or have access to) records reasonably substantiating its claim that a consumer owes a debt in order to avoid engaging in deceptive or unfair collection practices in violation of the FDCPA when it attempts to collect the debt.[596] Thus, records reasonably substantiating a debt collector's claim that a consumer owes a debt are records that are evidence of compliance or non-compliance with the FDCPA and Regulation F. As a result, although the record retention requirement does not mandate retention of any records beyond three years after the debt collector's last collection activity on the debt, restarting debt collection activity at any time would mean that the last collection activity on the debt had not yet occurred.

Records To Be Retained

Consumer advocates generally recommended that, rather than require that debt collectors retain ''evidence of compliance,'' the record retention provision should require debt collectors to retain more types of documents. Specifically, these commenters said, the provision should reflect the types of documents described in the record retention provision of the Bureau's SBREFA Outline, which would have ''encompass[ed] all records the debt collector relied upon for the information in the validation notice and to support claims of indebtedness, for example, the information the debt collector obtained before beginning to collect, the representations the debt collector received from the creditor before beginning to collect, and the records the debt collector relied upon in responding to a dispute.'' [597]

As the Bureau intended with its proposal to require a debt collector to retain ''evidence of compliance,'' the final rule clarifies that a debt collector must retain records that are evidence of compliance or noncompliance with the FDCPA and Regulation F, which includes records that evidence that the debt collector refrained from conduct prohibited by the FDCPA and Regulation F. *See* final comment 100(a)–1. The Bureau declines, however, to go further and to apply the final rule's record retention requirement to all of the types of records that were described in the Bureau's 2016 SBREFA Outline. At that time, the Bureau was considering a broader set of possible regulatory provisions, pursuant to legal authorities including the Bureau's Dodd-Frank Act section 1031 unfair, deceptive, or abusive or acts or practices (UDAAP) authority, which could have applied to parties including creditors, and which could have resulted in creditors being required to ensure that they pass complete and accurate information about consumer debts to debt collectors. In contrast, the Bureau is now adopting a final rule, pursuant primarily to its FDCPA authority,[598] that is narrower in scope and that applies only to FDCPA debt collectors. Accordingly, the Bureau determines that the record retention requirement that was described in the Bureau's SBREFA Outline is neither necessary nor warranted to accomplish the requirement's purpose, which is to promote effective and efficient enforcement and supervision of the requirements of the FDCPA and Regulation F, thereby promoting compliance with the law which is beneficial to consumers.

Burden for Smaller Debt Collectors

Several industry commenters, as well as the U.S. SBA Office of Advocacy expressed concern about the potential burden of the proposed requirement on

[593] To facilitate Bureau supervision of nonbank covered persons active in the consumer debt collection market, the Bureau published in 2012 a rule defining larger participants in that market. 77 FR 65775 (Oct. 31, 2012).

[594] 12 CFR 1022, app. E, para. III(c).

[595] This is because further collection activity on the account after deletion of some of the account's records would necessarily mean that the debt collector had failed to retain records, per § 1006.100(a), ''starting on the date that the debt collector begins collection activity on a debt until not less than three years after the debt collector's last collection activity on the debt.''

[596] FDCPA section 807 states that ''[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt.'' Section 808 states that ''[a] debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt.''

[597] Small Business Review Panel Outline, *supra* note 36, at 35.

[598] Although the final rule uses certain authorities provided to the Bureau by the Dodd-Frank Act, the rule relies primarily on the Bureau's FDCPA authority and does not rely at all on the Bureau's Dodd-Frank Act UDAAP authority.

small debt collectors. These commenters noted that the cost of retaining electronic debt collection records, including telephone call recordings and scanned images, can be significant. Some of these commenters observed that most debt collectors have incorporated record retention procedures and costs into their daily operations, but that any additional requirements to retain records beyond three years could impose significant expense. Others stated their belief that a recorded telephone call would almost always constitute ''evidence of compliance'' and that, to reduce burden, the Bureau should consider imposing a tiered recordkeeping requirement for call recordings that takes into account the costs of maintaining recorded calls for small debt collectors.

As discussed above, the Bureau concludes that its revisions to § 1006.100(a) (and its addition of § 1006.100(b) for a special rule regarding telephone calls, as discussed below) address the concerns of commenters, including small businesses, regarding the burdens of a record retention requirement, including for small businesses. In addition, the Bureau in the final rule has added comment 100(a)–2 to make clear that a debt collector need not create and maintain, for the sole purpose of evidencing compliance, additional records that the debt collector would not have created in the ordinary course of its business in the absence of the record retention requirement in § 1006.100(a). For these reasons, the Bureau determines that most debt collectors of all sizes will be able to comply with the final rule's record retention requirement without making significant changes to their existing record retention policies and procedures.[599] Accordingly, the Bureau concludes that the final record retention requirement will not impose a significant burden on debt collectors.

For all of the reasons discussed above, the Bureau is finalizing § 1006.100(a) to provide that, except as provided in § 1006.100(b), a debt collector must retain records that are evidence of compliance or noncompliance with the FDCPA and Regulation F starting on the date that the debt collector begins collection activity on a debt until three years after the debt collector's last collection activity on the debt. Comment 100–1 states that nothing in § 1006.100 prohibits a debt collector from retaining records that are evidence of compliance or noncompliance with the FDCPA and Regulation F for more than three years after the applicable date.

Comment 100(a)–1 clarifies that, if a record is of a type that could evidence compliance or noncompliance depending on the conduct of the debt collector that is revealed within the record, then the record is one that is evidence of compliance or noncompliance and the debt collector must retain it. The comment also provides examples.[600] As noted above, comment 100(a)–2 clarifies that a debt collector need not create and maintain, for the sole purpose of evidencing compliance, additional records that the debt collector would not have created in the ordinary course of its business in the absence of the record retention requirement in § 1006.100(a). Comment 100(a)–3 states, as was proposed, that § 1006.100(a) does not require retaining actual paper copies of documents and that records may be retained by any method that reproduces them accurately and ensures the debt collector can easily access them (including the debt collector having a contractual or other legal right to access records possessed by another entity). And final comment 100(a)–4 provides clarity regarding when the last collection activity on an account occurs and, thus, when the retention clock starts to run.

100(b)

As noted in the section-by-section analysis of § 1006.100(a), the Bureau received a number of comments regarding the unique concerns associated with retaining telephone call recordings. Industry commenters stated that the lifespan of debt collection accounts can vary significantly, with some remaining open only for months and others remaining open for many years. These commenters further stated that many debt collectors' systems store telephone call recordings in large batch files based on date (*e.g.,* a debt collector creates and stores one batch file each day that contains all of the call recordings for that day) and that, under the Bureau's proposal, a debt collector would need to retain a given date's call recordings for at least three years beyond the lifespan of the longest-lifespan account for which a call was recorded on that date. These commenters expressed concern that, as a result, there could be significant burden associated with retaining many call recordings for well beyond three years.

To alleviate this problem, some industry commenters suggested that the final rule take an approach to record retention under which debt collectors would be required to retain a record, including a call recording, for three years from the unique or discrete event—such as a telephone call or letter, report to a credit bureau, or a payment or credit—that generated the record. These commenters also noted that the suggested event-specific approach would help reduce burden in the area of healthcare debt collection, because healthcare debts are usually packaged by patient rather than by account or debt.

The Bureau agrees that the potential unique burdens associated with retaining telephone call recordings (for debt collectors who record telephone calls) merits a special rule regarding their retention. The Bureau therefore is finalizing § 1006.100(b) to set forth a separate retention time period for telephone call recordings. Section 1006.100(b) states that, if a debt collector records telephone calls made in connection with the collection of a debt, the debt collector must retain the recording of each such telephone call for three years after the date of the call.[601] Thus, in contrast to other record types, a debt collector could delete a call recording after three years and yet collection activity on the relevant account could continue after that time.[602] The Bureau concludes that this approach to call recordings addresses industry commenters' concerns regarding potentially having to retain some call recordings for much longer than three years, due to debt collectors' batch file call recording systems.

The Bureau declines to adopt this event-specific approach for retention of

[599] As in the proposal, the final recordkeeping requirement does not require a debt collector to record telephone calls. However, as discussed below, if a debt collector's practice is to record telephone calls, then the such records are evidence of compliance or noncompliance and the debt collector must retain them.

[600] Final comment 100(a)–1 includes an example that refers, in part, to disclosures required by the FDCPA, as implemented by Bureau regulation. The Bureau expects that, in the Bureau's disclosure-focused final rule, this reference will be updated to refer to disclosures required by § 1006.34.

[601] Final comment 100(b)–1 clarifies that, while nothing in § 1006.100 requires a debt collector to make call recordings, if a debt collector records telephone calls, the recordings are evidence of compliance or noncompliance with the FDCPA and Regulation F and the debt collector must retain the recording of each such telephone call for three years after the date of the call.

[602] For example, if a call recording occurred at month six in the life of an account, the call recording could be deleted three years later; and, collection activity on that account could continue past the account's three-and-a-half-year mark, notwithstanding that the call recording had been deleted. Further, as noted above, comment 100–1 provides that nothing in § 1006.100 prohibits a debt collector from retaining records that are evidence of compliance or noncompliance with the FDCPA and Regulation F for more than three years after the applicable date.

record types other than call recordings, as suggested by some commenters. This is because the Bureau determines, based on comments received and its own experience, that the burden of retaining call recordings can be significant, such that it is appropriate to give debt collectors a date certain on which call recordings may be deleted—three years after the date of the telephone call—notwithstanding that collection activity on the relevant account might continue after that time. As discussed above, however, the Bureau concludes that it is generally inappropriate for a debt collector to continue collection activity on an account after the debt collector has begun to delete its records related to that account. Further, the Bureau believes based on feedback received that the burden of retaining other record types for the record retention period is not as significant as that of retaining call recordings. The Bureau therefore believes that an event-specific approach to record retention is neither necessary nor warranted for records other than call recordings.[603]

For the reasons described above, the Bureau is finalizing § 1006.100 to facilitate supervision of, and to assess and detect risks to consumers posed by debt collectors, including debt collectors who are larger participants of the consumer debt collection market, as defined in 12 CFR part 1090, and to enable the Bureau to conduct enforcement investigations to identify and help prevent and deter abusive, unfair, and deceptive debt collection practices.

The Bureau is finalizing § 1006.100 pursuant to its authority under title X of the Dodd-Frank Act. Specifically, the Bureau is finalizing § 1006.100 pursuant to Dodd-Frank Act section 1022(b)(1), which, among other things, provides that the Bureau's director may prescribe rules and issue orders and guidance as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws and to prevent evasions thereof. The Bureau also is finalizing § 1006.100 pursuant to Dodd-Frank Act section 1024(b)(7)(A), which authorizes the Bureau to prescribe rules to facilitate supervision of a person described in Dodd-Frank Act section 1024(a)(1) including a person identified as a larger participant of a market for a consumer financial product or service as defined by rule in accordance with section 1024(a)(1)(B) of the Dodd-Frank Act;[604] and Dodd-Frank Act section 1024(b)(7)(B), which authorizes the Bureau to require a person described in Dodd-Frank Act section 1024(a)(1) to retain records for the purpose of facilitating supervision of such a person and assessing and detecting risks to consumers.

Title X of the Dodd-Frank Act does not provide a private right of action. Accordingly, the Bureau has determined that § 1006.100 does not provide a private right of action if a debt collector were to fail to comply with the requirements of § 1006.100.

Section 1006.104 Relation to State Laws

FDCPA section 816 provides that the FDCPA does not annul, alter, or affect, or exempt any person subject to the provisions of the FDCPA from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of the FDCPA, and then only to the extent of the inconsistency. FDCPA section 816 also provides that, for purposes of that section, a State law is not inconsistent with the FDCPA if the protection such law affords any consumer is greater than the protection provided by the FDCPA.[605] The Bureau proposed § 1006.104 to implement FDCPA section 816.[606] Proposed § 1006.104 mirrored the statute, except that proposed § 1006.104 referred to both the provisions of the FDCPA and the corresponding provisions of Regulation F. Proposed comment 104–1 would have clarified that a disclosure required by applicable State law that describes additional protections under State law does not contradict the requirements of the FDCPA or the corresponding provisions of Regulation F.

Several industry and consumer advocate commenters expressed overall support for proposed § 1006.104 and its related commentary and did not request changes. For instance, at least one commenter stated that the proposal appropriately recognized the ability of States to enact laws that offer greater protections than those the FDCPA provides.

A State Attorney General commenter expressed concern about how the proposal would interact with State unfair or deceptive acts or practices laws that exempt from liability acts or transactions permitted or affirmatively authorized by Federal law. The commenter was particularly concerned that debt collectors might argue that compliance with the proposal's safe harbor provisions constitutes a defense to liability under State consumer protection laws. To mitigate this possibility, the commenter asked the Bureau to clarify that it does not intend to exempt debt collectors from State law requirements that afford equal or greater protection to consumers. Further, the commenter asked the Bureau to clarify that an act or transaction that satisfies the proposal's safe harbor provisions is not affirmatively authorized or permitted with regard to any other law, such that the act or transaction would be exempt from liability under State law pursuant to an exemption for federally permitted transactions.

Some commenters asked the Bureau to clarify how proposed § 1006.104 and its related commentary would impact State law disclosure requirements. According to these commenters, proposed comment 104–1 did not track FDCPA section 816's statutory language and therefore would be susceptible to competing interpretations. These commenters expressed concern that proposed comment 104–1 could be interpreted to mean that proposed § 1006.104 would preempt State law disclosure requirements that afford the same protections as the FDCPA and the corresponding provisions of Regulation F. These commenters opposed such an interpretation as being inconsistent with FDCPA section 816.

The Bureau notes that the final rule implements the FDCPA, a Federal law. The final rule does not interpret State law. Regarding the effect of the final rule on State law, the Bureau will apply the standard Congress set forth in FDCPA section 816. Under FDCPA section 816, debt collectors are only relieved of an obligation to comply with State law if that law is inconsistent with the FDCPA or the corresponding provisions of Regulation F, and then only to the extent of that inconsistency (and, as noted above, a State law that affords consumers greater protection than the FDCPA and Regulation F would not be inconsistent). For example, a State law that affords greater protection to consumers by imposing a call frequency limit is not preempted by § 1006.14(b), which sets a presumption of compliance or violation as to call frequency only with respect to the FDCPA and Regulation F. Thus, this final rule does not affirmatively permit debt collectors to comply with the presumption regarding call frequency in § 1006.14 instead of an applicable State-law frequency limit that affords greater protection to consumers. Further, the

[603] The Bureau has considered comments received regarding the different structure of medical debt accounts and records relative to other debt types. The Bureau declines to adopt a record retention provision specific to medical debt.

[604] 12 CFR 1090.105 defines larger participants of the consumer debt collection market.

[605] 15 U.S.C. 1692n.

[606] *See* 84 FR 23274, 23368 (May 21, 2019).

Bureau emphasizes that any safe harbor provided by Regulation F is a safe harbor only for purposes of compliance with the FDCPA and Regulation F and is not a safe harbor with regard to State laws, unless States choose to incorporate those Federal standards into their State legal frameworks. Moreover, as discussed in their respective section-by-section analyses, the Bureau is not finalizing the safe harbors that were set forth in proposed §§ 1006.18(g) and 1006.42(e)(2), which were specifically cited by commenters as being potentially problematic vis-a-vis State laws. As a result, the final rule contains fewer safe harbors that could interrelate with States' laws prohibiting unfair, deceptive, or abusive acts and practices.

After considering the comments, and pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors, the Bureau is finalizing § 1006.104 as proposed to implement FDCPA section 816. Because § 1006.104 largely restates the FDCPA, the provision appropriately accommodates State debt collection laws, including those laws that afford consumers greater protections than the FDCPA and the corresponding provisions of Regulation F.

The Bureau is not finalizing proposed comment 104–1 at this time. Because proposed comment 104–1 specifically addressed how State law disclosure requirements might interact with the FDCPA and Regulation F, the Bureau expects to determine whether and how to finalize proposed comment 104–1 as part of its disclosure-focused final rule.

Section 1006.108 Exemption for State Regulation and Appendix A Procedures for State Application for Exemption From the Provisions of the Act

FDCPA section 817 provides that the Bureau shall by regulation exempt from the requirements of the FDCPA any class of debt collection practices within any State if the Bureau determines that, under the law of that State, that class of debt collection practices is subject to requirements substantially similar to those imposed by the FDCPA, and that there is adequate provision for enforcement.[607] Sections 1006.1 through 1006.8 of existing Regulation F implement FDCPA section 817 and set forth procedures and criteria whereby States may apply to the Bureau for exemption of debt collection practices within the applying State from the provisions of the Act.[608] The Bureau proposed to retain these procedures and criteria, reorganized as § 1006.108 and appendix A, and with minor changes for clarity.[609]

Consistent with existing § 1006.2, proposed § 1006.108(a) provided that any State may apply to the Bureau for a determination that, under the laws of that State, any class of debt collection practices within that State is subject to requirements that are substantially similar to, or provide greater protection for consumers than, those imposed under FDCPA sections 803 through 812 and the corresponding provisions of Regulation F, and that there is adequate provision for State enforcement of such requirements. Proposed § 1006.108(b) stated that the procedures and criteria whereby States may apply for such an exemption are set forth in appendix A.

Proposed appendix A set forth the procedures and criteria whereby States may apply to the Bureau for the exemption described in proposed § 1006.108. Proposed appendix A largely mirrored existing §§ 1006.1 through 1006.8, with certain revisions, including clarifying in proposed paragraph IV(a)(1)(i) that the ''substantially similar'' standard in FDCPA section 817 applies to the Bureau's consideration of all aspects of the State law for which the exemption is sought, including defined terms and rules of construction.[610] Accordingly, proposed paragraph IV(a)(1)(iv) used the phrase ''substantially similar'' rather than ''the same'' as in existing Regulation F.

Some commenters expressed general support for proposed § 1006.108 and proposed appendix A. However, some commenters raised various concerns about incorporating the existing language of § 1006.2 and urged the Bureau to change the proposed language. For instance, an individual commenter argued that the term substantially similar is ambiguous and should be removed from both § 1006.108 and appendix A. Under this approach, § 1006.108 would permit exemptions only for State laws that provide greater protection for consumers than those imposed under FDCPA sections 803 through 812 and the corresponding provisions of Regulation F. Conversely, at least one industry commenter stated that the proposal (and existing Regulation F) deviated from the statutory language of FDCPA section 817 by allowing States to receive an exemption for State laws that ''provide greater protection for consumers'' than the FDCPA and Regulation F. According to this commenter, this language could permit States to supplant the requirements of the FDCPA and Regulation F and expose debt collectors to a patchwork of inconsistent State laws. This commenter urged the Bureau to revise proposed § 1006.108 and proposed appendix A consistent with FDCPA section 817 to permit exemptions only for State laws whose requirements are substantially similar to the FDCPA and the corresponding provisions of Regulation F.

The Bureau declines to adopt the recommendation to remove the phrase ''substantially similar'' from § 1006.108 and appendix A. FDCPA section 817 uses ''substantially similar,'' so removing that phrase from proposed § 1006.108 and proposed appendix A would deviate from the FDCPA. Further, the Bureau disagrees that the phrase is ambiguous. As discussed in the section-by-section analysis of § 1006.38(d)(2)(ii), the concept of ''substantially the same,'' which is analogous to ''substantially similar,'' is sufficiently clear and is a concept that is present in other regulations.

However, the Bureau agrees with commenters that proposed § 1006.108 and proposed appendix A should be modified to refer only to State laws with substantially similar requirements as the FDCPA and the corresponding provisions of Regulation F. The Bureau recognizes the prerogative of States to establish debt collection laws within their jurisdictions. The Bureau notes that FDCPA section 816, which is implemented by § 1006.104, accommodates State laws that afford greater protections to consumers than the FDCPA as long as they are not inconsistent with the Act. The Bureau is also skeptical that the proposed language, which is consistent with existing § 1006.2, would have resulted in an irreconcilable patchwork of inconsistent State laws since only one State has applied for and received an exemption pursuant to FDCPA section 817 since 1995.[611] Nevertheless, FDCPA section 817 refers only to exempting State laws with requirements that are substantially similar to those imposed by the Act and does not mention exempting State laws that afford greater protections to consumers. Accordingly,

[607] 15 U.S.C. 1692o.

[608] 12 CFR part 1006.

[609] *See* 84 FR 23274, 23368 (May 21, 2019).

[610] The Bureau also proposed several additional changes to existing Regulation F. The Bureau proposed to define the terms ''applicant State law'' and ''relevant Federal law'' in proposed paragraph I(b). Proposed appendix A would have stricken existing § 1006.3(c) as redundant of proposed paragraph III(a) as revised. Proposed paragraph III(d) of appendix A would have repeated existing § 1006.3(e) with certain clarifications. Proposed paragraph VI(b) would have repeated existing § 1006.6(b) with certain clarifications.

[611] *See* 60 FR 66972 (Dec. 27, 1995).

the Bureau is modifying § 1006.108(a) to remove the reference to State requirements that ''provide greater protection for consumers than'' FDCPA sections 803 through 812 and the corresponding provisions of Regulation F. At the same time, the Bureau is not modifying paragraph IV(a)(2). Paragraph IV(a)(2) states that, when assessing whether an applicant State law is substantially similar to relevant Federal law, the Bureau will not consider adversely any additional requirements of State law that are not inconsistent with the purpose of the Act or the requirements imposed under relevant Federal law. Thus, while the Bureau's exemption standard is whether the State law has ''substantially similar'' requirements, exemptions may be available for State laws that are both substantially similar to the FDCPA and afford greater consumer protections. The Bureau also is finalizing conforming changes to appendix A.

Commenters also provided feedback specific to proposed appendix A. An industry commenter objected to proposed paragraph IV(a)(1)(i)'s use of the phrase ''substantially similar'' rather than ''the same,'' which appears in existing § 1006.4(a)(1)(i). According to the commenter, the Bureau's proposal to permit variation from FDCPA-defined definitions and rules of construction would create uncertainty. The commenter therefore suggested that the Bureau finalize paragraph IV(a)(1)(i) using the language in existing Regulation F.

The Bureau declines to adopt this recommendation. As discussed above, FDCPA section 817 and final § 1006.108(a) expressly permit exemptions for State regulation when, under the laws of that State, any class of debt collection practices within that State is subject to requirements that are substantially similar to those imposed under FDCPA sections 803 through 812 and the corresponding provisions of this final rule. To best reflect FDCPA section 817's statutory language and to ensure consistency throughout Regulation F, the Bureau uses the phrase ''substantially similar'' in § 1006.108 and appendix A. Thus, the Bureau is finalizing paragraph IV(a)(1)(i) of appendix A as proposed.

Trade associations asked the Bureau to mandate a timeframe for when the Bureau would act on State exemption applications. According to these commenters, such a timeframe would benefit States by reducing the likelihood that their requests would become outdated and would provide certainty to consumers and debt collectors. The Bureau declines to adopt this recommendation. The Bureau cannot, in advance, anticipate the questions raised by a given State exemption application. While the Bureau intends to act expeditiously on applications, it is not feasible to commit to a mandatory timeframe for responses, particularly as only one State has obtained an exemption since the FDCPA was passed.[612] Notably, other Federal consumer financial laws that involve Bureau determinations regarding State law do not impose response timeframes.[613] In addition, the Bureau notes that State government commenters, which commenters stated would benefit from a mandatory timeframe, did not request one. Pursuant to paragraph VI(a) of appendix A, a final rule granting an exemption under this provision becomes effective 90 days after the date of the publication of such rule in the **Federal Register**. This 90-day grace period provides sufficient time for debt collectors and consumers to adjust to an exemption, which will bolster certainty in the market. Thus, the Bureau concludes that a mandatory timeframe is unnecessary.

A consumer advocate recommended that the Bureau expressly require that, when a State informs the Bureau about a change in applicable State laws pursuant to paragraph (VI)(b)(i) of appendix A,[614] or the Bureau informs a State about an amendment to the FDCPA or Regulation F pursuant to paragraph (VI)(c) of appendix A, the State must provide a report outlining its continued eligibility for the exemption and that the Bureau conduct a review in light of these changes. The Bureau declines to adopt this recommendation. The purpose of paragraphs (VI)(b) and (c) of appendix A is to help the Bureau monitor whether an exemption granted pursuant to FDCPA section 817 and the corresponding provisions of Regulation F continues to be appropriate. That the Bureau would review reports and information provided pursuant to these paragraphs is implicit in the framework of § 1006.108 and appendix A. Thus, no additional clarification or modification is necessary.

Trade associations stated that the proposal did not specify what steps a State would need to take if, after applying, a State withdraws and resubmits its exemption application. The Bureau declines to address this comment as part of the rulemaking but notes that, if such a scenario occurred, it would work with the State to ensure that the State's application received appropriate consideration. These commenters also asked whether a State that currently has an exemption under FDCPA section 817 and existing Regulation F will need to reapply or whether the Bureau would grandfather such an exemption. No modification to the proposed appendix text is necessary in response to this comment. Appendix A sections VI and VIII, respectively, provide frameworks for evaluating and revoking existing exemptions. As noted above, to date, only one State has been granted an exemption. Pursuant to the procedures established in sections VI and VIII, the Bureau intends to review in due course whether that exemption remains appropriate in light of this final rule and the upcoming disclosure-focused final rule.

A consumer advocate commenter asked the Bureau to clarify in proposed paragraph VI(d) of appendix A that, if an exemption is granted, the State law provisions that parallel the FDCPA and the corresponding provisions of Regulation F constitute Federal law. The Bureau declines to adopt this recommendation. As noted in the proposal, the Bureau did not propose to change existing § 1006.2 language in proposed appendix A because it did not seek to make substantive changes to the requirements for State requests for exemptions.[615] Because the commenter did not explain what purpose this clarification would serve, the Bureau adopts paragraph VI(d) of appendix A as proposed.

For the reasons described above, the Bureau is finalizing § 1006.108 and appendix A largely as proposed, but with modifications to mirror the statutory language. Accordingly, pursuant to § 1006.108 and appendix A, a State may apply to the Bureau for a determination that, under the laws of that State, any class of debt collection practices within that State is subject to requirements that are substantially similar to those imposed under FDCPA sections 803 through 812 and the corresponding provisions of Regulation F.

The Bureau is finalizing § 1006.108 and appendix A to implement and interpret FDCPA section 817 and pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors.

[612] The FTC granted Maine the exemption in 1995. *See* 60 FR 66972 (Dec. 27, 1995).

[613] *See, e.g.,* 12 CFR 1024.5(c)(3).

[614] Paragraph (VI)(b)(i) of proposed appendix A would have required a State to provide a report to the Bureau within 30 days of any change in the applicant State law.

[615] *See* 84 FR 23274, 23369 (May 21, 2019).

Appendix C to Part 1006—Issuance of Advisory Opinions

FDCPA section 813(e) provides that provisions in the FDCPA that impose liability do not apply to any act done or omitted in good faith in conformity with any advisory opinion of the Bureau, notwithstanding that, after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.[616]

The Bureau proposed to add appendix C to Regulation F to publish a list of any advisory opinions that the Bureau issues pursuant to FDCPA section 813(e).[617] Proposed appendix C also would have clarified that any act done or omitted in good faith in conformity with any advisory opinion issued by the Bureau, including those referenced in appendix C, provides the protection from liability for FDCPA-based violations afforded under FDCPA section 813(e). Proposed appendix C also included instructions for requesting an advisory opinion.

The Bureau received several comments regarding appendix C from industry trade groups and a group of consumer advocates. The comments uniformly supported including appendix C, and a list of advisory opinions, in the regulation.

Industry commenters suggested adopting a timeline component that would require the Bureau to respond to requests for advisory opinions within a certain period of time and publish draft opinions for notice and comment before finalizing. The group of consumer advocates suggested that the Bureau clarify that advisory opinions issued by the FTC prior to the Bureau's creation no longer have any validity. They also suggested that the Bureau engage in notice and comment rulemaking to amend the regulation or its commentary instead of relying on advisory opinions, or, if the Bureau continues to issue advisory opinions, to do so only in extremely limited circumstances that includes publishing the draft opinion for notice and comment with a minimum review period of 60 days, as well as publishing any denials of requests for advisory opinions.

With respect to the commenter's request to clarify that FTC advisory opinions no longer have any validity, the Bureau declines to do so. As explained in the Bureau's 2011 Identification of Enforceable Rules and Orders,

> for laws with respect to which rulemaking authority will transfer to the CFPB, the official commentary, guidance, and policy statements issued prior to July 21, 2011, by a transferor agency with exclusive rulemaking authority for the law in question (or similar documents that were jointly agreed to by all relevant agencies in the case of shared rulemaking authority) will be applied by the CFPB pending further CFPB action. The CFPB will give due consideration to the application of other written guidance, interpretations, and policy statements issued prior to July 21, 2011, by a transferor agency in light of all relevant factors, including: Whether the agency had rulemaking authority for the law in question; the formality of the document in question and the weight afforded it by the issuing agency; the persuasiveness of the document; and whether the document conflicts with guidance or interpretations issued by another agency.[618]

The Bureau is the first Federal agency to possess authority to issue substantive rules for debt collection under the FDCPA. However, the Bureau considers FTC advisory opinions issued before July 21, 2011, to be ''other written guidance, interpretations, and policy statements.'' Thus, to the extent that this rulemaking does not supersede any such interpretations, the Bureau will continue to give due consideration in light of all relevant factors.

The Bureau is finalizing appendix C with revisions to update the process for submitting a request for an advisory opinion. In June 2020, the Bureau launched a new pilot advisory opinion program and, at the same time, proposed a procedural rule for a permanent advisory opinion program.[619] The pilot advisory program allows entities seeking to comply with any of the Bureau's regulations, including this final rule, to submit a request if uncertainty exists.[620]

Final appendix C reflects this new process. It states that a request for an advisory opinion may be submitted in accordance with the instructions regarding submission and content of requests applicable to any relevant advisory opinion program that the Bureau offers. The Bureau will review requests for advisory opinions and will make advisory opinions public consistent with the process outlined in such a program.

The Bureau is finalizing appendix C pursuant to its authority under FDCPA sections 813(e) and 814(d). Final appendix C will facilitate compliance with Regulation F by ensuring that participants who have questions know how to request clarification and any interested party can easily locate each advisory opinion addressing questions relating to Regulation F.

Supplement I to Part 1006—Official Interpretations

The Bureau proposed to add Supplement I to Regulation F to publish official interpretations of the regulation (*i.e.,* commentary).[621] Proposed comment I–1 explained that the commentary is the Bureau's vehicle for supplementing Regulation F and has been issued pursuant to the Bureau's authority to prescribe rules under 15 U.S.C. 1692*l*(d) and in accordance with the notice-and-comment procedures for informal rulemaking under the APA. Proposed comment I–2 set forth the procedure for requesting that an official interpretation be added to Supplement I, and proposed comment I–3 described how the commentary is organized and numbered.[622] The Bureau is finalizing comment I–3 with certain technical corrections and, as discussed below, is revising comments I–1 and –2 in response to feedback.

The Bureau is revising comment I–1 to clarify that the provisions of the commentary are issued under the same authorities as the corresponding provisions of Regulation F. In particular, this amendment has the effect of clarifying that some provisions of the commentary are issued under sections 1022 and 1032 of the Dodd-Frank Act, instead of or in addition to authorities under the FDCPA. The Bureau is also revising comment I–1 for clarity to expressly reference the notice-and-comment procedures of section 553 of the APA,[623] rather than referring to such requirements as ''the notice-and-comment procedures for informal rulemaking.''

The Bureau is revising comment I–2 to clarify that only revisions to the commentary, rather than all Bureau interpretations of the regulation, will be incorporated into the commentary. The Bureau is making this revision to reserve the possibility that the Bureau may interpret the regulation without necessarily adopting such interpretations into the commentary. The Bureau is also revising comment I–2 to clarify that revisions to the commentary made in accordance with the rulemaking procedures of section 553 of the APA (5 U.S.C. 553) will be incorporated in the commentary after

[616] 15 U.S.C. 1692k(e).

[617] 84 FR 23274, 23370 (May 21, 2019).

[618] *Identification of Enforceable Rules and Orders,* 76 FR 43569, 43570 (July 21, 2011).

[619] 85 FR 37331 (June 22, 2020).

[620] The proposed permanent advisory opinion program contemplates expanding the program to allow other individuals and entities to request guidance.

[621] 84 FR 23274, 23370 (May 21, 2019).

[622] Proposed commentary relating to specific sections of the regulation is addressed in the section-by-section analyses of those sections, above.

publication in the **Federal Register**. As proposed, the comment referenced publication in the **Federal Register**, but not the other requirements of the APA.

VI. Effective Date

The Bureau proposed that the final rule take effect one year after publication in the **Federal Register**. The Bureau received several comments on this aspect of the proposal. A few industry commenters supported the proposed effective date, stating that a one-year implementation period would provide debt collectors with enough time to comply with the rule. An industry commenter supported an 18-month implementation period, stating that the rule, as proposed, would require updated policies and procedures and significant employee training and programming changes that will take time to identify, program, and test. Another industry commenter requested a 24-month implementation period. A government commenter encouraged the Bureau to provide small entities with more than one year to comply, if such entities were not exempted from the rule altogether. Several industry commenters asked the Bureau to clarify that a debt collector is permitted to comply with all or part of the final rule before the effective date.

The Bureau has considered these comments and has determined that, as proposed, the final rule will become effective one year after publication in the **Federal Register**. The Bureau determines that the revisions made to the proposal and discussed in detail in part V will permit debt collectors to meet this effective date period.

As discussed in part V, the Bureau intends to issue a disclosure-focused final rule to address all aspects of proposed §§ 1006.26 and 1006.34 and certain related topics, as noted in part V. The Bureau recognizes that all stakeholders may benefit if the effective dates for both rules are harmonized; accordingly, the Bureau will assess the effective date of the disclosure-focused final rule and, if necessary, will consider adjusting the effective date for this final rule.

The Bureau notes that debt collectors may, but are not required to, comply with the final rule's requirements and prohibitions before the effective date. Until that date, the FDCPA and other applicable law continue to govern the conduct of FDCPA debt collectors. Similarly, to the extent the final rule establishes a safe harbor from liability for certain conduct or a presumption that certain conduct complies with or violates the rule, those safe harbors and presumptions are not effective until the final rule's effective date.

VII. Dodd-Frank Act Section 1022(b) Analysis

A. Overview

In developing the rule, the Bureau has considered the potential benefits, costs, and impacts as required by section 1022(b)(2)(A) of the Dodd-Frank Act.[624]

Debt collectors play a critical role in markets for consumer financial products and services. Credit markets function because lenders expect that borrowers will pay them back. In consumer credit markets, if borrowers fail to repay what they owe per the terms of their loan agreement, creditors often engage debt collectors to attempt to recover amounts owed, whether through the court system or through less formal demands for repayment.

In general, third-party debt collection creates the potential for market failures. Consumers do not choose their debt collectors, and, as a result, debt collectors do not have the same incentives that creditors have to treat consumers fairly.[625] Certain provisions of the FDCPA may help mitigate such market failures in debt collection, for example by prohibiting unfair, deceptive, or abusive debt collection practices by third-party debt collectors.

Any restriction on debt collection may reduce repayment of debts, providing a benefit to some consumers who owe debts and an offsetting cost to creditors and debt collectors. A decrease in repayment will in turn lower the expected return to lending. This can lead lenders to increase interest rates and other borrowing costs and to restrict availability of credit, particularly to higher-risk borrowers.[626] Because of this, policies that increase protections for consumers with debts in collection involve a tradeoff between the benefits of protections for those consumers and the possibility of increased costs of credit and reduced availability of credit for all consumers. Whether there is a net benefit from such protections depends on whether consumers value the protections enough to outweigh any associated increase in the cost of credit or reduction in availability of credit.

The final rule will further the FDCPA's goals of eliminating abusive debt collection practices and ensuring that debt collectors who refrain from such practices are not competitively disadvantaged.[627] However, as discussed below, it is not clear based on the information available to the Bureau whether the net effect of the final rule will be to make it more costly or less costly for debt collectors to recover unpaid amounts, and therefore not clear whether the rule will tend to increase or decrease the supply of credit. The final rule will benefit both consumers and debt collectors by increasing clarity and certainty about what the FDCPA prohibits and requires. When a law is unclear, it is more likely that parties will disagree about what the law requires, that legal disputes will arise, and that litigation will be required to resolve disputes. Since 2010, consumers have filed approximately 8,000 to 12,000 lawsuits under the FDCPA each year, some of which involve issues on which the law is unclear.[628] The

[624] Specifically, section 1022(b)(2)(A) of the Dodd-Frank Act (12 U.S.C. 5512(b)(2)(A)) requires the Bureau to consider the potential benefits and costs of the regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact of the rule on insured depository institutions and insured credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act (12 U.S.C. 5516); and the impact on consumers in rural areas.

[625] Consumers do choose their lenders, and, in principle, consumer loan contracts could specify which debt collector would be used or what debt collection practices would be in the event a loan is not repaid. Some economists have identified potential market failures that prevent loan contracts from including such terms even when they could make both borrowers and lenders better off. For example, terms related to debt collection may not be salient to consumers at the time a loan is made. Alternatively, if such terms are salient, a contract that provides for more lenient collection practices may lead to adverse selection, attracting a disproportionate share of borrowers who know they are more likely to default. *See* Thomas A. Durkin *et al., Consumer Credit and the American Economy* 521–25 (Oxford U. Press 2014) (discussing potential sources of market failure and potential problems with some of those arguments). *See also* Erik Durbin & Charles Romeo, *The Economics of Debt Collection: With attention to the issue of salience of collections at the time credit is granted* (Sept. 4, 2020), Journal of Credit Risk (discussing how rules that limit debt collection affect consumer welfare when debt collection is not salient to consumers when they borrow).

[626] *See* Thomas A. Durkin *et al., Consumer Credit and the American Economy* 521–25 (Oxford U. Press 2014) (discussing theory and evidence on how restrictions on creditor remedies affect the supply of credit). Empirical evidence on the impact of State laws restricting debt collection is discussed in section G below. The provisions in this final rule could also affect consumer demand for credit, to the extent that consumers contemplate collection practices when making borrowing decisions. However, there is evidence suggesting that consumer demand for credit is generally not responsive to differences in creditor remedies. *See* James Barth *et al., Benefits and Costs of Legal Restrictions on Personal Loan Markets,* Journal of Law & Economics, 29(2) (1986).

See 15 U.S.C. 1692(e).

[627] *See id.*

[628] *See* WebRecon LLC, *WebRecon Stats for Dec 2019 & Year in Review, https://webrecon.com/webrecon-stats-for-dec-2019-and-year-in-review-how-did-your-favorite-statutes-fare/* (last visited Oct. 4, 2020). Greater clarity about legal requirements could reduce unintentional violations

Continued

number of disputes settled without litigation has likely been much greater.[629] Perhaps more important than the costs of resolving legal disputes are the steps that debt collectors take to prevent legal disputes from arising in the first place. This includes direct costs of legal compliance, such as auditing and legal advice, as well as indirect costs from avoiding collection practices that might be both effective and legal but that raise potential legal risks. In some cases, debt collectors seeking to follow the law and avoid litigation have adopted practices that appear to be economically inefficient, with costs that exceed the benefits to consumers or even impose net costs on consumers.[630]

Several provisions of the final rule will likely change the way debt collectors communicate with consumers, and these provisions are likely to interact with each other in ways that make their net impact difficult for the Bureau to predict. Most significant of these are the provisions related to telephone call frequencies, limited-content messages, and electronic disclosures, although other provisions might fall into this category as well. The communication provisions collectively are likely to reduce the number of telephone calls from debt collectors. Currently many, though by no means all, debt collectors communicate with consumers strictly through live telephone calls and mail, with limited or no communication by voicemail message, email, text message, or other electronic media such as website portals.

It is possible that the net effect of the communication provisions will be to make debt collection more effective. Debt collectors who currently communicate by live telephone calls in excess of the rule's presumption of compliance for telephone call frequencies could substitute for some of the excessive telephone call volume by leaving limited-content messages (which are voicemail messages) and sending email or text messages. Consumers could respond to this change in communication media by engaging with such debt collectors as much as or more than they currently do by telephone. If this occurs, consumers could benefit from a reduction in telephone calls that may annoy, abuse, or harass them, as well as from resolving their outstanding debts in a more timely fashion. At the same time, debt collectors could benefit from reduced time spent making telephone calls and from increased revenue. There is some reason to believe this may occur—as noted below, a substantial fraction of consumers prefer to communicate by email, and consumers may well be more likely to return a voicemail message from an identified caller than to answer their telephones in response to a call from an unknown caller.

Alternatively, the provisions of the final rule might make debt collection less effective. Debt collectors could comply with the telephone call frequency provisions, reducing outbound calling for some debt collectors, but not increase contact with consumers by using other communication media. This might occur if debt collectors still fear some legal risk from using other media, or if they find the new communication media are not effective in reaching consumers. In this case, although the number of telephone calls would be reduced, it would come at the cost of making it more difficult for debt collectors to reach some consumers, reducing revenue and potentially imposing costs on both consumers and debt collectors from increased litigation to recover debts.

The effect of the final rule on debt collectors would likely lie somewhere in between these two extremes, and the Bureau finds these effects will likely vary by debt collector and type of debt. Some firms will likely adopt or expand use of newer communication media due to the reduced legal risk and find less need for telephone calls, while other firms may not do so or may not experience the same effect. Still other firms may be largely unaffected by the communication-related provisions. As discussed below, some debt collectors currently place only one or two telephone calls per week to any consumer. Such debt collectors are unlikely to change their calling practices and may not find it cost-effective to develop the information-technology infrastructure necessary to communicate by email or text message. Relatedly, the Bureau is aware of at least one mid-sized collection firm that primarily uses email for communication currently, and such firms also will be unlikely to alter their practices, although they may benefit from reduced litigation costs.

In short, the provisions related to communications will likely reduce the overall number of telephone calls per consumer, while at the same time potentially reducing the number of calls required to reach each consumer. Although the Bureau believes it is likely that consumers will benefit directly from a reduction in telephone calls that annoy, abuse, or harass them, the Bureau cannot predict the net effect of these provisions on debt collectors' costs and revenues or the net change in indirect costs to consumers if debt collectors cannot reach them from, for example, litigation.

In developing the final rule, the Bureau has consulted, or offered to consult with, the appropriate prudential regulators and other Federal agencies, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies.

B. Provisions To Be Analyzed

The analysis below considers the potential benefits, costs, and impacts to consumers and covered persons of key provisions of the final rule (provisions), which include:

1. Prohibited communications with consumers.

2. Telephone call frequencies3

3. Limited-content messages.

4. Prohibition on the sale or transfer of certain debts.

5. Electronic disclosures and communications.

In addition to the provisions listed above, the rule restates nearly all of the FDCPA's substantive provisions and adds certain clarifying commentary.

C. Data Limitations and Quantification of Benefits, Costs, and Impacts

The discussion in this part VII relies on publicly available information as well as other information the Bureau has obtained. To better understand consumer experiences with debt collection, the Bureau developed its 2015 Debt Collection Consumer Survey, which provides the first comprehensive and nationally representative data on consumers' experiences and preferences related to debt collection.[631] The Bureau

and could also reduce lawsuits because, when parties can better predict the outcome of a lawsuit, they may be more likely to settle claims out of court.

[629] Some debt collectors have reported that they receive approximately 10 demand letters from attorneys asserting a violation of the FDCPA for each lawsuit filed. *See* Small Business Review Panel Outline, *supra* note 36, at 69 n.105.

[630] For example, as discussed further below, many debt collectors currently avoid leaving voicemail messages for consumers or communicating with consumers by email because sending voicemail messages or emails may create legal risks, notwithstanding that consumers may prefer such messages to receiving multiple telephone calls in which no message is left.

[631] The Bureau's survey was conducted between December 2014 and March 2015. Consumers with and without debts in collection were asked to complete this survey in order to provide the Bureau with data necessary to understand the experience and demographics of consumers who have been contacted by debt collectors. Consumers were selected using the Bureau's Consumer Credit Panel, a de-identified 1-in-48 sample of Americans with consumer reports at one of the nationwide CRAs. *See* CFPB Debt Collection Consumer Survey, *supra* note 16, at 7–10.

also relies on its consumer complaint data, its Consumer Credit Panel, the Credit Card Database,[632] and other sources to understand potential benefits and costs to consumers of the rule.[633] To better understand potential effects of the rule on industry, the Bureau has engaged in significant outreach to industry, including through the Operations Study.[634] In July 2016, the Bureau consulted with small entities as part of the SBREFA process and obtained important information on the potential impacts of proposals that the Bureau was considering at the time, many of which are included in the final rule.[635]

The sources described above, together with other sources of information and the Bureau's market knowledge, form the basis for the Bureau's consideration of the likely impacts of the rule. The Bureau makes every attempt to provide reasonable estimates of the potential benefits and costs to consumers and covered persons of the rule. While the Debt Collection Consumer Survey provides representative data on consumer experiences with debt collection, the survey responses generally do not permit the Bureau to quantify, in dollar terms, how particular provisions will affect consumers. With respect to industry impacts, much of the Bureau's existing data come from qualitative input from debt collectors and other entities that operate in the debt collection market rather than representative sampling that would allow the Bureau to estimate total benefits and costs.

General economic principles and the Bureau's expertise in consumer financial markets, together with the data and findings that are available, provide insight into the potential benefits, costs, and impacts of the final rule. Where possible, the Bureau has made quantitative estimates based on these principles and the data available. Some benefits and costs, however, are not amenable to quantification, or are not quantifiable given the data available to the Bureau. The Bureau provides a qualitative discussion of those benefits, costs, and impacts. In the proposed rule, the Bureau requested additional data or studies that could help quantify the benefits and costs of the rule to consumers and covered persons. The Bureau summarizes comments on this subject below, but few comments explicitly addressed quantifying the costs and benefits of the rule or provided additional data or studies. Comments on the benefits and costs of the rule are also discussed in part V above.

D. Baseline for Analysis

In evaluating the potential benefits, costs, and impacts of the final rule, the Bureau takes as a baseline the current legal framework governing debt collection. This includes the requirements of the FDCPA as currently interpreted by courts and law enforcement agencies, other Federal laws, and the rules and statutory requirements promulgated by the States. In the consideration of benefits and costs below, the Bureau discusses its understanding of practices in the debt collection market under this baseline and how those practices are likely to change under the final rule.

Until the creation of the Bureau, no Federal agency was given the authority to write substantive regulations implementing the FDCPA, meaning that many of the FDCPA's requirements are subject to interpretations in court decisions that are not always consistent or do not always definitely resolve an issue, such as a single district court opinion on an issue. Debt collectors' practices reflect their interpretations of the FDCPA and their decisions about how to balance effective collection practices against litigation risk. Many of the impacts of the final rule relative to the baseline would arise from changes that debt collectors would make in response to additional clarity about the most appropriate interpretation of what conduct is permissible and not permissible under the FDCPA's provisions.

The Bureau received no comments regarding this choice of baseline for its section 1022(b) analysis.

E. Goals of the Rule

The final rule is intended to further the FDCPA's goals of eliminating abusive debt collection practices and ensuring that debt collectors who refrain from such practices are not competitively disadvantaged. To these ends, an important goal of the rule is to benefit both consumers and debt collectors by increasing clarity and certainty about what the FDCPA prohibits and requires, which could improve compliance with the FDCPA while reducing unnecessary litigation regarding the FDCPA's requirements.

As discussed in part V and in this part VII, the goals of the rule's provisions regarding telephone call frequency include reducing consumer annoyance, abuse, or harassment attributable to repeated or continuous debt collection telephone calls, while minimizing inadvertent negative impacts on debt collectors' ability to collect, by establishing presumptions that, with certain exceptions, debt collectors who place telephone calls at or below specified frequency levels comply with the FDCPA, and debt collectors who place telephone calls exceeding specified frequency levels violate the FDCPA. The provisions regarding limited-content messages are intended to reduce debt collectors' need to rely on repeated telephone calls to establish contact with consumers by clarifying how a debt collector may leave a voicemail message while minimizing the risk of third-party disclosure.

The rule is also intended to protect consumers from the risks associated with electronic communications while also facilitating the use of such communications in debt collection, including by: (1) Clarifying how the FDCPA's communication restrictions apply to technologies that have developed since the statute was passed, such as mobile telephones, email, text messaging, and social media; (2) enabling consumers who do not wish to engage in electronic communications to opt out of such communications easily; and (3) clarifying how debt collectors can engage in email or text message communications in a way that limits the risk of third-party disclosures. The rule also sets a general standard for sending required disclosures that is intended to provide consumers with the same protection whether the debt collector sends the disclosure in writing or electronically.

F. Coverage of the Rule

The final rule will apply to debt collectors as defined in the FDCPA. This definition encompasses a number of types of businesses, which can be generally categorized as: Collection agencies, which collect payments owed to their clients, often for a contingency fee; debt buyers, which collect debts that they purchase and own and either regularly collect or attempt to collect debts owned by others or have as their principal purpose the collection of consumer debt; collection law firms that either have as their principal purpose the collection of consumer debt or

[632] The Credit Card Database is a compilation of de-identified loan-level information from the credit card portfolios of large banks. *See* Bureau of Consumer Fin. Prot., *Credit Card Agreement Database, https://www.consumerfinance.gov/credit-cards/agreements/* (last visited Oct. 15, 2020).

[633] For more information about Bureau data sources, *see Sources and Uses of Data at the Bureau of Consumer Financial Protection* (Sept. 26, 2018), *https://www.consumerfinance.gov/data-research/research-reports/sources-and-uses-data-bureau-consumer-financial-protection/*.

[634] *See* CFPB Debt Collection Operations Study, *supra* note 34.

[635] *See* Small Business Review Panel Report, *supra* note 37.

regularly collect or attempt to collect consumer debt owed to others; and loan servicers when they acquire servicing of loans already in default.

Although creditors that collect on debts they own generally will not be affected directly by the rule, they may experience indirect effects. Creditors that hire or sell debts to FDCPA-covered debt collectors may experience higher costs if debt collectors' costs increase and if those costs are passed on to creditors. As described below, the Bureau believes that many compliance costs on FDCPA-covered debt collectors will be one-time costs to come into compliance rather than ongoing costs to stay in compliance. To the extent compliance costs are incurred only once to adjust existing debt collectors' systems and do not increase costs for new entrants, they are unlikely to be passed on to creditors because they will not affect either marginal costs or the number of firms in the market.

G. Potential Benefits and Costs to Consumers and Covered Persons

The Bureau discusses the benefits and costs of the rule to consumers and covered persons (generally FDCPA-covered debt collectors) in detail below.[636] The Bureau believes that an important benefit of many of the provisions to both consumers and covered persons—compared to the baseline of the FDCPA as currently interpreted by courts and law enforcement agencies—is an increase in clarity and precision of the law governing debt collection. Greater certainty about legal requirements can benefit both consumers and debt collectors, making it easier for consumers to understand and assert their rights and easier for firms to ensure they are in compliance. The Bureau discusses these benefits in more detail with respect to certain provisions below but believes that they generally apply, in varying degrees, to all of the provisions discussed below.

Some commenters urged the Bureau to consider other particular costs and benefits to consumers of restrictions on debt collection beyond those discussed explicitly below. One commenter encouraged the Bureau to consider the effect of aggressive debt collection practices on marital stability and on consumer privacy. A law firm commenter representing low-income and underserved individuals and families noted that stress resulting from debt collection efforts can have detrimental effects on consumer health. The Bureau acknowledges that, to the extent that the final rule reduces aggressive debt collection, consumers may receive benefits such as those discussed by these commenters. The Bureau does not discuss these benefits explicitly below, as these benefits are not readily quantified, but the qualitative discussion below should be understood to include all consumer benefits.

1. Prohibited Communications With Consumers

Section 1006.6(b) generally implements FDCPA section 805(a)'s prohibition on a debt collector communicating with a consumer at unusual or inconvenient times and places, with a consumer represented by an attorney, and at a consumer's place of employment. This section also expressly prohibits attempts to make such communications, which debt collectors already must avoid given that a successful attempt would be an FDCPA violation. Section 1006.14(h)(1) interprets FDCPA section 806's prohibition on a debt collector engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt to prohibit debt collectors from communicating or attempting to communicate with a person through a medium of communication if the person has requested that the debt collector not use that medium to communicate with the person.

Debt collectors are already prohibited from communicating with consumers at a time or place that is known or should be known to be inconvenient to the consumer. The Bureau therefore expects that debt collectors already keep track of what consumers tell them about the times and places that they find inconvenient and avoid communicating or attempting to communicate with consumers at those times or places. Similarly, the provisions regarding communication with attorneys and at the consumer's place of employment track requirements that debt collectors are already required to comply with under the FDCPA. The Bureau understands that many debt collectors currently employ systems and business processes designed to limit communication attempts to consumers at inconvenient times and places and that many debt collectors also use these systems and processes to prevent communications with consumers through media that consumers have told them not to use. The provisions may benefit consumers and debt collectors by further clarifying the requirements of FDCPA sections 805(a) and 806, but the Bureau does not expect that the provisions will cause significant changes to debt collectors' existing practices.

2. Telephone Call Frequencies

Section 1006.14(b)(1) prohibits a debt collector from, in connection with the collection of a debt, placing telephone calls or engaging in telephone conversations repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number. Section 1006.14(b)(2)(i) provides for a rebuttable presumption of compliance for a debt collector who places a telephone call to a particular person in connection with the collection of a particular debt neither: (A) More than seven times within seven consecutive days; nor (B) within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt, subject to the exclusions in § 1006.14(b)(3). Section 1006.14(b)(2)(ii) sets forth a rebuttable presumption of a violation for a debt collector who places a telephone call to a particular person in connection with the collection of a particular debt: (A) More than seven times within seven consecutive days; or (B) within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt.

By establishing in the final rule a rebuttable presumption of compliance or of a violation, the Bureau provides additional flexibility relative to the proposal to debt collectors in cases where there may be a good reason to call, or to have a live communication with, a person, more frequently than the bright-line limits in the proposed rule. Debt collectors will also need to determine whether, under the circumstances, their calling might violate the FDCPA and the rule despite a telephone call frequency within the presumption of compliance. The Bureau anticipates that debt collectors will generally choose to call no more often than the specified telephone call frequencies in order to reduce legal risks. Therefore, the discussion below generally assumes that the practical effect of the final rule will be to cause debt collectors to reduce telephone calling frequency, in most cases, to at most the placement of seven telephone calls in a seven-day period and one live

[636] For purposes of the section 1022(b)(2) analysis, the Bureau considers any consequences that consumers perceive as harmful to be a cost to consumers. In considering whether consumers might perceive certain activities as harmful, the Bureau is not analyzing whether those activities would be unlawful under the FDCPA or the Dodd-Frank Act.

telephone conversation in a seven-day period. Thus, many of the benefits and costs of the provision are similar to those under the bright-line rule that was included in the proposal. At the same time, the final rule provides additional flexibility to debt collectors but reduces the legal certainty compared to the proposed bright-line telephone call frequency limits, which will affect the benefits and costs of the call frequency provisions as discussed further below.

As discussed above in part V, commenters who addressed the telephone call frequency limits in the proposal strongly opposed the seven-telephone call weekly frequency limit. Consumer advocates, some State Attorneys General, and multiple other commenters argued that the limit was too high, while industry commenters and other commenters believed that the limit was too low. Several commenters argued that a bright-line cap conceptually was a good idea for clarity, but that a cap of seven telephone calls was variously too low, too high, not supported by rigorous evidence, or not supportable under the FDCPA. Some industry commenters argued that bright lines are not helpful and that the proposed limits were too low in part because of the need to try multiple telephone numbers. Supporters of a lower limit often also argued that the limits on calling should be per-person. One commenter argued that the proposed limit was a reasonable compromise between preventing consumer harm and minimizing industry burden. Commenters were generally more supportive of the proposed limit of one live conversation per seven-day period, although some industry commenters argued that this limit should be higher, or that the proposed exceptions to the limit were unclear or should be expanded to include circumstances specified by the commenters, such as where there was active litigation or as required by applicable law.

Many commenters said that the Bureau did not have evidence to support the specific proposed call limit of seven call attempts in a seven-day period. The Bureau requested data from industry that could provide further evidence on the effects of particular frequency limits but did not receive data that would permit it to quantify the costs and benefits of different frequency limits. The Bureau believes that providing for a rebuttable presumption of compliance or of a violation, rather than a bright-line limit, will reduce the cost to consumers or to industry of selecting a limit that is too high or too low. In addition, other provisions, such as those that address limited-content messages and electronic communications, provide industry with additional tools for reaching consumers.

Potential Benefits to Consumers

Telephone calls debt collectors make with intent to annoy, abuse, or harass consumers are likely to cause consumers harm, and the Bureau has evidence, discussed below and in part V above, that many consumers perceive harm from debt collectors' repeated telephone calls.[637] The Bureau expects the provision to limit this harm by reducing the frequency of telephone calls and telephone conversations.[638] FDCPA section 806 already generally prohibits conduct the natural consequence of which is to harass, oppress, or abuse any person. FDCPA section 806(5) also specifically prohibits repeated or continuous calling and telephone conversations with ''intent to annoy, abuse, or harass any person at the called number.'' These prohibitions have been interpreted differently by different courts, and, while some debt collectors call consumers less frequently than seven times in a given seven-day period, many debt collectors place telephone calls to consumers or engage consumers in telephone conversations more frequently than this.

To quantify consumer benefits from the provision, the Bureau would need information regarding both how much the provision would reduce the number of calls debt collectors place to consumers and the benefit (or harm) each consumer would receive as a result of this reduction. Although the Bureau's data do not permit it to reliably quantify either the reduction in call frequency or how much consumers would value this reduction in dollar terms, the discussion below summarizes the data available to the Bureau on these two points.

Data from the Bureau's Debt Collection Consumer Survey indicate that debt collectors often may attempt to contact consumers more frequently than seven times per week. In the survey, 35 percent of consumers who had been contacted by a debt collector said the debt collector had contacted or attempted to contact them four or more times per week, including 14 percent who said the debt collector had contacted or attempted to contact them eight or more times per week.[639] Another 29 percent said that the debt collector had attempted to contact them one to three times per week.[640] The survey question did not ask respondents to distinguish between actual contacts and contact attempts, and consumers are likely not aware of all unsuccessful contact attempts.[641] Still, the survey responses suggest that it is not uncommon for debt collectors to place telephone calls to consumers more than seven times per week, and the responses would be consistent with many debt collectors having live telephone conversations with consumers more frequently than one time per week, which would be presumed to be a violation under the final rule.[642] Based on this, it is reasonable to estimate that at least 6.9 million consumers[643] are

[637] The FDCPA's standard of liability for repeated calling is not perceived harm by consumers, but rather depends on the debt collector's intent or the ''natural consequence'' of the conduct. *See* FDCPA section 806(5) and 806, 15 U.S.C. 1692d(5) and 1692d. Nonetheless, section 1022(b)(2)(A) of the Dodd-Frank Act requires the Bureau to consider the potential benefits and costs of its regulation to consumers and covered persons, which may include potential benefits or costs that were not contemplated or intended by the FDCPA.

[638] By leading some debt collectors to further limit telephone calls, the rule could have the ancillary effect of preventing some calls that are not intended to annoy, abuse, or harass consumers and could in fact prevent some calls that consumers would find beneficial, as discussed below under ''Potential costs to consumers.'' This ancillary effect may be ameliorated by the provision being structured as a rebuttable presumption of violation. Telephone calls that consumers would find beneficial are more likely to have facts that would overcome the presumption of a violation. *See* comment 14(b)(2)(ii)–2.

[639] CFPB Debt Collection Consumer Survey, *supra* note 16 at 44 n.5.

[640] *Id.*

[641] The survey also did not ask respondents to distinguish between calls about a single debt and calls about multiple debts.

[642] The survey questions did not distinguish among different types of contact, and survey responses may have included contacts such as letters or email that would not be subject to the provision. The survey suggests that contact attempts from debt collectors other than by telephone or letter are relatively uncommon. CFPB Debt Collection Consumer Survey, *supra* note 16. at 42, table 22. The Bureau understands that debt collectors seldom send letters more than once per week, so a large majority of contact attempts likely were by telephone. Information from industry also confirms that debt collectors sometimes place telephone calls to consumers more than seven times per week. *See* discussion under ''Costs to covered persons'' below.

[643] This is calculated as 14 percent of an estimated 49 million consumers contacted by debt collectors each year. The Bureau estimates that about 32 percent of consumers with a credit file, or about 67 million, are contacted each year by a creditor or debt collector attempting to collect a debt. Of those, 23 percent were most recently contacted by a creditor, 63 percent by a debt collector, and 15 percent did not know whether the contact was from a creditor or debt collector. Based on this, the Bureau estimates that 73 percent of consumers were contacted by a debt collector, assuming that the share of consumers contacted by a debt collector is the same in this group as it is among consumers who did know whether the most recent contact was from a debt collector. *See* CFPB Debt Collection Consumer Survey, *supra* note 16 at 13, 40–41.

called by debt collectors more than seven times in a week during a year.

The Bureau's Debt Collection Consumer Survey supports an inference that many consumers would benefit if they received fewer calls from debt collectors, although it does not provide evidence with which to estimate the dollar value of those benefits. Most respondents who had been contacted by a debt collector at least once per week said they had been contacted too often. As shown in Table 1, 95 percent of respondents who said debt collectors had contacted or attempted to contact them four or more times per week and 76 percent of those reporting contact or attempted contact one to three times per week said that they had been contacted too often by the debt collector, whereas 22 percent of those contacted less than once a week said they had been contacted too often.

TABLE 1—CONSUMERS INDICATING THEY HAD BEEN CONTACTED TOO OFTEN, BY CONTACT FREQUENCY

[Percent]

Contact frequency	Consumers who said they were contacted too often
Less than once per week	22
One to three times per week	76
Four or more times per week	95

A State Attorney General commenter and another commenter interpreted the statistic that many consumers contacted at least once per week reported being contacted too often as evidence that the Bureau's proposed telephone call frequency limits were too high and allowed too much calling. The Bureau notes again that the survey did not distinguish between contact attempts and live conversations. And, given that many debt collectors do not currently leave voicemails, many survey respondents may not have been aware of (and therefore the survey results may not reflect consumers' views about) contact attempts that did not result in a conversation. The survey also did not explicitly ask whether the consumers who say they were contacted too often felt harassed. That said, the Bureau agrees that some consumers may consider some telephone call frequencies that would have been permitted under the proposal to be too frequent, but notes that, as discussed elsewhere in this part, restrictions on call frequency can also have negative consequences for consumers.

Multiple consumer advocate and other commenters noted that, because the proposed frequency limits were per debt rather than per person, consumers with multiple debts in collection could be called significantly more than seven times in each seven-day period and may be harmed as a result. The Bureau acknowledges that many consumers have multiple debts, and in some cases multiple debts may be collected by the same debt collector, although the Bureau does not have data to show how frequently consumers are called when they have multiple debts being collected by the same debt collector.

An industry trade group commenter criticized the Debt Collection Consumer Survey and argued that the Bureau should not rely on the survey's results. Specifically, the commenter asserted that the survey's sample size was too small to be reliable and that the estimates of the survey were not statistically significant. The commenter also objected to some of the subsample comparisons made by the Bureau in the study or in the proposed rule. The commenter also argued that the fact that the survey did not distinguish between attempted contacts and actual live contacts made the data unreliable. Finally, the commenter argued that consumer surveys are inherently unreliable.

With respect to the size of the survey sample, the Bureau notes that, for binary or categorical outcomes such as those in the survey, a sample size of a few hundred to a thousand is generally sufficient to obtain results that are within a few percentage points of what one would find in the general population, so long as the sampling procedure is random and designed to ensure a representative sample.[644] The survey included around 1,000 consumers who had experience with debt collection,[645] meaning the sample was large enough for the Bureau to make reasonable statistical inferences based upon it, including for subsamples of that group, such as consumers who reported being contacted one to three times per week.

With respect to statistical significance, the commenter is incorrect in stating that the results of the survey were statistically insignificant. The Bureau did not explicitly report measures of statistical precision in the survey report, as the report was intended for a general audience. However, the Bureau calculated measures of statistical significance for all of its estimates and took care in the report to discuss only comparisons that were statistically significant at a 95 percent confidence level or higher.[646] Moreover, in general, the 95 percent confidence interval for the statistics cited above is on the order of between three and 10 percentage points, with smaller subsamples having a wider margin.[647] For the statistics relied on by the Bureau and discussed above, a difference of plus or minus three to 10 percentage points would not meaningfully change the Bureau's conclusions. For instance, the survey found that, among consumers who reported being contacted between one and three times per week by debt collectors, 76 percent said they were contacted too often. If the true percentage in the population were 66 percent, or 86 percent, the basic conclusion would be the same. Finally, with respect to the commenter's assertion that the limitations of the survey make it inherently unreliable, the Bureau disagrees. Although the phrasing of the question about contact frequency does not specifically track the structure of the rule's telephone call frequency provisions, the Bureau nonetheless believes the survey provides useful information about consumers' experience with debt collection and about the benefits consumers may receive from the final

[644] Indeed, the Bureau's use of its Consumer Credit Panel as a sampling frame for the survey allowed the Bureau to make the sample more representative of the U.S. population than is usually possible in a survey. *See* CFPB Debt Collection Consumer Survey, *supra* note 16, for more details.

[645] As noted in the survey report, the Bureau oversampled consumers that it expected to be more likely to have experience with debt collection. Oversampling is a standard procedure in survey methodology that is used when the researcher is interested in analyzing a particular sub-population but also wants to analyze the population as a whole. Groups that are oversampled are assigned a lower weight when analyzing the whole sample but can be treated as individuals with equal weight when analyzing the subsample. Thus, although based upon the survey weights the Bureau estimated that 32 percent of all consumers had experience with debt collection, the survey data included over 1,000 consumers who reported having experience with debt collection in the past year. The commenter mistakenly quotes the size of the subsample as 632 individuals. While incorrect, this is largely beside the point—as long as the sampling was done correctly, even a sample of 600 individuals can be used to make inferences about the whole population, albeit with a larger confidence interval or margin of error.

[646] The Bureau followed the same approach in its recent report on its disclosure testing, where it disclosed the approach more explicitly. *See* CFPB Quantitative Testing Report, *supra* note 33.

[647] While these statistics were not explicitly reported in the survey report, the Bureau notes that the margin of error on a survey of this nature is largely a function of the sample size of the survey, and that margins of error on surveys with sample sizes in the range of 600–1,000 will be familiar to many lay readers. For instance, political polls with sample sizes of 600–1,000 respondents are often reported in the news and have margins of error that are generally in the range of 3 to 5 percentage points.

rule's presumptions regarding telephone call frequencies.

The Bureau's consumer complaint data also indicate that consumers find frequent or repeated calls harmful. Communication tactics ranked third in debt collection complaints submitted to the Bureau during 2018 and fourth in 2019, and the majority of complaints in this category—55 percent in both years, or about 6,000 complaints across both years—were about frequent or repeated telephone calls.[648]

Several industry and other commenters disputed the reliability and representativeness of the Bureau's complaint data. Some of these commenters pointed to reports of inaccuracies in the complaint data themselves, while others argued that complaints only represent a tiny fraction of all consumers contacted by debt collectors. The Bureau acknowledges that, as in most industries, a relatively small percentage of consumers in collection file formal complaints. The Bureau also notes that not all consumers who have problems with a debt collector file complaints with the Bureau—many may not formally complain at all, and others may file complaints with another source, such as the Federal Trade Commission or their State Attorney General's office. Nonetheless, the Bureau believes that the rate of consumer complaints provides a useful benchmark as to the importance of the problem of frequent or repeated calls. That is, among the consumers who complain to the Bureau about debt collection communication tactics (one of the most complained-about categories), more than half complain about repeated calls, indicating that frequent or repeated telephone calls represent a large share of debt collection problems.[649]

Although the Bureau does not have evidence that could be used to estimate the monetary value consumers attach to a reduction in telephone call frequency, there is indirect evidence of costs consumers are willing to bear to avoid unwanted calls. One leading service that offers to block inbound ''robocalls'' to a consumer's mobile telephone charges $1.99 per month for the service.[650] Such services are an imperfect analogy to the rule's telephone call frequencies for at least two different reasons: First, they are intended to completely block calls rather than limit their frequency; and second, such services block telemarketing calls in addition to debt collection calls, while not blocking all debt collection calls. Given these differences, the price of this service does not provide a precise analog for the value to consumers of the telephone call frequencies. Nonetheless, the example does provide evidence that many consumers are willing to pay prices in the range of $24 per year to avoid unwanted telephone calls.[651]

Some of the benefits from the final rule's telephone call frequency provisions could be obtained if consumers used protections they already have under the FDCPA to help them avoid too-frequent debt collection calls. Debt collectors must cease most communications in response to a written request from the consumer to do so. Furthermore, because section 805(a)(1) of the FDCPA prohibits debt collectors from communicating about a debt at any time or place that the debt collector knows or should know is inconvenient to the consumer, debt collectors risk violating section 805(a)(1) if they do not take heed when consumers say they do not want to communicate at certain times or places. However, many consumers may not want to completely cease communication about a debt because, for example, debt collectors who cannot recover through such communications may initiate litigation to recover on the debt. Additionally, consumers who tell debt collectors to cease communication orally may not benefit because some debt collectors may not honor consumers' requests to cease communications unless they are made in writing. In the Debt Collection Consumer Survey, 42 percent of respondents who had been contacted about a debt in collection reported having requested that a creditor or debt collector stop contacting them.[652] These respondents generally did not make the request in writing.[653] Of these consumers, approximately 75 percent reported that the creditor or debt collector did not stop attempting to contact them.[654]

As discussed above, technological solutions are also increasingly available to consumers who want to avoid certain telephone calls and may be used to screen out calls from some debt collectors. However, such solutions may be under-inclusive (in that they do not screen out telephone calls from all debt collectors) or over-inclusive (in that a consumer may want to maintain some telephone contact with a debt collector rather than eliminating all calls from that debt collector).

Potential Costs to Consumers

Consumers may benefit from communicating with debt collectors about their debts. For consumers being contacted about a debt they in fact owe, communicating with the debt collector may help consumers resolve the debt, which could help avoid further fees and interest, adverse credit reporting, or lawsuits. A few commenters made these points, saying that the proposed bright-line limits on telephone call frequency would affect access to and the cost of credit and would lead to more negative credit reporting and litigation. For consumers being contacted about a debt they do not owe, communications from debt collectors may alert consumers to errors in their credit reports or that they are victims of identity theft. During the meeting of the Small Business Review Panel, some debt collectors said that the frequency limits that were then under consideration could extend the period needed to establish contact with a consumer, as further discussed below under ''Potential costs to covered persons.'' If the telephone call frequencies in the final rule mean that debt collectors are less able to reach some consumers, or that communication with some consumers is delayed, those consumers may be harmed by missing

[648] *See* Bureau of Consumer Fin. Prot., *Consumer Complaint Database, https://www.consumerfinance.gov/data-research/consumer-complaints/search/?dataNormalization=None&date_received_max=2019-12-30&date_received_min=2018-01-01&issue=Communication%20tactics%E2%80%A2Frequent%20or%20repeated%20calls&product=Debt%20collection&searchField=all&tab=Map* (last visited Oct. 23, 2020). Consumers can identify only one issue to categorize their complaints, so these numbers do not include cases in which a consumer chose a different issue (such as ''I don't owe the debt'') but also complained about call frequency. Note that consumers who complain about frequent or repeated telephone calls may not be receiving a frequency of calls that would violate the Rule.

[649] Note that not all of the consumers making these complaints would be helped by the rule, as they may have received a frequency of telephone calls that would not violate the rule.

[650] Nomorobo, *http://www.nomorobo.com* (last visited Oct. 22, 2020).

[651] Another source of indirect evidence of the value to consumers of reduced telephone call frequency is the Bureau's consumer complaints. Based on the Bureau's records, the average time for a consumer to file a complaint with the Bureau by telephone or through the web portal is approximately 15 minutes, although this varies over time and across complaint categories. Valuing consumers' time using the average U.S. private sector wage of approximately $27 per hour suggests that some consumers are willing to give up approximately $6.75 worth of their time in hopes of reducing call frequency from one debt collector. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Economic News Release: Employment Situation,* table B–3 (Feb. 1, 2019), *https://www.bls.gov/news.release/empsit.t19.htm.*

[652] CFPB Debt Collection Consumer Survey, *supra* note 16, at 35, table 17.

[653] Of consumers who asked not to be contacted, 87 percent said they made the request by telephone or in person only. *Id.* at 34–35.

[654] *Id.*

an opportunity to resolve a debt or to resolve a debt sooner.

To quantify any such harm, the Bureau would need data to estimate how the telephone call frequencies in the final rule will affect whether and when debt collectors communicate with consumers as well as the harm consumers experience if they do not communicate with debt collectors. In its discussion below of costs to covered persons, the Bureau discusses the available evidence about how the telephone call frequencies in the final rule will affect whether debt collectors communicate with consumers. As discussed there, the data are limited, but evidence the Bureau does have suggests that, if debt collectors limit their calling to the frequency levels specified in final § 1006.14(b)(2), it might somewhat reduce the number of consumers reached by telephone within a few months after a debt collector starts attempting contact, but that the reduction is likely to be limited to a relatively small fraction of debts.

The Bureau does not have representative data that can be used to quantify the harm consumers experience when they do not communicate with debt collectors, or when those communications are delayed. If consumers do not communicate with debt collectors about debts, they could suffer additional harm from debt collection in some cases, particularly if the debt collector or creditor initiates a lawsuit. A suit could lead to increased fees, legal costs, and the possibility of a judgment that could lead to garnishment of wages or other legal steps to recover the debt.

One large debt buyer's comment included an analysis of its own data, which found that delaying contacting a consumer by two, four, or 12 months increased the probability of litigation by 15, 19, and 35 percent, respectively. This commenter did not state how much the proposed bright-line limits on telephone call frequencies would delay consumer contact but did state that raising the proposed seven telephone call weekly frequency limit to 15 calls per week would reduce its number of referrals to litigation by 2,459 consumers per year. These data confirm the general principle above, that some consumers may face litigation costs as a consequence of the telephone call frequency levels, but they do not provide enough information for the Bureau to assess the size of the effect. To assess this, the Bureau would need to know how much the rule would be expected to delay consumer contact. For instance, as discussed below, the Bureau estimated in the proposal based on one debt collector's calling data that the proposed bright-line telephone call frequency limits would increase the time to first contact by an average of about one week. Even taking the commenter's analysis as given, if the average delay is approximately a week, this would have very different implications for litigation overall compared to an average delay of approximately six months. In addition, both the Bureau's calling data and the commenter's litigation likelihood data are each from a single firm and thus unlikely to be representative of the market as a whole. The Bureau expects the delay in making contact, and any resulting increase in litigation, to vary by the age of debt, the type of debt, and firm-specific practices.

To the extent that some debt collectors currently call less than the final rule's telephone call frequencies to avoid legal risks, such debt collectors could perceive a reduction in legal risk that leads them to increase their calling frequency as a result of the final rule. This would result in costs to some consumers if they find the increase in call frequency harmful. Some consumer advocate commenters echoed this point but did not provide any data to help quantify potential increases in telephone call frequency or the effects of such increases on consumers. Because consumers can rebut the presumption that telephone call frequencies below those in final § 1006.14(b)(2) comply with FDCPA section 806(5), any increase in harassment as a result of the provision may also be limited, compared to the bright-line limit in the proposal that the commenters expressed concern about.

Potential Benefits to Covered Persons

As with several other provisions of the rule, the rebuttable presumptions of compliance and violation with § 1006.14(b)(1) and FDCPA section 806(5) based on the frequencies with which debt collectors placed telephone calls may reduce legal uncertainty about the interpretation of existing FDCPA language. Frequent telephone calls are a consistent source of consumer-initiated litigation and consumer complaints to Federal and State law enforcement agencies. By establishing a standard for call frequency, this provision makes it easier for debt collectors to know what calling patterns are permitted and reduce the costs of litigation and threats of litigation. To the extent that some debt collectors currently call less than the telephone call frequencies to avoid legal risks, they may call more frequently if they see the provision as reducing those legal risks, potentially increasing collection revenue.

Some debt collectors might also benefit from a reduction in calls made by other debt collectors. The Bureau understands that many consumers have multiple debts being collected by different debt collectors.[655] In seeking payments from consumers, multiple debt collectors compete with each other to obtain consumers' attention and seek payment, which can lead to a large aggregate number of debt collection calls, potentially overwhelming some consumers and making them less likely to answer calls or otherwise engage with debt collectors.[656] This in turn could make it harder for each debt collector to recover outstanding debt.[657] Thus, one potential benefit to debt collectors of the provision's telephone call frequencies is a lower frequency of telephone calls by other debt collectors, which could make consumers more likely to engage and repay.

In addition, some debt collectors specialize in approaches to collection that do not rely on frequent call attempts, and these debt collectors may benefit from the telephone call frequency provision. In particular, debt collectors who focus on litigation and those who communicate with consumers primarily by media not covered by the provision, such as letters and email, may be more effective in communicating with consumers relative to debt collectors who focus on communicating by telephone. This, in turn, may increase their market share at the expense of debt collectors who are more dependent on frequent calls.

Potential Costs to Covered Persons

This provision imposes at least two categories of costs on debt collectors. First, it means that debt collectors must track the frequency of outbound telephone calls, which will require many debt collectors to bear one-time costs to update their systems and train staff, and which will create ongoing costs for some debt collectors. Second, for some debt collectors, the provision may lead to a reduction in the frequency with which they place telephone calls to consumers, which could make it harder

[655] The Bureau's survey indicates that 72 percent of consumers with a debt in collection were contacted about two or more debts in collection, and 16 percent were contacted about five or more debts. *Id.* at 13, table 1.

[656] For example, borrowers could simply ignore telephone calls or could adopt call screening or blocking technology.

[657] In other words, debt collectors may face a ''prisoner's dilemma,'' in which each debt collector has incentives to call more frequently even though debt collectors might collectively benefit from a mutual reduction in call frequency.

to reach consumers and delay or reduce collections revenue.

With respect to one-time implementation costs, many debt collectors will incur costs to revise their systems to track telephone call frequencies. Such revisions could range from small updates to existing systems to the introduction of completely new systems and processes. The Bureau understands that larger debt collectors generally already implement system limits on call frequency to comply with client contractual requirements, debt collector internal policies, and State and local laws.[658] Such debt collectors might need only to revise existing calling restrictions to ensure that existing systems track telephone calls in a manner consistent with the new provision. Larger collection agencies might also need to respond to client requests for additional reports and audit items to verify that they comply with the provision, which could require these agencies to make systems changes to alter the reports and data they currently produce for their clients to review.

Smaller debt collectors and collection law firms are less likely to have existing systems that track or limit calling frequency and may therefore face larger costs to establish systems to do so. However, many smaller debt collectors report that they generally attempt to reach each consumer by telephone only one or two times per week and generally do not speak to a consumer more than one time per week, which suggests that their practices would afford them a presumption of compliance (and actual compliance, depending on the circumstances) with respect to telephone call frequencies under the final rule.[659] For such debt collectors, existing policies may be sufficient to ensure compliance with the provision, although they may incur one-time costs to establish systems for documenting compliance.

With respect to ongoing costs of compliance, the Bureau expects that the telephone call frequencies specified in § 1006.14(b)(2)(i)(A) could reduce some debt collectors' ability to reach consumers, particularly when the debt collector has not yet established contact with a consumer. These impacts are discussed below. The Bureau's understanding, based on feedback from small entity representatives and other industry outreach, is that the frequency of one telephone conversation per week in final § 1006.14(b)(2)(i)(B) is unlikely to affect debt collectors' ability to communicate with consumers in most cases.[660]

Several industry commenters noted ambiguities regarding how the proposed telephone call frequency limits would work if a consumer has multiple debts or if there are multiple consumers on an account. These commenters argued that managing these ambiguities would lead to additional ongoing costs of compliance. As discussed in part V, in the final rule the Bureau has clarified in the official commentary how debt collectors should count calls in various circumstances. This should reduce the ongoing costs of compliance with these provisions compared to the proposal.

The final telephone call frequency provisions may cause many debt collectors to place telephone calls less frequently than they currently do. This decrease in telephone calls may impose ongoing costs on debt collectors by increasing the time it takes to establish contact with consumers, all else equal. Most debt collectors currently rely heavily on telephone calls as a means of establishing contact with consumers, although other provisions of this final rule are intended to facilitate debt collectors' use of electronic communications. While debt collectors generally send letters in addition to calling,[661] the Bureau understands that response rates to letters can be quite low. If contact with consumers is delayed, it will delay collection revenue and may reduce revenue if consumers who are reached later are less willing or able to repay the debt. In addition, if the debt collector is unable to reach the consumer during the period that the owner of the debt permits the debt collector to attempt to collect the debt, then reducing call frequency in accordance with the provision might prevent a debt collector from reaching the consumer entirely.[662]

A creditor trade association commenter provided some data that helps to characterize the delays in collection that result from reduced calls made by creditors. The commenter cited two unrelated randomized controlled trials conducted by two of its members, both automotive lenders. The trials estimated the impact on the likelihood of accounts becoming more severely delinquent (*i.e.,* roll rates) by randomly reducing calls to consumers at risk of becoming 31, 61, or 85 days past due on their accounts.[663] The first trial reduced calling from an average of 1.06 call attempts per day to an average of 0.76 call attempts per day. The figures presented showed substantial increases in roll rates, but no confidence intervals were presented. The second trial reduced calling from three calls per telephone number per day to three calls per consumer per day then to two calls per consumer per day. The reduction in calls generally increased roll rates, but the differences were often not statistically significant.

One debt collection industry commenter stated that it requires an average of 16 calls to reach each consumer. This commenter argued for a limit of 16 calls per week on the basis that most consumers have multiple numbers that have to be tried before a right-party contact (RPC) is achieved, but the commenter did not provide any information as to the expected impact of the proposed frequency limits. Another industry commenter, a large debt buyer, stated that, when searching for a consumer, it places between 50 and 75 calls per debt before achieving RPC. This commenter argued for 15 calls per week, again noting that consumers having multiple telephone numbers increases the number of calls needed to achieve an RPC. The commenter reported that, if the proposed limits were increased to 15 per week, 9,629 more of their consumers would enter a repayment plan and 2,459 fewer would have their account forwarded for litigation. The commenter, however, did

[658] *See* CFPB Debt Collection Operations Study, *supra* note 34, at 28–29.

[659] *See id.* at 29.

[660] The impact might be greater if consumers could not consent to more frequent contact. For example, if a debt collector reached a consumer on the telephone and the consumer said it was not a good time to speak, then the rule would permit the debt collector and consumer to agree to speak again at a specified time within less than one week. *See* the section-by-section analysis of § 1006.14(b)(3)(i); *see also* comment 14(b)(2)(ii)–2.iii, which clarifies that a factor that may rebut the presumption of a violation is whether, if the exclusion in § 1006.14(b)(3)(i) does not apply, the debt collector placed a telephone call in response to the consumer's request for information. Similarly, the Bureau expects that debt collectors will be largely unaffected by the application of the telephone call frequencies to location contacts with third parties because the Bureau understands that, while location calls may be made to several numbers, they do not generally involve frequently calling each number.

[661] In the Bureau's survey, 85 percent of respondents who had been contacted by a debt collector said that they had been contacted by telephone and 71 percent said that they had been contacted by letter. Respondents were asked to select all ways in which they had been contacted. CFPB Debt Collection Consumer Survey, *supra* note 16, at 29–30, table 14.

[662] If the provision were to cause some debt collectors to lose revenue for this reason, the amounts not collected would generally be transferred to another party: either to consumers (if the amounts were never collected) or to another debt collector (if the amounts were collected through further collection efforts, including through a lawsuit).

[663] Because these trials were conducted by first-party creditors seeking to collect on accounts in relatively early stages of delinquency, their results may not apply to accounts subject to third-party debt collection.

not provide any insights into its methodology or the statistical precision of its estimated effects.

Some debt collectors do not place telephone calls frequently enough to be affected by the telephone call frequencies that establish a presumption of a violation. While the Bureau understands that some debt collectors regularly call consumers two to three times per day or more, other debt collectors have told the Bureau that they seldom call more than once or twice per week. These differences may reflect different debt types and collection strategies. For example, smaller debt collectors frequently retain debts indefinitely, and they may face less pressure to reach consumers quickly than debt collectors who collect debts for a limited period. Debt collectors who focus on litigation may also place less emphasis on establishing telephone communication with consumers.

Some debt collectors have indicated that frequent calling is especially important if the debt collector has multiple potential telephone numbers and does not know the best way to reach the consumer.[664] Additionally, some debt collectors specialize in attempting to collect debts for which the creditor has lost contact with the consumer, and frequent call attempts to establish contact with the consumer may be especially important for such debt collectors.

For debt collectors who currently call consumers more frequently than the presumptive cap but who will choose to limit their calling such that they receive a presumption of compliance, the telephone call frequencies could affect when and if they establish communication with consumers. The Bureau does not have representative data that permit it to quantify how the telephone call frequencies would impact how long it takes to establish contact or whether contact is established at all. However, the Bureau has analyzed microdata on outbound calling from one large collection agency (''Calling Data'') that helps illustrate the potential impact of the telephone call frequencies. While the data from this agency may not be representative of the market as a whole, the results of the Bureau's analysis of the data are generally consistent with summary information shared by other large collection agencies.[665]

The Calling Data show that, in the first eight weeks of collections, the overall frequency of call attempts to consumers who have not yet spoken with the debt collector declines slowly. Roughly 40 percent of consumers receive more than seven calls per week in the first four weeks, but this drops to 27 percent by week eight. Although the overall distribution of contact attempts changes slowly from week to week, the data show that, over time, some consumers get called more, while others get called less. Consumers with whom an RPC has been established and who made no payment and consumers for whom RPC has not been achieved tend to receive the most collection calls. Consumers who have engaged but made a partial payment receive fewer calls. Moreover, the debt collector who provided the Calling Data engages in ''call sloping,'' meaning that it places fewer total calls each week that it works a portfolio of debts.

The Calling Data show that, for the debts included in that data set, consumers who take longer to reach are not less likely to pay. Although the probability that each call results in an RPC declines with successive calls, the rate at which RPCs are translated into payments increases steadily through at least the first 50 calls. As a result, an RPC that is achieved in any of the first 50 calls is approximately equal in value to the debt collector as an RPC that is achieved with fewer calls, suggesting that call attempts remain important to debt collection even after many calls have been attempted.

Summary data provided by some other large debt collectors indicate that the number of calls needed to reach consumers can vary considerably, but that the majority of debts would not be affected or would be affected very little by reducing current telephone call frequencies to levels that would afford the debt collector a presumption of compliance under the final rule. These data indicate that 50 percent or more of consumers who are ultimately reached by these debt collectors are reached within the first seven calls overall (not per week), though other debt collectors have indicated that it takes 15 to 21 calls to reach 50 percent of such consumers. These data also indicate that reaching 95 percent of consumers may take between 50 and 60 calls, meaning that 5 percent of consumers reached are contacted only after more than 50 or 60 calls have been placed.

There are limitations to using the data discussed above to make inferences about how the telephone call frequencies in the final rule may affect debt collectors' ability to reach consumers. This is in part because establishing contact depends on factors other than the number of calls made (*e.g.,* the time of day called) and in part because debt collectors who wish to operate within the presumption of compliance might change their contact behavior in ways that permit them to reach a given number of consumers with fewer calls, as discussed further below. In addition, other aspects of the rule, including the provision that clarifies the legal status of limited-content messages, could make it easier for debt collectors to reach consumers with fewer calls.

The data discussed above may not be representative, meaning that some debt collectors might need more or fewer calls to reach similar numbers of consumers. Overall, however, the available data suggest that reducing telephone call frequencies to levels that afford a debt collector a presumption of compliance would somewhat reduce the ability of debt collectors to reach consumers by telephone within a few months, but that the reduction is likely to be limited to a relatively small fraction of debts. This could affect primarily debt collectors who receive placements of debts for four to six months and do not engage in litigation. Such debt collectors could lose revenue if they are unable to establish contact with consumers or if collections based on telephone calls become less effective and, as a result, creditors place more debts with debt collectors specializing in litigation.

To illustrate potential effects of the provision on debt collector revenue, the Bureau used the Calling Data to simulate the effect of the provision under an assumption that the debt collector limits telephone call frequency such that it would receive a presumption of compliance under the rule, under specific assumptions about how limiting calls would affect collections. That is, the Bureau created a ''but-for'' version of the Calling Data in which calls that would exceed those limits were assumed to have been either delayed or eliminated, and the Bureau compared RPCs and payments in this ''but-for'' data with the actual outcomes achieved by the debt collector. This is at best a rough approximation of the effects of the provision, both because it relies heavily on the assumptions made and because it is based on the data of one particular debt collector, and may

[664] *See, e.g.,* Small Business Review Panel Report, letter from FMA Alliance Ltd., *supra* note 37, at appendix A–6. Multiple industry and trade association commenters on the proposal echoed this sentiment.

[665] The summary information was shared with Bureau staff during industry outreach meetings that are part of the Bureau's routine market-monitoring efforts. Although most debt collectors are small firms, evidence suggests that a majority of debt collected is collected by collection agencies with 100 or more employees. *See* CFPB Debt Collection Operations Study, *supra* note 34, at 7.

not be representative of other firms in the industry.

The Bureau created two versions of its simulation analysis, one of which uses more conservative assumptions as to the impact of limiting telephone calls on successful contacts and collections. However, the Bureau believes that even the more conservative version of this analysis likely overstates the potential effects of reducing call frequency because it cannot reflect any changes the debt collector would make to its calling strategy in response to the reduced frequency. That is, one would expect a rational collection firm to strategically choose which calls to eliminate or delay in order to reduce call frequency, while the Bureau's analysis must to some extent select calls arbitrarily. In particular, at least for the debt collector who provided data to the Bureau, debts with multiple telephone numbers would be most likely to be affected by a decision to limit call frequency. The Bureau is not able to identify telephone type (such as mobile vs. landline, or work vs. home) in the data, but debt collectors are often able to do so. The Bureau would expect debt collectors in similar situations to omit calls to less promising telephone numbers, rather than to call the same numbers, and to cease calling earlier in the process.

In the first, more conservative version of the simulation (Version 1), the Bureau assumed that all calls the debt collector did not make each week were simply shifted to the next week.[666] The Bureau assumed that any successful RPCs that occurred after the 25th simulated week would never occur because in reality the debt collector was only contracted to collect on the debts in the data for up to 25 weeks. Version 1 implicitly assumes that the probability that a call results in an RPC does not depend on how much time has passed since collection began, only on the number of calls that have been made.

In a second, more aggressive version of the simulation (Version 2), the Bureau assumed that any calls that would not be made because they exceed seven calls per week are eliminated, rather than shifted forward. When a consumer's first RPC would have occurred on a call that would not be made in a given week, the Bureau treats the data for that debt as censored as of that week.[667]

The Bureau made additional assumptions that were common to both versions of the simulation. For inbound calls, that is, calls from consumers to the debt collector, the Bureau assumed that the calls were not delayed or eliminated. Thus, the Bureau is implicitly assuming that inbound calls are prompted by letters from the debt collector or other external factors, rather than by a number of calls.[668] The Bureau made additional assumptions to simulate the effect on payments. The Calling Data indicate if the consumer ever paid and how much, but they do not always indicate when payment was received—the Bureau observes the timing of payments only if the consumer made payment over the telephone. About half of all consumers in the data who make at least a partial payment do so without ever having an RPC. For the simulation, the Bureau assumed that, if the debt collector achieved at least one RPC in the simulation, then the amount of any payments made by the consumer is unchanged. If the consumer received an RPC in the original data but did not receive any RPC in the simulation, the Bureau assumed that any payments recorded in the original data did not occur for purposes of the simulation.

Table 2 shows the results of the simulation analysis described above. Under Version 1, the reduced call frequency would reduce first RPCs by 2.76 percent of the first RPCs and dollars collected by 1 percent.[669] The average first RPC would be delayed by less than one week. These effects are not evenly distributed across consumers, however. In the simulation, the debt collector is much more likely to miss an RPC or payment if it calls multiple telephone numbers for a consumer.[670] For consumers where the debt collector calls only one telephone number, hardly any miss an RPC in the simulation, and the average delay is almost zero. This is because the debt collector rarely calls a particular telephone more than seven times per week. In contrast, for consumers where the debt collector calls five or more telephone numbers, the simulation predicts that the reduced call frequency will eliminate more than 7 percent of RPCs and delay the remaining RPCs by almost two weeks.

The assumptions of Version 2 suggest a more substantial effect on RPCs and collections, although the Bureau notes again that even Version 1 likely overstates the potential effect of the provision. The simulation predicts that RPCs would decline by 15.7 percent, and dollars collected would decline by 7.7 percent.

TABLE 2—RESULTS OF SIMULATION ANALYSIS

Version	Assumed effect of call frequency provision	Percent change in RPCs within 25 weeks	Average delay in remaining RPCs (in weeks)	Percent change in dollars collected within 25 weeks
Version 1	Calls above seven roll to next week	−2.76	0.85	−1.04
Version 2	Calls above seven eliminated	−15.7	0	−7.7

Overall, there is reason to expect that the simulation analysis overstates the potential effect of the final rule's telephone call frequencies because the simulation ignores any changes debt collectors would make to mitigate the

[666] For example, if the debt collector called a particular consumer 10 times in the first week, eight times in the second week, and five times in the third week, in the Bureau's simulation, the last three calls in the first week would become the first three calls in the second week. The second week would then have a total of 11 calls, and the last four calls would become the first four calls in the third week. The third week would then have eight calls, so the last call would become the first call of the fourth week, and so on.

[667] That is, the Bureau assumes that it does not know when or whether that consumer would ever have a successful RPC, only that there was no RPC up until that week. The Bureau then calculates the percentage of debts with an RPC by the 25th week of collections using the Kaplan-Meier product limit estimator for the survival function, a standard tool for measuring rates of an outcome when some observations are censored. It is necessary to assume that such consumers are censored because in reality after an initial RPC, the debt collector generally changes its calling behavior, particularly if it obtains a promise to pay.

[668] The debt collector who provided the data does not leave voicemails, but it is possible that consumers eventually return a call in response to repeated missed calls on their telephones.

[669] The change in payments is less than the change in RPCs both because some consumers pay without an RPC (and the Bureau assumed this did not change in the simulation) and because consumers in the data who had an earlier first RPC, and thus were less likely to be affected by the frequency limits, were also more likely to pay in full.

[670] The Bureau does not observe in the data how many telephone numbers the consumer has, only how many the debt collector chooses to call.

effects of reduced call frequency. The simulation also assumes that debt collectors will not take advantage of the flexibility afforded by the rebuttable-presumption approach to call more frequently in certain circumstances. Nevertheless, certain assumptions that the Bureau makes for simplicity likely reduce the predicted impact of the provision. In particular, in Version 1 the Bureau assumes that a call with an RPC that is shifted later due to reduced call frequency will remain an RPC. This may not be true in practice. Empirically, the probability that a call results in an RPC declines over time—this is evident in the data examined by the Bureau and is consistent with input from industry stakeholders. If consumers are less likely to answer the telephone as time passes, irrespective of the number of calls debt collectors have made, reducing call frequency could reduce payments and revenue by a larger fraction than the simulation suggests (assuming no re-optimization by debt collectors).[671]

A trade group commenter argued that the Bureau's analysis of the Calling Data was unreliable for several reasons. The commenter asserted that the Bureau's analysis was invalid because it did not describe the sample size, because it did not present ''methodology'' or ''algorithms,'' and because it did not list assumptions. The Bureau believes the analysis does provide information relevant to understanding potential costs of the rule. The Calling Data contains proprietary information of the submitter that includes confidential commercial information and that is protected by the Bureau's regulations on the protection of confidential information.[672] The Bureau's confidentiality regulations permit disclosure of materials derived from or created using confidential information to the extent that such materials do not identify, either directly or indirectly, any person to whom the confidential information pertains.[673] As such, it would not be appropriate to identify the debt collector explicitly. In addition, disclosing the total number of calls likewise would be inappropriate because, for large debt collectors such as the one who provided the calling data, the total number of calls placed in a six-month period is likely sufficient to identify the debt collector. The Bureau fully described the methods used to calculate its simulation analysis in the proposal and has repeated that description above. Finally, the discussion of the analysis in the proposal, repeated above, not only described the Bureau's assumptions but also discusses the effect that each assumption has on the outcome of the analysis in some detail. The Bureau acknowledges the limitations of the Calling Data, particularly for extrapolating to the market as a whole, but finds that these data provide useful information to at least characterize the scale of the probable effects of the final rule.

A State Attorney General commenter argued that the Bureau had no evidence that a frequency limit of seven call attempts per seven-day period would yield more consumer engagement and payments than a lower limit such as three call attempts per week. The Bureau acknowledges that it does not have sufficient evidence to quantify the differences in consumer engagement or payments from different telephone call frequencies. However, the Bureau notes that, in its analysis of the Calling Data, a limit of seven calls in a seven-day period led to measurable reductions in RPCs and payments, and that changing the assumptions in the simulation analysis of the calling data had a measurable effect on RPCs and payments even with the same weekly limits. This provides some basis for finding that limiting calls further would reduce payments further for debt collectors who are similar to the debt collector who provided the Calling Data.

Debt collectors could take steps to reduce the number of calls necessary to establish contact and mitigate any lost revenue from limiting call frequency so that they maintain a presumption of compliance. As indicated, if multiple telephone numbers are available, debt collectors might reduce their calls to numbers that they can identify as being less likely to yield a successful contact. In addition, the Bureau understands that debt collectors can reduce the number of calls needed to establish an RPC by purchasing higher-quality contact information from data vendors. Such purchases will be worthwhile if their cost is less than the additional revenue expected from higher contact rates.

In addition, and as discussed below, the Bureau's final rule also includes provisions that could reduce the legal risks associated with other means of communication, such as voicemail messages, text messages, or email, which could enable debt collectors to reach consumers more effectively with fewer calls. This could mitigate the impact of limiting telephone call frequencies to establish a presumption of compliance and might mean that the net effect of the rule would be to increase the likelihood that debt collectors are able to reach consumers. In addition, debt collectors who are unable to reach consumers because they wish to operate within the presumption of compliance might still pursue such debts through litigation. To the extent that frequent call attempts play a more important role in collecting certain types of debt relative to others, some debt collectors might shift their business toward collecting those types for which frequent calls are less important.

Alternative Approaches To Limiting the Frequency of Telephone Calls and Telephone Conversations

The Bureau considered alternatives to the final rule's rebuttable-presumption approach to telephone call frequencies on debt collector telephone calls and telephone conversations. The potential benefits and costs of those alternatives to consumers and covered persons relative to the final rule are discussed briefly below.

The proposal would have established a bright-line limit on telephone call frequency rather than a rebuttable presumption. Specifically, proposed § 1006.14(b)(1) set forth the general prohibition, § 1006.14(b)(2) described bright-line frequency limits for telephone calls and telephone conversations during a seven-day period, and proposed § 1006.14(b)(3), (4), and (5) described telephone calls excluded from the frequency limits, the effect of complying with the frequency limits, and a definition, respectively. A bright-line limit on telephone call frequency would provide greater clarity to consumers and debt collectors about whether calling practices comply with the FDCPA. For example, under the proposal, a debt collector who did not place telephone calls to consumers more than seven times in a seven-day period would know that it was complying with

[671] Another assumption that might reduce the predicted effect of reduced call frequency in both versions is the assumption that payment is tied to whether or not the first RPC occurs. For instance, in Version 1, the Bureau assumed that a consumer would not pay only if the first RPC would have occurred after the 25th week in the simulation. Yet about a quarter of consumers in the data who eventually pay some portion of their debt had at least two RPCs. It may be that the subsequent RPCs were necessary for the payment to occur, but the Bureau's analysis did not track whether subsequent RPCs occurred after the 25th week under the simulated frequency reductions. The Bureau also notes that there is an implicit assumption in both versions of the simulation that could lead to overstating the effect of the call frequency reduction. The simulation assumes that, if all RPCs for a consumer were eliminated, then the consumer would never pay. Given that, as noted above, a substantial number of consumers in the original data pay despite having no RPCs, it is possible that some consumers whose RPCs were eliminated by the reduced call frequencies would nonetheless pay eventually.

[672] *See* 12 CFR part 1070.

[673] *See* 12 CFR 1070.41.

the provision, whereas, under the final rule, a debt collector following the same practice would also need to consider whether the presumption of compliance might be rebutted in the case of particular consumers or accounts. This could result in greater compliance costs and greater risk of litigation for debt collectors compared with the proposal. On the other hand, the final rule may provide greater flexibility to debt collectors and additional benefits to consumers compared with the proposal. For consumers, the final rule may provide additional benefits in cases where seven or fewer telephone call attempts per week would be harassing, such as rapid succession calling. For debt collectors, the final rule may make it more possible to reach consumers if they are unable to make contact within seven call attempts in a week and additional calls would not be harassing.

The Bureau also considered a broader version of § 1006.14(b)(1) that would have set a numerical prohibition on repeated or continuous attempts to contact a person by other media, such as by sending letters, emails, or text messages to a person in connection with the collection of a debt. Such an approach could provide additional benefits to consumers if they are harassed or abused by frequent communication from debt collectors through such media.

However, during the SBREFA process, some small entity representatives suggested that compliance with a rule that limited the frequency of communications by media other than telephone calls would be more costly than compliance with a rule that applied only to calls. These small entity representatives indicated that, while many existing debt collection systems already track the frequency of telephone calls, modifying systems to track communication by other media would be significantly more expensive.

As discussed in part V, because debt collectors do not presently engage in widespread use of electronic communications, the Bureau concludes that it does not have sufficient information to warrant applying numeric limitations to electronic communications.[674] Debt collectors will still need to ensure that their communications other than telephone calls do not violate the FDCPA section 806's general prohibition on harassment, oppression, and abuse, but the final rule will not require them to develop systems that treat telephone calls and other communications equivalently for purposes of tracking contact frequency.

The Bureau also considered a proposal that would have limited the number of calls permitted to any particular telephone number (*e.g.,* at most two calls to each of a consumer's landline, mobile, and work telephone numbers). The Bureau considered such a limit either instead of or in addition to an overall limit on the frequency of telephone calls to one consumer. Such an alternative could potentially reduce the effect of frequency limits on debt collector calls if it permitted more total calls when consumers have multiple telephone numbers. Such an approach could impose smaller costs on debt collectors in some cases compared to the final rule by making it easier to contact consumers for whom debt collectors have multiple telephone numbers. At the same time, such an approach might provide smaller consumer benefits compared to the final rule by potentially permitting a high frequency of calls in some cases. Some consumers could receive (and some debt collectors could place) more telephone calls simply based on the number of telephone numbers that certain consumers happened to have (and that debt collectors happened to know about). Such an approach also could create incentives for debt collectors, for example, to place telephone calls to less convenient telephone numbers after exhausting their telephone calls to consumers' preferred numbers.

3. Limited-Content Messages

Section 1006.2(j) defines limited-content message as a voicemail message for a consumer that includes all of the content described in § 1006.2(j)(1), that may include any of the content described in § 1006.2(j)(2), and that includes no other content. In particular, § 1006.2(j)(1) provides that a limited-content message must include all of the following: A business name for the debt collector that does not indicate that the debt collector is in the debt collection business, a request that the consumer reply to the message, the name or names of one or more natural persons whom the consumer can contact to reply to the debt collector, and a telephone number that the consumer can use to reply to the debt collector. Section 1006.2(j)(2) provides that a limited-content message also may include one or more of the following: A salutation, the date and time of the message, suggested dates and times for the consumer to reply to the message, and a statement that if the consumer replies, the consumer may speak to any of the company's representatives or associates. Section 1006.2(b) and (d), which define the terms attempt to communicate and communication, respectively, provide that a limited-content message is an attempt to communicate but is not a communication.

Potential Benefits and Costs to Consumers

As discussed below under ''potential benefits and costs to covered persons,'' many debt collectors currently do not leave voicemail messages for consumers because of the risk of litigation. The Bureau expects that, by clarifying that ''communication'' for purposes of the FDCPA does not include the limited-content message, the rule will make debt collectors more likely to leave voicemail messages if they are unable to reach consumers by telephone.

In general, an increased use of voicemail messages should make it more convenient for consumers to communicate with debt collectors because consumers will be better able to arrange a discussion at a time that is convenient for them rather than at a time when the debt collector happens to reach them. Related to this, some consumers express annoyance at receiving repeated calls from callers who do not leave messages. To the extent that debt collectors respond to the rule by leaving messages when a consumer does not answer the telephone, the provision might help address that problem.

If more debt collectors are willing to leave messages, it may lead to an indirect benefit to consumers by reducing the number of unwanted call attempts without reducing the likelihood that consumers communicate with debt collectors. Although some debt collectors may leave frequent messages or continue to call frequently despite having left messages, an industry trade publication recommends a best practice of waiting three to seven days after leaving a message to give the consumer an opportunity to return the call.[675] During the meeting of the Small Business Review Panel, small entity representatives indicated that limited-content messages would reduce the need for frequent calling.[676] One commenter on the proposal, a large debt buyer, indicated the same. Thus, some consumers may experience reduced numbers of calls if more debt collectors

[674] The Bureau received no comments advocating that any frequency limits be applied to mailed communications, and the Bureau is unaware of other evidence suggesting that would support such a limit.

[675] insideARM, *Operations Guide: Call Volume* 10 (Nov. 14, 2014).

[676] Small Business Review Panel Report, *supra* note 37, at 25.

leave messages and wait for a return call.

Debt collectors cannot be certain that a voicemail message will be heard only by the consumer for whom it was left. Some consumers could be harmed by an increase in limited-content messages, either because they are harassed by frequent messages or because the messages increase the risk of third-party disclosure. Although the message itself would not convey any information about the debt, the message will include a business name for the debt collector that does not indicate that the debt collector is in the debt collection business and some third parties who hear the message may assume or discover that the caller is a debt collector attempting to collect a debt from the recipient. On the other hand, the provision might lead debt collectors who currently leave more detailed messages that pose greater risk of revealing the purpose of the call to third parties to switch to messages that pose less risk. In such instances, the impact of the provision may be to reduce the likelihood of third-party disclosures.

Multiple consumer advocate and other commenters argued that the proposed limited-content message would quickly become associated with debt collectors, such that a third party overhearing a limited-content message would immediately recognize it as a message from a debt collector. These commenters asserted that as a result, consumers would suffer privacy harms from the use of limited-content messages. Whether or not the commenters are correct in their argument, the changes the Bureau has made to the required content of the limited-content message in the final rule should, on balance, reduce the privacy risks to consumers. By including the name of the company (that does not indicate that the debt collector is in the debt collection business) but not the consumer, the limited-content message will both sound less unique (the commenters noted that few legitimate businesses currently leave messages without leaving their business name) and will not identify the call as being intended for a particular consumer. In addition, the Bureau notes that the potential scope of harm from third parties overhearing voicemail messages is smaller than it may have been in past years and is shrinking. As more consumers transition away from landline telephones to personal mobile phones, the possibility of a third party overhearing a voicemail message becomes less likely, as voicemails on mobile devices generally are not played in a way that allows bystanders to overhear. A voicemail on a mobile device may have no more risk of third-party disclosure than other forms of communication, and in some circumstances may have less risk.

Survey results indicate that consumers are concerned about third parties overhearing voicemail messages left by debt collectors, with nearly two-thirds of consumers saying it is very important that others do not hear or see a message from a creditor or debt collector, as shown in Table 3 below. However, most respondents also said that they would prefer that a voicemail message from a debt collector indicate that the caller is attempting to collect a debt. Even among consumers who said it was ''very important'' that others not see or hear messages about debt collection, 63 percent said they preferred that the purpose of the call be included in a message from a creditor or debt collector attempting to collect the debt. This suggests that many consumers either do not expect third parties to overhear voicemail messages left for them or attach greater importance to knowing what the call is about than to the risk a third party will overhear the message.

TABLE 3—PREFERENCES REGARDING OTHERS SEEING OR HEARING DEBT COLLECTOR MESSAGE

[Percent]

Importance of others not seeing or hearing a message	All consumers	Consumers contacted about a debt in collection
Very important	64	65
Somewhat important	23	24
Not at all important	14	10

Potential Benefits and Costs to Covered Persons

The Bureau understands that many debt collectors avoid leaving voicemail messages, or leave them only under limited circumstances, because of the legal risk associated with doing so. Currently, debt collectors leaving a voicemail message for a consumer either do not include the statement that the call is from a debt collector (the so-called ''mini–*Miranda*'' warning) and risk being deemed in violation of FDCPA section 807(11) or include that statement and risk that the existence of a debt will be disclosed to a third party hearing the message and that they will be deemed in violation of FDCPA section 805(b). The provision in the final rule will reduce both direct and indirect costs to some debt collectors by interpreting the FDCPA not to require the mini–*Miranda* warning in a limited-content message, which will reduce legal risks associated with such messages.

Debt collectors may indirectly benefit from clarification of the type of messages that may be left because messages may make it easier to establish contact with consumers. Currently, many debt collectors limit or avoid leaving voicemail messages for fear of FDCPA liability.[677] Leaving voicemail messages may be a more efficient way of reaching consumers than repeated call attempts without leaving such messages. For example, consumers who do not answer calls from callers they do not recognize might return a voicemail message. If so, the provision could permit debt collectors to reach such consumers with fewer contact attempts.

Commenters were divided on whether the proposed limited-content message would increase the ability of debt collectors to reach consumers. An industry trade group commenter and a State Attorney General commenter argued that consumers would not respond to the proposed limited-content messages and would treat them as spam calls. A different industry trade group commenter argued that the proposed limited-content message would in fact increase consumer engagement and reduce the need for repeated telephone

[677] In the Bureau's Debt Collection Operations Study, 42 of 58 respondents reported sometimes leaving voice messages. Of those that do leave voice messages, many reported leaving them only under certain specific circumstances. *See* CFPB Debt Collection Operations Study, *supra* note 34, at 29–30.

calls. As discussed above, the Bureau has revised the requirements for the limited-content message in ways that should decrease the likelihood that consumers treat the messages as spam, such as by requiring debt collectors to include the name of the collection firm that does not indicate that the debt collector is in the debt collection business. As such, the Bureau believes that it is more likely than not that the provision will make it easier for debt collectors to establish contact with consumers.

The provision may also reduce the direct costs of voicemail-related litigation, which can be large.[678] While the Bureau does not have data on the costs to debt collectors of defending such litigation, some debt collectors have suggested that resolving an individual lawsuit typically costs $5,000 to $10,000, and resolving a class action could cost much more. Moreover, debt collectors report that the large majority of threatened lawsuits are settled before a suit is filed, so the frequency of filed lawsuits substantially understates how often debt collectors bear costs from claimed FDCPA violations.[679] The Bureau anticipates that the clarification of the definition of communication will significantly reduce the legal risk to debt collectors of leaving voicemail messages.

The provision generally does not require debt collectors to incur new costs because it does not require any debt collectors to change their policies regarding messages. However, in order to obtain benefits from the provision, debt collectors who plan to adopt the practice of leaving limited-content messages will incur one-time costs to develop policies and procedures to implement limited-content messages under the rule and to train employees on these policies and procedures.

4. Prohibition on the Sale or Transfer of Certain Debts

Section 1006.30(b)(1) prohibits a debt collector from selling, transferring for consideration, or placing for collection a debt if the debt collector knows or should know that the debt was paid or settled or discharged in bankruptcy. Section 1006.30(b)(2) creates some exceptions to this prohibition.

The Bureau understands, based on its market knowledge and outreach to debt collectors, that debt collectors generally do not sell, transfer, or place for collections debts (other than in circumstances covered in the exceptions) if they have reason to believe the debts cannot be validly collected because they have been paid or settled or discharged in bankruptcy. The final rule provides an exception for transfer of secured debt that has been discharged in bankruptcy, provided that the debt collector provides notice to the transferee that the debt has been discharged. The Bureau understands that, if debt collectors transfer such secured debt, they generally already provide such notice in the ordinary course of business. Therefore, the Bureau expects the benefits and costs of this provision to be minimal.

5. Electronic Disclosures and Communications

The final rule includes provisions that clarify how debt collectors can communicate with consumers by email and text message in compliance with the FDCPA and the final rule. With respect to the validation notice, which most debt collectors currently provide by mail, § 1006.42 sets forth standards that debt collectors must meet if they send notices electronically. With respect to any communications about a debt, § 1006.6(d)(3) through (5) specifies procedures that debt collectors may use to send an email or text message to a consumer about a debt such that the debt collector may obtain a safe harbor from civil liability under the FDCPA for an unintentional disclosure of the debt to a third party.

Potential Benefits and Costs to Consumers

Today, most debt collectors generally communicate with consumers by letter and telephone. If the rule leads debt collectors to increase their use of email and text messages, it will benefit consumers who prefer electronic communications to letters or telephone calls.

Many consumers appear to prefer to receive certain disclosures about financial products by electronic means rather than mail. In 2016, of a sample of 203 million active general purpose credit card accounts, approximately 141 million accounts (69 percent of all accounts) were enrolled in online servicing, of which approximately 80 million (39 percent of all accounts) opted into delivery of periodic statements by electronic means only.[680] Because consumers who experience debt collection differ from consumers who do not,[681] these estimates would be more accurate if the Bureau knew how many consumers who experience debt collection have opted into receiving electronic-only (paperless) disclosures from their creditors. It is not clear whether consumers who experience debt collection would be more or less digitally engaged with disclosures than their counterparts without debt collection experience.[682]

Other data from the Debt Collection Consumer Survey show that about 15 percent of consumers indicate that email is their most preferred method of being contacted about a debt in collection, with almost half of consumers indicating that a letter is their most preferred method, and about a quarter identifying a telephone as their most preferred method.[683] At the time of the survey very few debt collectors communicated by email, whereas many debt collectors communicated by telephone and letter, so survey respondents may have found it more difficult to evaluate their preferences for receiving debt collection communications by email. That said, the lower percentage for email may suggest that consumers are more likely to prefer electronic communications for periodic statements and similar disclosures than for debt collection communications. Taken together, these data suggest that a minority of consumers—between 15 and 39 percent—might prefer electronic validation notices, while a majority—as many as 69 percent—might prefer to receive electronic communications (other than the validation notice)

[678] There were at least 162 voicemail-related lawsuits filed in 2015 under section 805(b) of the FDCPA, which prohibits third-party disclosures; of these, 11 cases were class actions. In addition, at least 125 voicemail-related lawsuits were pursued under section 807(11), which prohibits communicating with a consumer without providing the mini–*Miranda* disclosure; of these 49 cases were class actions. *See* Small Business Review Panel Outline, *supra* note 36 at 69 n.104 (citing data provided by WebRecon, LLC).

[679] Some debt collectors have reported that they receive approximately 10 demand letters for every lawsuit filed and that FDCPA claims are typically settled for $1,000 to $3,000. *See id.* at 69 n.105.

[680] These estimates are based on data reported in Bureau of Consumer Fin. Prot., *The Consumer Credit Card Market,* at 164–66 (Dec. 2017), *https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2017.pdf.* This rate has increased every year since at least 2013. These rates were lower for private label and retail co-brand cards, suggesting that the product's use case, acquisition channel, and consumer base composition may all affect both provider practices and consumer behavior.

[681] *See* CFPB Debt Collection Consumer Survey, *supra* note 16, at 15–17. Consumers who have experienced debt collection tend to have lower incomes, be under age 62, and be non-white.

[682] An FDIC survey that addressed access to banking services found that the share of respondents accessing bank accounts through online or mobile methods generally increased with income and was lower for respondents aged 65 or more. *See* Fed. Deposit Ins. Corp., *2017 FDIC National Survey of Unbanked & Underbanked Households* at 27 & table 4.4 (Oct. 2018), *https://www.fdic.gov/householdsurvey/.*

[683] CFPB Debt Collection Consumer Survey, *supra* note 16, at 23.

instead of or in addition to paper communications or telephone calls.

As discussed above with respect to the rule's provisions regarding call frequency, most consumers experiencing debt collection report that debt collectors call too often. The provisions regarding electronic communications may have the indirect effect of reducing call frequency. These provisions may cause debt collectors to substitute email or text messages for telephone calls, and email or text messages may provide an easier channel for consumers to ask debt collectors to call less often. The benefits to consumers of reduced call frequency generally are discussed above. While some consumers prefer not to receive electronic communications from debt collectors, the final rule's provisions requiring opt-out notices and specifying that consumers can limit the method of communication should reduce any harm to such consumers by making it relatively easy to stop or restrict attempts at electronic communication.

Consumer advocates argued that some specific groups may be adversely impacted by specifying how validation notices may be sent by email, including by hyperlink. In particular, these commenters noted that older consumers and poorer consumers are generally less likely to have readily available access to the internet. The commenters expressed concern that these consumers, who may be vulnerable in other ways as well, might not receive required notices and be harmed as a result. The Bureau agrees that some consumers may be less likely than others to receive notices sent electronically. In addition, in quantitative testing completed by the Bureau after publication of the proposal, the Bureau found a strong preference among consumers for receiving validation notices through the mail and much less willingness by consumers to receive validation notices by email or text message.[684]

As discussed in part V, the Bureau is not finalizing the proposed exemption to the E–SIGN Act and the alternative procedures under which debt collectors could send required disclosures electronically, including through a hyperlink, and is not finalizing the specific safe harbor for sending a validation notice electronically in an initial communication with a consumer. When the validation notice is not part of the initial communication, debt collectors will not be permitted to send it electronically without having obtained the consumer's E–SIGN consent. The Bureau does not believe that consumers will generally provide E–SIGN consent if they do not have ready access to email and the internet. In addition, under the final rule (and consistent with the proposal), all required disclosures sent in writing or electronically (including the validation notice sent as an initial communication) must be sent in a manner that is reasonably expected to provide actual notice to the consumer, and in a form that the consumer may keep and access later. This requirement reduces the risk that debt collectors will send validation notices electronically unless they are able to show that the electronic method used to send the validation notice is reasonably expected to provide actual notice to the consumer.

The risk of third-party disclosure may be different for electronic debt collection communications than for letters or telephone calls, although the Bureau is not aware of evidence that would indicate whether such risk is higher or lower. Bureau data suggests that almost two-thirds of consumers consider it very important that third parties do not hear or see a message from a creditor or debt collector.[685] To the extent that information in an electronic disclosure is less likely or more likely to be seen or heard by third parties than communications by mail or telephone, consumers receiving validation notices electronically are likely to experience a benefit or a cost, respectively.

Receiving disclosures electronically rather than in the mail may affect the likelihood that consumers notice and read the disclosures, which could lead to benefits or costs for consumers if they become more or less likely to inadvertently ignore or miss important information. The Bureau does not have information about how frequently consumers currently read validation notices sent by mail or how often they would read disclosures sent electronically.[686]

Multiple commenters, including individual commenters, a State Attorney General commenter, and consumer advocate commenters, identified other potential costs to consumers of the proposed electronic communications provisions. Several commenters noted that sending validation notices through a hyperlink would be problematic because of the security risks of clicking on links in emails from unknown senders. In these commenters' view, consumers would either decline to click on the links and so would not receive important disclosures, or they would click and be more likely to click on dangerous links in the future. Multiple commenters raised the concern that debt collectors would make it difficult to opt out of electronic communications.

Under the final rule, for validation notices that are not provided in the initial communication, the requirement to comply with the E–SIGN Act will mean that consumers have consented to receive electronic communications before the validation notice is sent electronically, which should help to address these commenters' concerns. In addition, under the final rule (and consistent with the proposal), all required disclosures sent in writing or electronically must be sent in a manner reasonably expected to provide actual notice, and in a form that the consumer may keep and access later. This should reduce the risk that debt collectors will send required communications in a manner that consumers are unlikely to read or are unable to keep and access later. In addition, the final rule requires debt collectors that use electronic communications to provide consumers with a reasonable and simple method to opt out of such communications.

Potential Benefits and Costs to Covered Persons

Debt collectors who send required disclosures electronically rather than sending letters could benefit because they would no longer have to print and mail disclosures. The Bureau estimates that the marginal cost of mailing a validation notice is approximately $0.50 to $0.80, whereas the marginal cost of sending the same communication by email would be approximately zero. The Bureau estimates that approximately 140 million validation notices are mailed each year.[687] Assuming average

[684] *See* CFPB Quantitative Testing Report, *supra* note 33, at 33.

[685] *See* CFPB Debt Collection Consumer Survey, *supra* note 16, at 38.

[686] One debt collector who currently communicates with consumers by email reports that 60 percent of consumers open at least one email and 25 percent click a link to review their options. *See* Small Business Review Panel Report, *supra* note 37, at 7. As of 2015, about one-tenth of all mass-market credit card consumers accessed their online PDF periodic account statements in the final quarter of the year, which implies that fewer than one-half of consumers who receive only electronic statements viewed those statements. *See* Bureau of Consumer Fin. Prot., *The Consumer Credit Card Market,* at 134 figure 8 (Dec. 2015), *https://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf.* However, the Bureau does not have data about the frequency with which consumers open or otherwise access paper periodic statements. In addition, notices of debts in collection may seem more serious or important than periodic statements and may be more likely to be opened.

[687] The assumption of 140 million validation notices per year is based on an estimated 49 million consumers contacted by debt collectors each year

mailing costs of $0.65, this would result in annual validation notice mailing costs of approximately $91 million per year. If the rule leads a significant percentage of validation notices to be sent electronically rather than by postal mail, it could reduce mailing costs for debt collectors by millions or tens of millions of dollars per year.

Debt collectors who use electronic communications may also benefit to the extent that some consumers are more likely to engage with debt collectors electronically than by telephone or letter. During the SBREFA process, several small entity representatives said that communication by email or text was preferred by some consumers and would be a more effective way to engage with them about their debts.[688] One debt collector who currently uses email to contact consumers reports that its collection rates are greater than those of traditional debt collectors. While collection rates are likely to vary according to debt collector, type of debt, and related factors, clarifying the legality of electronic communications and disclosures will make it easier for debt collectors to test the efficacy of electronic communication and use it if they find it effective, potentially lowering costs and increasing the overall effectiveness of collections.

Some commenters, including consumer advocates and individual commenters, disagreed with the principle of saving debt collectors money by explicitly providing alternative procedures and safe harbors for electronic communication at, according to these commenters, the expense of consumers. As discussed above, the Bureau believes that some consumers will benefit from electronic communications, and that it can be appropriate to reduce regulatory burden even in cases where there may be countervailing costs to some consumers.

The Bureau understands that few debt collectors currently communicate with consumers using electronic means. For debt collectors who do communicate with consumers electronically, the rule requires them to provide a method for opting out of such communications. The Bureau understands that such methods are common features of services that provide the ability to send electronic communications to consumers. The Bureau therefore does not anticipate that these requirements will impose significant costs on debt collectors that choose to communicate with consumers electronically.

H. Potential Reduction of Access by Consumers to Consumer Financial Products and Services

This rule contains a mix of provisions that will either restrict or encourage certain debt collection activities, the net impact of which is uncertain. Economic theory indicates that it is possible for changes in debt collection rules, such as those contained in this final rule, to affect consumers' access to credit positively or negatively. Theory says that creditors should decide to extend credit based on the discounted expected value of the revenue stream from that extension of credit. This entails considering the possibility that the consumer will ultimately default. Specifically, the discounted expected value of an extension of credit will be the discounted present value of the stream of interest payments under the terms of the credit agreement, multiplied by the probability that the consumer pays, plus the discounted expected value of the creditor's recovery should the consumer default, times the probability of default. A profit-maximizing creditor will only extend credit to a given consumer if this expected value is positive.[689] Anything that reduces the expected value of a creditor's recovery in the event of default, in general, will lower the discounted expected value of the extension of credit as a whole. This, in turn, may make potential extensions of credit with a discounted expected value only slightly above zero to become negative, such that a creditor will be less willing to extend credit. Likewise, anything that increases the expected value of a creditor's recovery increases the discounted expected value of the credit extension and may change the sign of the expected value of potential credit extensions that had negative expected values, such that a profit-maximizing creditor will be more willing to extend credit.

There are a few ways that the rule might increase or decrease the expected value of creditors' recovery in the event of a consumer's default, although theory alone gives no indication whether any of these actual effects on recovery would be large enough to have practical significance. The additional clarity provided by the final rule regarding limited-content messages and the use of electronic communications should facilitate some communications and thereby tend to increase the expected value of recovery, while the call frequency presumption may reduce the expected value of recovery. First, to the extent that the rule raises costs for debt collectors, debt collectors in theory could pass these costs on to creditors, whether by charging higher contingency fees to creditors or by paying lower prices to creditors when buying debt.[690] Second, the rule may reduce the amount of expected recovery, either by making it less likely that consumers ultimately pay, or by reducing the amount that consumers pay in the event of a settlement. Finally, the rule could increase the time it takes for debt collectors to recover. A rational creditor would discount future income more the further in the future it occurs, and so later payment of the same amount of money would reduce the discounted expected value of the payment. Alternatively, the rule might lower costs for debt collectors, increase expected recovery and decrease the time it takes for debt collectors to recover amounts owed.[691]

If the rule reduces the expected value of extending credit, creditors might respond in three ways: (1) Increase their standards for lending, with an aim of reducing the probability of default; (2) reduce the amount of credit offered, thus reducing their losses in the event of a default; or (3) increase interest rates or other costs of credit such as fees, thus increasing their revenue from consumers who do not default. Which of these mechanisms any given creditor would pursue with respect to any given credit transaction depends on the specifics of the particular credit market.

and an assumption that each receives an average of approximately 2.8 notices during the year.

[688] *See, e.g.,* Small Business Review Panel Report, *supra* note 37, at appendix A.

[689] For purposes of this discussion, the Bureau ignores risk preferences and assumes that creditors are risk neutral. That is, while a risk-averse decision maker would prefer a certain payment of $100 to an uncertain investment with expected value of $100, the discussion in this section assumes creditors are indifferent between these options. Creditors may be risk averse to some degree, such that they would prefer the certain investment to the gamble, or even risk seeking, such that they prefer a gamble with the prospect of a higher return. The theoretical argument described here does not hinge on creditors' risk preferences—the Bureau makes this assumption solely for ease of exposition.

[690] The Bureau notes that the degree of this pass-through depends on the relative degree of market power held by debt collectors and creditors. If creditors have more market power, debt collectors will have limited ability to demand higher fees or lower wholesale prices. Many comments on the Small Business Review Panel Outline indicated that debt collectors have little market power in their interactions with creditors, which is consistent with little pass-through of additional costs. *See, e.g.,* Small Business Review Panel Report, *supra* note 37, at 16–17.

[691] Because creditors are generally not subject to the FDCPA, creditors could also respond to changes to debt collection rules by changing their decisions about whether to use third-party debt collectors or to collect debts themselves. The option to move debt collection activities ''in house'' could reduce any impact of the final rule on the costs of recovering unpaid debts.

A number of industry and other commenters agreed with the general principle that debt collection restrictions may reduce access to credit, although these comments generally did not specifically address the analysis above. One commenter argued that access to credit is not always a good thing and asserted that debts under collection are more likely to be the result of high-interest, predatory lending.

The Bureau is aware of three empirical, academic studies using modern data and methods that estimate the magnitude of the effect of debt collection restrictions on access to credit,[692] one by a researcher affiliated with the Federal Reserve Bank of Philadelphia (Fedaseyeu Study),[693] another by researchers at the Federal Reserve Bank of New York (Fonseca Study),[694] and a third by researchers at the Bureau (Romeo-Sandler Study).[695] All three empirical studies use changes in State or local debt collection laws and regulations to examine the effect of those laws on measures of credit access.

The Fedaseyeu Study used aggregate data on new credit card accounts combined with credit union call report data to examine the effect of various State law changes between 1999 and 2012 on the number of new revolving lines of credit opened each year in each State. This study finds that an additional restriction on debt collectors decreases the number of new accounts by about two accounts per quarter per 1000 consumers residing in a State. For comparison, the data used for the Fedaseyeu Study showed an average of 120 new accounts per quarter per 1000 consumers. The Fedaseyeu Study finds no effect of debt collection laws on the average credit card interest rate.[696] However, the Fedaseyeu Study has some important limitations, particularly regarding extrapolating its results to the effects of the rule. Most importantly, it considers a wide variety of types of debt collection laws, including provisions with limited consumer protection aspects. Specifically, a majority of the debt collection law changes included in the Fedaseyeu Study largely involve changes to licensing fees, bonds, or levels of statutory penalties for violations, rather than prohibiting or requiring specific conduct, and each such change is given the same weight as a law governing conduct.[697] Leaving aside the question of whether monetary adjustments under State law are of a comparable magnitude to the final rule under Federal law, the final rule focuses on conduct, rather than State licensing fees, bonds, or penalty amounts. As such, the results of the Fedaseyeu Study are less informative as to the effects of the final rule than they would be if the legal changes at issue were more comparable to those in the final rule. The data analysis in the Fedaseyeu Study is also somewhat limited by the data that were available. The aggregate data used make it difficult to control for confounding factors, such as differences in credit scores among consumers.

The Fonseca Study follows a similar design as the Fedaseyeu Study and examines the same set of State law changes, but it employs microdata from the Federal Reserve Bank of New York's Consumer Credit Panel, a nationally representative sample of credit records from Equifax. The main results of the Fonseca Study focus on the initial loan amounts or limits for automobile loans, credit cards, and non-traditional finance loans.[698] The study finds a moderate effect on automobile loan amounts, and a small effect on initial credit card limits. Like the Fedaseyeu Study, a major limitation of the Fonseca Study is its focus on licensing requirements, which are not directly comparable to the provisions in the rule. That the Fonseca Study finds larger effects on automobile loans than credit cards also raises questions. Although third-party debt collectors are sometimes involved in collecting on automobile loans when the loan balance exceeds the value of the car, most delinquent automobile debt is resolved through repossession. The fact that the Fonseca Study nonetheless found a moderately large effect on automobile balances suggests that possibly the study's methodology was not successful in isolating the causal effect of the debt collection laws, but instead was picking up other, unrelated, factors.

The Romeo-Sandler Study uses microdata from two large administrative datasets: The Bureau's Consumer Credit Panel (CCP)[699] and Credit Card Database (CCDB).[700] This study focuses on four recent major changes in State or local laws and regulations that imposed additional conduct requirements on either debt buyers or on all debt collectors.[701] By focusing on the effect of changes to laws that regulate debt collector conduct, the results of the Romeo-Sandler Study are arguably more applicable to understanding effects of the rule, although the specific changes to State or local laws studied differ considerably from the provisions of the rule.

The Romeo-Sandler Study assesses three main outcomes: The probability that a credit inquiry results in an open credit card account, the credit limit on newly opened credit card accounts, and initial interest rates on credit card accounts. As discussed above, creditors might limit any of these factors to adjust for the effects of a regulation such as the final rule. The Romeo-Sandler Study

[692] In addition, earlier empirical research examined the relationship between restrictions on creditor remedies and the supply of credit. *See* Thomas A. Durkin *et al., Consumer Credit and the American Economy* 521–525 (Oxford U. Press 2014) (summarizing this empirical literature).

[693] Viktar Fedaseyeu, *Debt Collection Agencies and the Supply of Consumer Credit,* Journal of Financial Economics, 138 (2020).

[694] Julia Fonseca *et al., Access to Credit and Financial Health: Evaluating the Impact of Debt Collection* (Fed. Reserve Bank of N.Y. Staff Report No. 814, 2017).

[695] Charles Romeo & Ryan Sandler, *The Effect of Debt Collection Laws on Access to Credit,* Journal of Public Economics, (Forthcoming).

[696] In addition to the results described here, the Fedaseyeu Study also examines the effect of debt collection laws on the number of debt collection firms per capita and a measure of the recovery rate from debt collection. The Bureau omits discussion of these results here because they are not directly relevant to the question of consumer access—the Bureau discusses potential effects on debt collection firms above.

[697] Specifically, Fedaseyeu created an index of debt collection regulation, with one point added for a tightening in any one of six categories of regulation, including licensing requirements, bonding requirements, and the creation of a board to regulate third-party debt collectors.

[698] The Fonseca Study defines non-traditional finance loans as ''retail cards, personal loans and a residual loan category.'' Like the Fedaseyeu Study, the Fonseca Study also examines the effect of the debt collection laws studied on the number of debt collectors present in each State; again, the Bureau omits discussion of those results in this section.

[699] Although similar in nature, the Bureau's CCP is not the same as the Federal Reserve Bank of New York's Consumer Credit Panel, discussed above. The Bureau's CCP is an anonymized sample of credit records from one of the three nationwide CRAs, containing a 1-in-48 representative sample of all adults with a credit record. The data contain all credit accounts (trade lines) and hard inquiries on a consumer's credit report, with a unique, anonymous identifier linking records belonging to the same consumer. This CCP does not contain any personally identifying information on individual consumers.

[700] The CCDB is a monthly panel describing balances, payments, and interest rates on all credit card accounts issued by a set of major banks, representing roughly 90 percent of the credit card market. As with the CCP, accounts are identified by an anonymous identifier, and the CCDB does not contain any personally identifying information.

[701] New laws were put into effect in North Carolina in October 2009 and California in January 2014; both of these laws focused exclusively on debt buyers. In addition, New York City, in April 2010, and New York State, in December 2014, introduced new debt collection restrictions through administrative regulations. These updated restrictions generally require debt collectors to take additional steps before collecting, including requiring additional documents to substantiate debts before collections can begin, requiring disclosures or additional documentation before lawsuits can be filed to enforce a debt, and requiring disclosures once the State's statute of limitations has run.

controls for individual consumers' credit scores and census tract demographic information and flexibly adjusts for State-level trends over time that might otherwise bias the estimates of an analysis. As with the Fedaseyeu Study and Fonseca Study, the Romeo-Sandler Study found effects of debt collection laws that are in the direction predicted by theory (*i.e.,* increased regulation increases the cost or decreases the availability of credit), but the effects are quite small in magnitude. Using the CCP, this study found that additional regulations on debt collectors' conduct caused the success rate of a credit inquiry to decline by less than 0.02 percentage points off a base rate of about 43 percent. The study concludes that one can statistically reject that the effect was as large as 0.7 percentage points. The study provides some context for these effects by comparing them to the effect of changing consumers' credit scores. The study found that each credit score point increases the probability of a successful credit inquiry for subprime borrowers by about 0.2 percentage points. Thus, the estimated effect of a debt collection law is equivalent to lowering consumers' credit scores by less than one point.[702] The Romeo-Sandler Study finds similarly small effects on credit limits, which are again equivalent to a very small change in credit score. The magnitude of the credit limit effect in the Romeo-Sandler Study is smaller than that found in the Fonseca Study.

The Romeo-Sandler Study also analyzes the effect of debt collection laws on credit card interest rates using the CCDB. The study finds that initial interest rates increase slightly following a State or local debt collection law or regulation, but that this entirely takes the form of a reduced frequency of accounts with an introductory APR of 0 percent—the level of positive initial interest rates are essentially unchanged.

The Romeo-Sandler Study is also able to shed light on potential areas of heterogeneity in the effects of State debt collection laws because of its access to rich microdata. The Romeo-Sandler Study explores the effects separately for consumers with high and low credit scores and finds somewhat larger (although still small) effects on consumers with sub-prime credit scores. This is consistent with theory. Even within the sub-sample of consumers with sub-prime credit scores, the effect of the laws is equivalent to a three-point decrease in sub-prime borrowers' credit scores.

The studies discussed above provide evidence that regulation of debt collection can affect consumer access to credit in ways consistent with economic theory. However, these studies do not speak directly to the likely effects of the final rule on consumer credit markets. The State or local laws analyzed in these studies implement a different set of consumer protections than those in the final rule. The final rule includes some provisions likely to increase debt collector costs, but also includes other provisions, such as those related to limited-content messages and email and text messages, which could lower costs for some debt collectors. In addition, creditors and debt collectors might react differently to changes in State or local collection standards than the standards in the Bureau's rules, which could affect all U.S. consumers. For instance, a nationwide creditor might choose not to adjust its credit standards in response to a change in only one State's debt collection laws, but might find it optimal to change its standards if similar laws applied nationwide or to a large share of its potential borrowers.

The Bureau received several comments from industry and trade association commenters generally asserting that restrictions on debt collection would have negative effects on access to credit and cited one or more of the studies above as support for this contention. None of these commenters addressed the Bureau's interpretation of the studies as showing that past restrictions had a quantitatively small effect on credit access, and none disagreed with the Bureau's observations about the limitations of the Fedaseyeu Study and the Fonseca Study.

I. Potential Specific Impacts of the Rule

1. Depository Institutions and Credit Unions With $10 Billion or Less in Total Assets, as Described in Dodd-Frank Act Section 1026

Depository institutions and credit unions are generally not debt collectors under the FDCPA and therefore are generally not covered by the rule. However, as noted above, creditors could experience indirect effects from the rule to the extent they hire FDCPA-covered debt collectors or sell debt in default to such debt collectors. Such creditors could experience higher costs if debt collectors' costs increase and if debt collectors are able to pass those costs on to creditors. The Bureau understands that many depository institutions and credit unions with $10 billion or less in total assets rely on FDCPA-covered debt collectors to collect debts, but the Bureau does not have data indicating whether such institutions are more or less likely than other creditors to do so. The Bureau did not receive any comments on this issue with respect to the final rule.

2. Impact of the Rule on Consumers in Rural Areas

Consumers in rural areas may experience benefits from the rule that are different in certain respects from the benefits experienced by consumers in general. For example, consumers in rural areas may be more likely to borrow from small local banks and credit unions that may be less likely to outsource debt collection to FDCPA-covered debt collectors. Debts owed by consumers in rural areas may also be more likely to be collected by smaller debt collectors, which the Bureau understands are less likely to place telephone calls to consumers in excess of the call frequencies in the final rule. The telephone call frequencies may therefore have less of an impact on consumers in rural areas. The Bureau requested interested parties to provide data, research results, and other factual information on how the proposed rule, if finalized, would affect consumers in rural areas, but the Bureau did not receive any comments on this subject.

VIII. Final Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct an Initial Regulatory Flexibility Analysis (IRFA) and a Final Regulatory Flexibility Analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements.[703] Section 604(a) of the RFA sets forth the required elements of the FRFA. Section 604(a)(1) requires a statement of the need for, and objectives of, the rule.[704] Section 604(a)(2) requires a statement of the significant issues raised by the public comments in response to the IRFA, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments. Section 604(a)(3) requires the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule and a

[702] The study notes, as a point of comparison, that this effect is considerably smaller than that of routine errors in credit reports. *See* Fed. Trade Comm'n, *Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003,* at 43 (Dec. 2012), *https://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf.*

[703] 5 U.S.C. 604(a).

[704] 5 U.S.C. 604(a)(1).

detailed statement of any change made to the proposed rule in the final rule as a result of the comments. Section 604(a)(4) requires a description of and, where feasible, an estimate of the number of small entities to which the rule will apply.[705] Section 604(a)(5) requires a description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for the preparation of the report or record.[706] Section 604(a)(6) requires a description of any significant alternatives to the rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the rule on small entities.[707] Finally, section 604(a)(7) requires a description of the steps the agency has taken to minimize any additional cost of credit for small entities.[708]

A. Statement of the Need for, and Objectives of, the Final Rule

The Bureau issues this rule primarily pursuant to its authority under the FDCPA and the Dodd-Frank Act.[709] The objectives of the rule are to answer certain interpretive questions that have arisen since the FDCPA's passage and to further the FDCPA's goals of eliminating abusive debt collection practices and ensuring that debt collectors who refrain from abusive debt collection practices are not competitively disadvantaged.[710] As the first Federal agency with authority under the FDCPA to prescribe substantive rules with respect to the collection of debts by debt collectors, the Bureau issues this rule to clarify how debt collectors may appropriately employ newer communication technologies in compliance with the FDCPA and to address other communications-related practices that currently pose a risk of harm to consumers, legal uncertainty to industry, or both. The Bureau intends that these clarifications will help to eliminate abusive debt collection practices and ensure that debt collectors who refrain from abusive debt collection practices are not competitively disadvantaged.[711]

As amended by the Dodd-Frank Act, FDCPA section 814(d) provides that the Bureau may ''prescribe rules with respect to the collection of debts by debt collectors,'' as that term is defined in the FDCPA.[712] Section 1022(a) of the Dodd-Frank Act provides that ''[t]he Bureau is authorized to exercise its authorities under Federal consumer financial law to administer, enforce, and otherwise implement the provisions of Federal consumer financial law.'' [713] ''Federal consumer financial law'' includes title X of the Dodd-Frank Act and the FDCPA. The legal basis for the rule is discussed in detail in the legal authority analysis in part IV and in the section-by-section analysis in part V.

B. Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis

The Bureau received comments on the IRFA from the Acting Chief Counsel for Advocacy of the Small Business Administration, which are discussed in the next section. The Bureau did not receive other comments that referenced the IRFA specifically; however, several commenters did raise issues about the burdens of the proposed rule's provisions, and the Bureau's response to these issues is discussed in parts V and VI above and in this part below.

C. Response to Any Comments Filed by the Chief Counsel for Advocacy of the Small Business Administration

The Acting Chief Counsel for Advocacy of the Small Business Administration filed a public comment letter on the proposed rule that discusses both the IRFA and certain of the proposed requirements (the ''SBA letter''). This section first responds to comments on the IRFA and then responds to the substantive comments on the proposed rule's provisions.

The SBA letter notes that the IRFA did not estimate the cost to small entities of establishing systems to comply with the proposed telephone call frequency limits. As discussed below and in the section 1022(b)(2) analysis, the Bureau does not have representative data that can be used to reliably measure the one-time costs of revising systems to comply with the telephone frequency provisions, but does discuss the qualitative information it has. The SBA letter notes that some small entity representatives said that one-time costs to revise systems could range from $35,000 to $200,000 and argues that these estimates should be included in the analysis. These estimates refer to costs for system improvements that would have been required to comply with information transfer requirements that were in the proposals under consideration during the SBREFA process but that were not included in the proposed rule.[714] While some small entity representatives said that it could be costly to modify their systems to comply with the contact limits then under consideration, they emphasized that those costs could be high in part because of the need to design limits that apply to forms of communication other than telephone calls, such as mail. The frequency limits in the proposed rule were limited to telephone calls, as are the telephone call frequency provisions in the final rule. The fact that these provisions apply only to the placement of telephone calls and to telephone conversations should limit the system investments that are required to track call frequency, because call frequency is something that many debt collectors already track in light of the FDCPA's existing prohibition on ''causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.''

The SBA letter also notes that the proposed rule could impose costs to read, understand, and train employees in new practices. The Bureau discussed these costs in the IRFA in the context of some specific provisions of the proposal; the Bureau has added a more general discussion of these costs in section E of the FRFA, below.

The SBA letter also notes that the Bureau claims some provisions will cause no significant impact because those provisions are already part of debt collectors' business practices and argues that the Bureau should clarify what the benefit of such provisions is to consumers if they will not change debt collector practices. As discussed in part V and the section 1022(b)(2) analysis, the Bureau believes that, by clarifying the FDCPA's requirements, the rule will benefit both consumers and debt collectors, including small entities. Many market participants have identified a need for greater clarity in interpreting many of the FDCPA's provisions. For example, an industry comment letter emphasized that ambiguities in the FDCPA lead to unnecessary and costly litigation. The Bureau believes that there is a benefit to clarifying the FDCPA's requirements even if the vast majority of debt collectors follow practices that meet those requirements. The additional clarity helps those debt collectors to avoid unnecessary litigation and to have

[705] 5 U.S.C. 604(a)(4).

[706] 5 U.S.C. 604(a)(5).

[707] 5 U.S.C. 604(a)(6).

[708] *Id.*

[709] *See* part IV, *supra.*

[710] *See* 15 U.S.C. 1692(e).

[711] *See id.*

[712] 15 U.S.C. 1692*l*(d).

[713] 12 U.S.C. 5512(a).

[714] Small Business Review Panel Report, *supra* note 37, at 21.

confidence in what practices do and do not violate the law. The additional clarity also makes it easier to establish whether less scrupulous debt collectors have violated the statute and to hold them accountable, which benefits debt collectors who do comply with the law as well as consumers.

The SBA letter points out that the proposed rule's PRA section estimated 1,029,500 burden hours and argues that this could translate into millions of dollars in recordkeeping and reporting costs. Most of this burden is not attributable to the rule itself but rather to the requirements of the FDCPA. As discussed in the supporting statement accompanying the Bureau's information collection request, the PRA estimates include the burden not only of complying with the new requirements introduced by the final rule but also of complying with the FDCPA itself. These burdens had not previously been accounted for under the PRA. Thus, the large majority of the estimated burden hours represent the burden of complying with FDCPA requirements that exist independent of the rule, in particular the requirement to provide a validation notice under section 809(a) of the FDCPA and the requirement to respond to consumer disputes under section 809(b) of the FDCPA. There are, of course, burdens associated with other information collections that are being introduced or clarified by the final rule, and those burdens are discussed in this FRFA as well as in the supporting statement.

The SBA letter also expressed several concerns about specific provisions of the proposed rule and recommended changes to those provisions. These concerns and recommendations, and the Bureau's response, are discussed in the section-by-section analysis of the relevant provisions in part V.

D. Description and, Where Feasible, Provision of an Estimate of the Number of Small Entities to Which the Final Rule Will Apply

As discussed in the Small Business Review Panel Report, for the purposes of assessing the impacts of the rule on small entities, ''small entities'' is defined in the RFA to include small businesses, small nonprofit organizations, and small government jurisdictions.[715] A ''small business'' is determined by application of SBA regulations in reference to the North American Industry Classification System (NAICS) classifications and size standards.[716] Under such standards, the Small Business Review Panel (Panel) identified four categories of small entities that may be subject to the provisions: Collection agencies (NAICS 561440) with $16.5 million or less in annual receipts, debt buyers (NAICS 522298) with $41.5 million or less in annual revenues, collection law firms (NAICS 541110) with $12.0 million or less in annual receipts, and servicers who acquire accounts in default. These servicers include depository institutions (NAICS 522110, 522120, and 522130) with $600 million or less in annual receipts or non-depository institutions (NAICS 522390) with $22.0 million or less in annual receipts. The Panel did not meet with small nonprofit organizations or small government jurisdictions.[717]

The following table provides the Bureau's estimate of the number and types of entities that may be affected by the final rule:

TABLE 4—ESTIMATED NUMBER OF AFFECTED ENTITIES AND SMALL ENTITIES BY CATEGORY

Category	NAICS	Small-entity threshold	Estimated total number of debt collectors within category	Estimated number of small-entity debt collectors within category
Collection agencies	561440	$16.5 million in annual receipts	9,000	8,800
Debt buyers	522298	$41.5 million in annual receipts	330	300
Collection law firms	541110	$12.0 million in annual receipts	1,000	950
Loan servicers	522110, 522120, and 522130 (depositories); 522390 (non-depositories).	$600 million in annual receipts for depository institutions; $22.0 million or less for non-depositories.	700	200

Descriptions of the four categories:

Collection agencies. The Census Bureau defines ''collection agencies'' (NAICS code 561440) as ''establishments primarily engaged in collecting payments for claims and remitting payments collected to their clients.''[718] In 2012, according to the Census Bureau, there were approximately 4,000 collection agencies with paid employees in the United States. Of these, the Bureau estimates that 3,800 collection agencies have $16.5 million or less in annual receipts and are therefore small entities.[719] Census Bureau estimates indicate that in 2012 there were also more than 5,000 collection agencies without employees, all of which are presumably small entities.

Debt buyers. Debt buyers purchase delinquent accounts and attempt to collect amounts owed, either themselves or through agents. The Bureau estimates that there are approximately 330 debt buyers in the United States, and that a substantial majority of these are small entities.[720] Many debt buyers—particularly those that are small entities—also collect debt on behalf of other debt owners.[721]

Collection law firms. The Bureau estimates that there are 1,000 law firms in the United States that either have as their principal purpose the collection of consumer debt or regularly collect consumer debt owed to others, so that the rule would apply to them. The

[715] 5 U.S.C. 601(6).

[716] The current SBA size standards are found on SBA's website, *http://www.sba.gov/content/table-small-business-size-standards.*

[717] Small Business Review Panel Report, *supra* note 37, at 29.

[718] As defined by the U.S. Census Bureau, collection agencies include entities that collect only commercial debt, and the rule applies only to debt collectors of consumer debt. However, the Bureau understands that relatively few collection agencies collect only commercial debt.

[719] The U.S. Census Bureau estimates average annual receipts of $95,000 per employee for collection agencies. Given this, the Bureau assumes that all firms with fewer than 100 employees and approximately one-half of the firms with 100 to 499 employees are small entities, which implies approximately 3,800 firms.

[720] The Receivables Management Association, the largest trade group for this industry segment, states that it has approximately 300 debt buyer members and believes that 90 percent of debt buyers are current members.

[721] The Bureau understands that debt buyers are generally nondepositories that specialize in debt buying and, in some cases, debt collection. The Bureau understands that debt buyers that are not collection agencies would be classified by the Census Bureau under ''all other nondepository credit intermediation'' (NAICS Code 522298).

Bureau estimates that 95 percent of such law firms are small entities.[722]

Loan servicers. Loan servicers would be covered by the rule if they acquire servicing of loans already in default.[723] The Bureau believes that this is most likely to occur with regard to companies that service mortgage loans or student loans. The Bureau estimates that approximately 200 such mortgage servicers may be small entities and that few, if any, student loan servicers that would be covered by the rule are small.[724]

E. Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of Classes of Small Entities That Will Be Subject to the Requirement and the Type of Professional Skills Necessary for the Preparation of the Report or Record

The final rule will not impose new reporting requirements, but it will impose new recordkeeping and compliance requirements on small entities subject to the rule. The requirements and the costs associated with them are discussed below. In addition to the specific costs discussed below, all small entities will incur costs to read the rule and incorporate its provisions into their policies and procedures, and small entities with employees will need to train employees in new policies and procedures. The extent of training required will depend on debt collectors' existing practices and on the roles performed by individual employees. Debt collectors employ an estimated 123,000 workers.[725] If, on average, the rule required an additional hour of training for each of these employees, at an average cost of $22 per hour, the total training cost would be approximately $2,700,000.[726]

1. Recordkeeping Requirements

Section 1006.100 generally will require FDCPA-covered debt collectors to retain evidence of compliance or noncompliance with the FDCPA and Regulation F starting on the date that the debt collector begins collection activity on a debt and ending three years after the debt collector's last collection activity on the debt. For recordings of telephone calls, § 1006.100(b) establishes a different retention period, under which the debt collector must retain the recordings for three years after the dates of the telephone calls. Thus, in contrast to other record types, a debt collector could delete a call recording after three years and yet collection activity on the relevant account could continue after that time.

The Bureau believes that most debt collectors are already maintaining records for three or more years for legal purposes and therefore will not incur significant costs as a result of the record retention requirement. During the SBREFA process, nearly all small entity representatives stated that their current practices are already consistent with a three-year record retention requirement, and some said that they retain records for longer periods ranging from five to ten years.[727] Some participants said, however, that they retain some information for a shorter period of time such as one year. Such small entities would incur additional costs for data storage and to update systems to reflect the longer storage period.

2. Compliance Requirements

The rule contains a number of compliance requirements that will apply to FDCPA-covered debt collectors who are small entities. The anticipated costs of compliance for small entities of these requirements are discussed below.

In evaluating the potential impacts of the rule on small entities, the Bureau takes as a baseline conduct in the debt collection markets under the current legal framework governing debt collection. This includes debt collector practices as they currently exist, responding to the requirements of the FDCPA as currently interpreted and other Federal laws as well as State statutes and rules. This baseline represents the status quo from which the impacts of this rule will be evaluated.

The Bureau requested that interested parties provide data and quantitative analysis of the benefits, costs, or impacts of the proposed rule on small entities but did not receive any comments on this subject.

The discussion here is limited to the direct costs to small entities of complying with the requirements of the final rule. Other impacts, such as the impacts of reduced call frequency on debt collectors' ability to contact consumers, are discussed at length in part VII. The Bureau believes that, except where otherwise noted, the impacts discussed in part VII apply to small entities.

(a) Prohibited Communications With Consumers

Section 1006.6(b) generally implements FDCPA section 805(a)'s prohibition on a debt collector communicating with a consumer at unusual or inconvenient times and places, with a consumer represented by an attorney, and at a consumer's place of employment. This section also expressly prohibits attempts to make such communications, which debt collectors already must avoid given that a successful attempt would be an FDCPA violation. Section 1006.14(h)(1) interprets FDCPA section 806's prohibition on a debt collector engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt to prohibit debt collectors from communicating or attempting to communicate with a person through a medium of communication if the person has requested that the debt collector not use that medium to communicate with the person.

Debt collectors are already prohibited from communicating with consumers at a time or place that is known or should be known to be inconvenient to the consumer. The Bureau therefore expects that debt collectors already keep track of what consumers tell them about the times and places that they find inconvenient and avoid communicating or attempting to communicate with consumers at those times or places. Similarly, the provisions regarding communication with attorneys and at the consumer's place of employment track requirements that debt collectors are already required to comply with under the FDCPA. The Bureau understands that many debt collectors

[722] The primary trade association for collection attorneys, the National Creditors Bar Association (NARCA), states that it has approximately 600 law firm members, 95 percent of which are small entities. The Bureau estimates that approximately 60 percent of law firms that collect debt are NARCA members and that a similar fraction of non-member law firms are small entities.

[723] The Bureau understands that loan servicers are generally classified under NAICS code 522390, ''Other Activities Related to Credit Intermediation.'' Some depository institutions (NAICS codes 522110, 522120, and 522130) also service loans for others and may be covered by the rule.

[724] Based on the December 2015 Call Report data as compiled by SNL Financial (with respect to insured depositories) and December 2015 data from the Nationwide Mortgage Licensing System and Registry (with respect to non-depositories), the Bureau estimates that there are approximately 9,000 small entities engaged in mortgage servicing, of which approximately 100 service more than 5,000 loans. *See* 81 FR 72160, 72363 (Oct. 19, 2016). The Bureau's estimate is based on the assumption that all those servicing more than 5,000 loans may acquire servicing of loans when loans are in default and that at most 100 of those servicing 5,000 loans or fewer acquire servicing of loans when loans are in default.

[725] 2020 FDCPA Annual Report, *supra* note 9, at 7.

[726] The estimated hourly cost is based on an estimated wage of $15 per hour and taxes, benefits, and incentives of $7 per hour. *See* CFPB Debt Collection Operations Study, *supra* note 34, at 17 (describing estimated debt collector wages ranging from $10 to $20 per hour).

[727] Small Business Review Panel Report, *supra* note 37, at 28.

currently employ systems and business processes designed to limit communication attempts to consumers at inconvenient times and places and that many debt collectors also use these systems and processes to prevent communications with consumers through media that consumers have told them not to use. For these reasons, the Bureau does not expect that the provisions will significantly impact small entities subject to the final rule.

(b) Telephone Call Frequencies

Section 1006.14(b)(1) prohibits a debt collector from, in connection with the collection of a debt, placing telephone calls or engaging in telephone conversations repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number. Section 1006.14(b)(2)(i) provides for a rebuttable presumption of compliance for a debt collector who places a telephone call to a particular person in connection with the collection of a particular debt neither: (A) More than seven times within seven-consecutive-days; nor (B) within a period of seven-consecutive-days after having had a telephone conversation with the person in connection with the collection of such debt, subject to the exclusions in § 1006.14(b)(3). Section 1006.14(b)(2)(ii) sets forth a rebuttable presumption of a violation for a debt collector who places a telephone call to a particular person in connection with the collection of a particular debt: (A) More than seven times within seven-consecutive-days; or (B) within a period of seven-consecutive-days after having had a telephone conversation with the person in connection with the collection of such debt.

The provision imposes at least two categories of costs on small entities subject to the final rule. First, it means that debt collectors must track the frequency of outbound telephone calls, which will require many debt collectors to bear one-time costs to update their systems and train staff, and which will create ongoing costs for some debt collectors. Second, for some debt collectors, the provision will require a reduction in the frequency with which they place telephone calls to consumers, which could make it harder to reach consumers and delay or reduce collections revenue.

With respect to one-time implementation costs, many debt collectors will incur costs to revise their systems to track telephone call frequencies. Such revisions could range from small updates to existing systems to the introduction of completely new systems and processes. The Bureau understands that larger debt collectors (including those that are small entities) generally already implement system limits on call frequency to comply with client contractual requirements, debt collector internal policies, and State and local laws.[728] Such debt collectors might need only to revise existing calling restrictions to ensure that existing systems track telephone calls in a manner consistent with the new provision. Larger collection agencies might also need to respond to client requests for additional reports and audit items to verify that they comply with the provision, which could require these agencies to make systems changes to alter the reports and data they currently produce for their clients to review.

Smaller debt collectors and collection law firms are less likely to have existing systems that track or limit communication frequency and may therefore face larger costs to establish systems to do so. However, many smaller debt collectors report that they generally attempt to reach each consumer by telephone only one or two times per week and generally do not speak to a consumer more than one time per week, which suggests that their practices would afford them a presumption of compliance with respect to telephone call frequencies under the final rule.[729] For such debt collectors, existing policies may be sufficient to ensure compliance with the provision, although they may incur one-time costs to establish systems for documenting compliance.

(c) Prohibition on the Sale or Transfer of Certain Debts

Section 1006.30(b)(1) prohibits a debt collector from selling, transferring for consideration, or placing for collection a debt if the debt collector knows or should know that the debt was paid or settled or discharged in bankruptcy. Section 1006.30(b)(2) creates several exceptions to this prohibition.

The Bureau understands, based on its market knowledge and outreach to debt collectors, that debt collectors generally do not sell, transfer, or place for collection debts (other than in circumstances covered in the exceptions) if they have reason to believe the debts cannot be validly collected because they have been paid or settled or discharged in bankruptcy. The final rule provides an exception for transfer of secured debt that has been discharged in bankruptcy, provided that the debt collector provides notice to the transferee that the debt has been discharged. The Bureau understands that, if debt collectors transfer such secured debt, they generally already provide such notice in the ordinary course of business. Therefore, the Bureau does not expect this provision to create significant compliance costs for small entities.

(d) Electronic Disclosures and Communications

The final rule includes provisions that clarify how debt collectors can communicate with consumers by email and text message in compliance with the FDCPA and the final rule. With respect to the validation notice, which most debt collectors currently provide by mail, § 1006.42 sets forth general standards for debt collectors to send notices electronically in a way that complies with the FDCPA's validation notice requirements. With respect to any communications about a debt, § 1006.6(d)(3) through (5) specifies procedures that debt collectors may use to send an email or text message to a consumer about a debt such that the debt collector may obtain a safe harbor from civil liability under the FDCPA for an unintentional disclosure of the debt to a third party.

The Bureau understands that few debt collectors currently communicate with consumers using electronic means. For debt collectors who do communicate with consumers electronically, the rule requires them to provide a method for opting out of such communications. The Bureau understands that such methods are common features of services that provide the ability to send electronic communications to consumers. The Bureau therefore does not anticipate that these requirements will impose significant costs on small entities that choose to communicate with consumers electronically.

F. Description of Any Significant Alternatives to the Final Rule That Accomplish the Stated Objectives of the Applicable Statutes and Minimize Any Significant Economic Impact of the Rule on Small Entities

Section 604(a)(6) of the RFA requires the Bureau to describe in the FRFA any significant alternatives to the rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the rule on small entities.[730] In developing the rule, the Bureau has considered alternative provisions and believes that none of the alternatives considered would be as effective at accomplishing

[728] *Id.* at 26.

[729] CFPB Debt Collection Operations Study, *supra* note 34, at 29.

[730] 5 U.S.C. 604(a)(6).

the stated objectives of the FDCPA and the applicable provisions of title X of the Dodd-Frank Act while minimizing the impact of the rule on small entities.

In developing the rule, the Bureau considered a number of alternatives, including those considered as part of the SBREFA process and certain alternative provisions that were part of the proposal. Many of the alternatives considered would have resulted in greater costs to small entities than would the rule. For example, the Bureau considered limiting the frequency of contacts or contact attempts by any media, rather than by telephone calls only. Because such alternatives would result in a greater economic impact on small entities than the rule, they are not discussed here. The Bureau also considered alternatives that might have resulted in a smaller economic impact on small entities than the rule. Certain of these alternatives are briefly described and their impacts relative to the rule provisions are discussed below.

Limitations on call frequency. The Bureau considered a proposal that would have limited the number of calls permitted to any particular telephone number (*e.g.,* at most two calls to each of a consumer's landline, mobile, and work telephone numbers). The Bureau considered such a limit either instead of or in addition to an overall limit on the frequency of telephone calls to one consumer. Such an alternative could potentially reduce the effect on debt collector calls if it permitted more calls when consumers have multiple telephone numbers. The Bureau decided to propose an aggregate approach because of concerns that a more prescriptive, per-telephone number approach could less effectively carry out the consumer protection purposes of the FDCPA—some consumers could receive (and some debt collectors could place) more telephone calls simply based on the number of telephone numbers that certain consumers happened to have (and that debt collectors happened to know about). Such an approach also could create incentives for debt collectors to, for example, place telephone calls to less convenient telephone numbers after exhausting their telephone calls to consumers' preferred numbers.

The proposed rule would have established a bright-line limit on telephone call frequency rather than a rebuttable presumption. Specifically, proposed § 1006.14(b)(1) set forth the general prohibition, § 1006.14(b)(2) described bright-line frequency limits for telephone calls and telephone conversations during a seven-day period, and proposed § 1006.14(b)(3), (4), and (5) described telephone calls excluded from the frequency limits, the effect of complying with the frequency limits, and a definition, respectively. The proposed rule's bright-line limit would impose lower costs on debt collectors than the final rule in some ways, although it would impose greater costs in other ways. Specifically, a bright-line limit on telephone call frequency would provide greater clarity to debt collectors about whether calling practices comply with the FDCPA. For example, under the proposal, a debt collector who did not place telephone calls to consumers more than seven times in a seven-day period would know that it was complying with the provision, whereas, under the final rule, a debt collector following the same practice would also need to consider whether the presumption of compliance might be rebutted in the case of particular consumers or accounts. This could result in greater compliance costs and greater risk of litigation for debt collectors compared with the proposal. On the other hand, the final rule may provide greater flexibility to debt collectors and additional benefits to consumers compared with the proposal. For debt collectors, the final rule may make it more possible to reach consumers if they are unable to make contact within seven call attempts in a week and additional calls would not be harassing.

G. Discussion of Impact on Cost of Credit for Small Entities

Section 604(a)(6) of the RFA requires the Bureau to a description of the steps the agency has taken to minimize any additional cost of credit for small entities.[731] The Bureau provided notification to the Chief Counsel for Advocacy of the Small Business Administration (Chief Counsel) that the Bureau would collect the advice and recommendations of the same small entity representatives identified in consultation with the Chief Counsel through the SBREFA process concerning any projected impact and the rule on the cost of credit for small entities. The Bureau sought to collect the advice and recommendations of the small entity representatives during the Small Business Review Panel meeting regarding the potential impact on the cost of business credit because, as small debt collectors with credit needs, the small entity representatives could provide valuable input on any such impact related to the rule.

The Bureau's Small Business Review Panel Outline asked small entity representatives to comment on how proposed provisions will affect cost of credit to small entities. The Bureau believes that the rule will have little impact on the cost of credit. However, it does recognize that consumer credit may become more expensive and less available as a result of some of these provisions, although the Romeo-Sandler Study indicates that the magnitude of the cost and availability of consumer credit from recent changes to State debt collection laws is small. Many small entities affected by the rule use consumer credit as a source of credit and may, therefore, see costs rise if consumer credit availability decreases. The Bureau does not expect this to be a large effect and does not anticipate measurable impact.[732]

During the SBREFA process, several small entity representatives said that the proposals under consideration at that time could have an impact on the cost of credit for them and for their small business clients. Some small entity representatives said that they use lines of credit in their business and that regulations that raise their costs or reduce their revenue could mean they are unable to meet covenants in their loan agreements, causing lenders to reduce access to capital or increase their borrowing costs. The final rule's provisions are more limited than those that were under consideration during the SBREFA process and should not raise costs or reduce revenue to the same degree. The Bureau did not receive public comments on the effect of the proposed rule on the cost of credit for small entities.

IX. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA),[733] Federal agencies are generally required to seek approval from the Office of Management and Budget (OMB) for information collection requirements prior to implementation. Under the PRA, the Bureau may not conduct or sponsor, and, notwithstanding any other provision of law, a person is not required to respond to, an information collection unless the information collection displays a valid control number assigned by OMB.

As part of its continuing effort to reduce paperwork and respondent burden, the Bureau conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on the information collection

[731] *Id.*

[732] Charles Romeo & Ryan Sandler, *The Effect of Debt Collection Laws on Access to Credit* (Off. of Research, Bureau of Consumer Fin. Prot., Working Paper No. 2018–01, 2018).

[733] 44 U.S.C. 3501 *et seq.*

requirements in accordance with the PRA. This helps ensure that the public understands the Bureau's requirements or instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Bureau can properly assess the impact of collection requirements on respondents.

The final rule amends 12 CFR part 1006 (Regulation F), which implements the FDCPA. The Bureau's OMB control number for Regulation F is 3170–0056. This rule revises the information collection requirements contained in Regulation F that OMB has approved under that OMB control number.

Under the final rule, the Bureau requires six information collection requirements in Regulation F:

1. State application for exemption (current § 1006.2, final rule § 1006.108).
2. Opt-out notice for electronic communications or attempts to communicate (final rule § 1006.6(e)).
3. Providing notice to transferee that secured debt was discharged in bankruptcy (final rule § 1006.30(b)(2)(ii)).
4. Responses to requests for original-creditor information (final rule § 1006.38(c)).
5. Responses to disputes (final rule § 1006.38(d)(2)).
6. Record retention (final rule § 1006.100).

The first collection, the State application for an exemption, is required to obtain a benefit and its respondents are exclusively State governments. The information collected under this collection regards State law, and so no issue of confidentiality arises. The remaining collections provide protection for consumers and will be mandatory. Because the Bureau does not collect any information in these remaining collections, no issue of confidentiality arises. The likely respondents are for-profit businesses that are FDCPA-covered debt collectors, including contingency debt collection agencies, debt buyers, law firms, and loan servicers, or State governments in the case of applications under § 1006.2 (final § 1006.108).

The collections of information contained in this rule, and identified as such, have been submitted to OMB for review under section 3507(d) of the PRA. A complete description of the information collection requirements, including the burden estimate methods, is provided in the information collection request (ICR) that the Bureau has submitted to OMB under the requirements of the PRA. The Bureau will publish a separate notice in the **Federal Register** when these information collections have been approved by OMB.

Please send your comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for the Bureau of Consumer Financial Protection. Send these comments by email to *oira_submission@omb.eop.gov* or by fax to 202–395–6974. If you wish to share your comments with the Bureau, please send a copy of these comments as described in the Addresses section above. The ICR submitted to OMB requesting approval under the PRA for the information collection requirements contained herein is available at *www.regulations.gov* as well as on OMB's public-facing docket at *www.reginfo.gov.*

Title of Collection: Regulation F: Fair Debt Collection Practices Act.

OMB Control Number: 3170–0056.

Type of Review: Revision of a currently approved collection.

Affected Public: Private Sector; State Governments.

Estimated Number of Respondents: 12,027.

Estimated Total Annual Burden Hours: 860,500.

The Bureau has a continuing interest in the public's opinion of its collections of information. At any time, comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, may be sent to the Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW, Washington, DC 20552, or by email to CFPB _*PRA@cfpb.gov.*

Where applicable, the Bureau will display the control number assigned by OMB to any documents associated with any information collection requirements adopted in this rule.

X. Congressional Review Act

Pursuant to the Congressional Review Act,[734] the Bureau will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States at least 60 days prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this rule as a ''major rule'' as defined by 5 U.S.C. 804(2).

XI. Signing Authority

The Director of the Bureau, Kathleen L. Kraninger, having reviewed and approved this document, is delegating the authority to electronically sign this document to Laura Galban, a Bureau Federal Register Liaison, for purposes of publication in the **Federal Register**.

[734] 5 U.S.C. 801 *et seq.*

List of Subjects in 12 CFR Part 1006

Administrative practice and procedure, Consumer protection, Credit, Debt collection, Intergovernmental relations.

Authority and Issuance

■ For the reasons set forth above, the Bureau revises Regulation F, 12 CFR part 1006, to read as follows:

PART 1006—DEBT COLLECTION PRACTICES (REGULATION F)

Subpart A—General

Sec.
1006.1 Authority, purpose, and coverage.
1006.2 Definitions.

Subpart B—Rules for FDCPA Debt Collectors

1006.6 Communications in connection with debt collection.
1006.10 Acquisition of location information.
1006.14 Harassing, oppressive, or abusive conduct.
1006.18 False, deceptive, or misleading representations or means.
1006.22 Unfair or unconscionable means.
1006.26 [Reserved]
1006.30 Other prohibited practices.
1006.34 [Reserved]
1006.38 Disputes and requests for original-creditor information.
1006.42 Sending required disclosures.

Subpart C—[Reserved]

Subpart D—Miscellaneous

1006.100 Record retention.
1006.104 Relation to State laws.
1006.108 Exemption for State regulation.
Appendix A to Part 1006—Procedures for State Application for Exemption From the Provisions of the Act
Appendix B to Part 1006—[Reserved]
Appendix C to Part 1006—Issuance of Advisory Opinions
Supplement I to Part 1006—Official Interpretations

Authority: 12 U.S.C. 5512, 5514(b), 5532; 15 U.S.C. 1692*l*(d), 1692o, 7004.

Subpart A—General

§ 1006.1 Authority, purpose, and coverage.

(a) *Authority.* This part, known as Regulation F, is issued by the Bureau of Consumer Financial Protection pursuant to sections 814(d) and 817 of the Fair Debt Collection Practices Act (FDCPA or Act), 15 U.S.C. 1692*l*(d), 1692o; title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), 12 U.S.C. 5481 *et seq.;* and paragraph (b)(1) of section 104 of the Electronic Signatures in Global and National Commerce Act (E–SIGN Act), 15 U.S.C. 7004.

(b) *Purpose.* This part carries out the purposes of the FDCPA, which include eliminating abusive debt collection practices by debt collectors, ensuring that debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and promoting consistent State action to protect consumers against debt collection abuses. This part also prescribes requirements to ensure that certain features of debt collection are disclosed fully, accurately, and effectively to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with debt collection, in light of the facts and circumstances. Finally, this part imposes record retention requirements to enable the Bureau to administer and carry out the purposes of the FDCPA, the Dodd-Frank Act, and this part, as well as to prevent evasions thereof. The record retention requirements also will facilitate supervision of debt collectors and the assessment and detection of risks to consumers.

(c) *Coverage.* (1) Except as provided in § 1006.108 and appendix A of this part regarding applications for State exemptions from the FDCPA, this part applies to debt collectors, as defined in § 1006.2(i), other than a person excluded from coverage by section 1029(a) of the Consumer Financial Protection Act of 2010, title X of the Dodd-Frank Act (12 U.S.C. 5519(a)).

(2) [Reserved]

§ 1006.2 Definitions.

For purposes of this part, the following definitions apply:

(a) *Act* or *FDCPA* means the Fair Debt Collection Practices Act (15 U.S.C. 1692 *et seq.*).

(b) *Attempt to communicate* means any act to initiate a communication or other contact about a debt with any person through any medium, including by soliciting a response from such person. An attempt to communicate includes leaving a limited-content message, as defined in paragraph (j) of this section.

(c) *Bureau* means the Bureau of Consumer Financial Protection.

(d) *Communicate* or *communication* means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(e) *Consumer* means any natural person obligated or allegedly obligated to pay any debt. For purposes of § 1006.6, the term *consumer* includes the persons described in § 1006.6(a). The Bureau may further define this term by regulation to clarify its application when the consumer is deceased.

(f) [Reserved]

(g) *Creditor* means any person who offers or extends credit creating a debt or to whom a debt is owed. The term creditor does not, however, include any person to the extent that such person receives an assignment or transfer of a debt in default solely to facilitate collection of the debt for another.

(h) *Debt* means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services that are the subject of the transaction are primarily for personal, family, or household purposes, whether or not the obligation has been reduced to judgment.

(i)(1) *Debt collector* means any person who uses any instrumentality of interstate commerce or mail in any business the principal purpose of which is the collection of debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due, or asserted to be owed or due, to another. Notwithstanding paragraph (i)(2)(vi) of this section, the term debt collector includes any creditor that, in the process of collecting its own debts, uses any name other than its own that would indicate that a third person is collecting or attempting to collect such debts. For purposes of § 1006.22(e), the term also includes any person who uses any instrumentality of interstate commerce or mail in any business the principal purpose of which is the enforcement of security interests.

(2) The term debt collector excludes:

(i) Any officer or employee of a creditor while the officer or employee is collecting debts for the creditor in the creditor's name;

(ii) Any person while acting as a debt collector for another person if:

(A) The person acting as a debt collector does so only for persons with whom the person acting as a debt collector is related by common ownership or affiliated by corporate control; and

(B) The principal business of the person acting as a debt collector is not the collection of debts;

(iii) Any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of the officer's or employee's official duties;

(iv) Any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(v) Any nonprofit organization that, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in liquidating their debts by receiving payment from such consumers and distributing such amounts to creditors;

(vi) Any person collecting or attempting to collect any debt owed or due, or asserted to be owed or due to another, to the extent such debt collection activity:

(A) Is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement;

(B) Concerns a debt that such person originated;

(C) Concerns a debt that was not in default at the time such person obtained it; or

(D) Concerns a debt that such person obtained as a secured party in a commercial credit transaction involving the creditor; and

(vii) A private entity, to the extent such private entity is operating a bad check enforcement program that complies with section 818 of the Act.

(j) *Limited-content message* means a voicemail message for a consumer that includes all of the content described in paragraph (j)(1) of this section, that may include any of the content described in paragraph (j)(2) of this section, and that includes no other content.

(1) *Required content.* A limited-content message is a voicemail message for a consumer that includes:

(i) A business name for the debt collector that does not indicate that the debt collector is in the debt collection business;

(ii) A request that the consumer reply to the message;

(iii) The name or names of one or more natural persons whom the consumer can contact to reply to the debt collector; and

(iv) A telephone number or numbers that the consumer can use to reply to the debt collector.

(2) *Optional content.* In addition to the content described in paragraph (j)(1) of this section, a limited-content message may include one or more of the following:

(i) A salutation;

(ii) The date and time of the message;

(iii) Suggested dates and times for the consumer to reply to the message; and

(iv) A statement that if the consumer replies, the consumer may speak to any of the company's representatives or associates.

(k) *Person* includes natural persons, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.

(l) *State* means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

Subpart B—Rules for FDCPA Debt Collectors

§ 1006.6 Communications in connection with debt collection.

(a) *Definition.* For purposes of this section, the term *consumer* includes:

(1) The consumer's spouse;

(2) The consumer's parent, if the consumer is a minor;

(3) The consumer's legal guardian;

(4) The executor or administrator of the consumer's estate, if the consumer is deceased; and

(5) A confirmed successor in interest, as defined in Regulation X, 12 CFR 1024.31, or Regulation Z, 12 CFR 1026.2(a)(27)(ii).

(b) *Communications with a consumer*—(1) *Prohibitions regarding unusual or inconvenient times or places.* Except as provided in paragraph (b)(4) of this section, a debt collector must not communicate or attempt to communicate with a consumer in connection with the collection of any debt:

(i) At any unusual time, or at a time that the debt collector knows or should know is inconvenient to the consumer. In the absence of the debt collector's knowledge of circumstances to the contrary, a time before 8:00 a.m. and after 9:00 p.m. local time at the consumer's location is inconvenient; or

(ii) At any unusual place, or at a place that the debt collector knows or should know is inconvenient to the consumer.

(2) *Prohibitions regarding consumer represented by an attorney.* Except as provided in paragraph (b)(4) of this section, a debt collector must not communicate or attempt to communicate with a consumer in connection with the collection of any debt if the debt collector knows the consumer is represented by an attorney with respect to such debt and knows, or can readily ascertain, the attorney's name and address, unless the attorney:

(i) Fails to respond within a reasonable period of time to a communication from the debt collector; or

(ii) Consents to the debt collector's direct communication with the consumer.

(3) *Prohibitions regarding consumer's place of employment.* Except as provided in paragraph (b)(4) of this section, a debt collector must not communicate or attempt to communicate with a consumer in connection with the collection of any debt at the consumer's place of employment, if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

(4) *Exceptions.* The prohibitions in paragraphs (b)(1) through (3) of this section do not apply when a debt collector communicates or attempts to communicate with a consumer in connection with the collection of any debt with:

(i) The prior consent of the consumer, given directly to the debt collector during a communication that does not violate paragraphs (b)(1) through (3) of this section; or

(ii) The express permission of a court of competent jurisdiction.

(c) *Communications with a consumer—after refusal to pay or cease communication notice*—(1) *Prohibition.* Except as provided in paragraph (c)(2) of this section, if a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wants the debt collector to cease further communication with the consumer, the debt collector must not communicate or attempt to communicate further with the consumer with respect to such debt.

(2) *Exceptions.* The prohibition in paragraph (c)(1) of this section does not apply when a debt collector communicates or attempts to communicate further with a consumer with respect to such debt:

(i) To advise the consumer that the debt collector's further efforts are being terminated;

(ii) To notify the consumer that the debt collector or creditor may invoke specified remedies that the debt collector or creditor ordinarily invokes; or

(iii) Where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

(d) *Communications with third parties*—(1) *Prohibitions.* Except as provided in paragraph (d)(2) of this section, a debt collector must not communicate, in connection with the collection of any debt, with any person other than:

(i) The consumer;

(ii) The consumer's attorney;

(iii) A consumer reporting agency, if otherwise permitted by law;

(iv) The creditor;

(v) The creditor's attorney; or

(vi) The debt collector's attorney.

(2) *Exceptions.* The prohibition in paragraph (d)(1) of this section does not apply when a debt collector communicates, in connection with the collection of any debt, with a person:

(i) For the purpose of acquiring location information, as provided in § 1006.10;

(ii) With the prior consent of the consumer given directly to the debt collector;

(iii) With the express permission of a court of competent jurisdiction; or

(iv) As reasonably necessary to effectuate a postjudgment judicial remedy.

(3) *Reasonable procedures for email and text message communications.* A debt collector maintains procedures that are reasonably adapted, for purposes of FDCPA section 813(c), to avoid a bona fide error in sending an email or text message communication that would result in a violation of paragraph (d)(1) of this section if those procedures include steps to reasonably confirm and document that:

(i) The debt collector communicated with the consumer by sending an email to an email address described in paragraph (d)(4) of this section or a text message to a telephone number described in paragraph (d)(5) of this section; and

(ii) The debt collector did not communicate with the consumer by sending an email to an email address or a text message to a telephone number that the debt collector knows has led to a disclosure prohibited by paragraph (d)(1) of this section.

(4) *Procedures for email addresses.* For purposes of paragraph (d)(3)(i) of this section, a debt collector may send an email to an email address if:

(i) *Procedures based on communication between the consumer and the debt collector.* (A) The consumer used the email address to communicate with the debt collector about the debt and the consumer has not since opted out of communications to that email address; or

(B) The debt collector has received directly from the consumer prior consent to use the email address to communicate with the consumer about the debt and the consumer has not withdrawn that consent; or

(ii) *Procedures based on communication by the creditor.* (A) A creditor obtained the email address from the consumer;

(B) The creditor used the email address to communicate with the consumer about the account and the consumer did not ask the creditor to stop using it;

(C) Before the debt collector used the email address to communicate with the consumer about the debt, the creditor sent the consumer a written or electronic notice, to an address the creditor obtained from the consumer and used to communicate with the consumer about the account, that clearly and conspicuously disclosed:

(*1*) That the debt has been or will be transferred to the debt collector;

(*2*) The email address and the fact that the debt collector might use the email address to communicate with the consumer about the debt;

(*3*) That, if others have access to the email address, then it is possible they may see the emails;

(*4*) Instructions for a reasonable and simple method by which the consumer could opt out of such communications; and

(*5*) The date by which the debt collector or the creditor must receive the consumer's request to opt out, which must be at least 35 days after the date the notice is sent;

(D) The opt-out period provided under paragraph (d)(4)(ii)(C)(*5*) of this section has expired and the consumer has not opted out; and

(E) The email address has a domain name that is available for use by the general public, unless the debt collector knows the address is provided by the consumer's employer.

(iii) *Procedures based on communication by the prior debt collector.* (A) Any prior debt collector obtained the email address in accordance with paragraph (d)(4)(i) or (ii) of this section;

(B) The immediately prior debt collector used the email address to communicate with the consumer about the debt; and

(C) The consumer did not opt out of such communications.

(5) *Procedures for telephone numbers for text messages.* For purposes of paragraph (d)(3)(i) of this section, a debt collector may send a text message to a telephone number if:

(i) The consumer used the telephone number to communicate with the debt collector about the debt by text message, the consumer has not since opted out of text message communications to that telephone number, and within the past 60 days either:

(A) The consumer sent the text message described in paragraph (d)(5)(i) of this section or a new text message to the debt collector from that telephone number; or

(B) The debt collector confirmed, using a complete and accurate database, that the telephone number has not been reassigned from the consumer to another user since the date of the consumer's most recent text message to the debt collector from that telephone number; or

(ii) The debt collector received directly from the consumer prior consent to use the telephone number to communicate with the consumer about the debt by text message, the consumer has not since withdrawn that consent, and within the past 60 days the debt collector either:

(A) Obtained the prior consent described in paragraph (d)(5)(ii) of this section or renewed consent from the consumer; or

(B) Confirmed, using a complete and accurate database, that the telephone number has not been reassigned from the consumer to another user since the date of the consumer's most recent consent to use that telephone number to communicate about the debt by text message.

(e) *Opt-out notice for electronic communications or attempts to communicate.* A debt collector who communicates or attempts to communicate with a consumer electronically in connection with the collection of a debt using a specific email address, telephone number for text messages, or other electronic-medium address must include in such communication or attempt to communicate a clear and conspicuous statement describing a reasonable and simple method by which the consumer can opt out of further electronic communications or attempts to communicate by the debt collector to that address or telephone number. The debt collector may not require, directly or indirectly, that the consumer, in order to opt out, pay any fee to the debt collector or provide any information other than the consumer's opt-out preferences and the email address, telephone number for text messages, or other electronic-medium address subject to the opt-out request.

§ 1006.10 Acquisition of location information.

(a) *Definition.* The term *location information* means a consumer's:

(1) Place of abode and telephone number at such place; or

(2) Place of employment.

(b) *Form and content of location communications.* A debt collector communicating with a person other than the consumer for the purpose of acquiring location information must:

(1) Identify himself or herself individually by name, state that he or she is confirming or correcting the consumer's location information, and, only if expressly requested, identify his or her employer;

(2) Not state that the consumer owes any debt;

(3) Not communicate by postcard;

(4) Not use any language or symbol on any envelope or in the contents of any communication by mail indicating that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and

(5) After the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond to the debt collector's communication within a reasonable period of time.

(c) *Frequency of location communications.* In addition to complying with § 1006.14(b)(1), a debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer must not communicate more than once with such person unless requested to do so by such person, or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information.

§ 1006.14 Harassing, oppressive, or abusive conduct.

(a) *In general.* A debt collector must not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt, including, but not limited to, the conduct described in paragraphs (b) through (h) of this section.

(b) *Repeated or continuous telephone calls or telephone conversations*—(1) *In general.* In connection with the collection of a debt, a debt collector must not place telephone calls or engage any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

(2) *Telephone call frequencies; presumptions of compliance and violation.* (i) Subject to the exclusions in paragraph (b)(3) of this section, a debt collector is presumed to comply with paragraph (b)(1) of this section and FDCPA section 806(5) (15 U.S.C. 1692d(5)) if the debt collector places a telephone call to a particular person in connection with the collection of a particular debt neither:

(A) More than seven times within seven consecutive days; nor

(B) Within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt. The date of the telephone conversation is the first day of the seven-consecutive-day period.

(ii) Subject to the exclusions in paragraph (b)(3) of this section, a debt

collector is presumed to violate paragraph (b)(1) of this section and FDCPA section 806(5) if the debt collector places a telephone call to a particular person in connection with the collection of a particular debt in excess of either of the telephone call frequencies described in paragraph (b)(2)(i) of this section.

(3) *Certain telephone calls excluded from the telephone call frequencies.* Telephone calls placed to a person do not count toward the telephone call frequencies described in paragraph (b)(2)(i) of this section if they are:

(i) Placed with such person's prior consent given directly to the debt collector and within a period no longer than seven consecutive days after receiving the prior consent, with the date the debt collector receives prior consent counting as the first day of the seven-consecutive-day period;

(ii) Not connected to the dialed number; or

(iii) Placed to the persons described in § 1006.6(d)(1)(ii) through (vi).

(4) *Definition.* For purposes of this paragraph (b), particular debt means each of a consumer's debts in collection. However, in the case of student loan debts, the term particular debt means all student loan debts that a consumer owes or allegedly owes that were serviced under a single account number at the time the debts were obtained by a debt collector.

(c) *Violence or other criminal means.* In connection with the collection of a debt, a debt collector must not use or threaten to use violence or other criminal means to harm the physical person, reputation, or property of any person.

(d) *Obscene or profane language.* In connection with the collection of a debt, a debt collector must not use obscene or profane language, or language the natural consequence of which is to abuse the hearer or reader.

(e) *Debtor's list.* In connection with the collection of a debt, a debt collector must not publish a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of sections 603(f) or 604(a)(3) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f) or 1681b(a)(3)).

(f) *Coercive advertisements.* In connection with the collection of a debt, a debt collector must not advertise for sale any debt to coerce payment of the debt.

(g) *Meaningful disclosure of identity.* In connection with the collection of a debt, a debt collector must not place telephone calls without meaningfully disclosing the caller's identity, except as provided in § 1006.10.

(h) *Prohibited communication media*—(1) *In general.* In connection with the collection of any debt, a debt collector must not communicate or attempt to communicate with a person through a medium of communication if the person has requested that the debt collector not use that medium to communicate with the person.

(2) *Exceptions.* Notwithstanding the prohibition in paragraph (h)(1) of this section:

(i) If a person opts out of receiving electronic communications from a debt collector, a debt collector may send an electronic confirmation of the person's request to opt out, provided that the electronic confirmation contains no information other than a statement confirming the person's request and that the debt collector will honor it;

(ii) If a person initiates contact with a debt collector using a medium of communication that the person previously requested the debt collector not use, the debt collector may respond once through the same medium of communication used by the person; or

(iii) If otherwise required by applicable law, a debt collector may communicate or attempt to communicate with a person in connection with the collection of any debt through a medium of communication that the person has requested the debt collector not use to communicate with the person.

§ 1006.18 False, deceptive, or misleading representations or means.

(a) *In general.* A debt collector must not use any false, deceptive, or misleading representation or means in connection with the collection of any debt, including, but not limited to, the conduct described in paragraphs (b) through (d) of this section.

(b) *False, deceptive, or misleading representations.* (1) A debt collector must not falsely represent or imply that:

(i) The debt collector is vouched for, bonded by, or affiliated with the United States or any State, including through the use of any badge, uniform, or facsimile thereof.

(ii) The debt collector operates or is employed by a consumer reporting agency, as defined by section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)).

(iii) Any individual is an attorney or that any communication is from an attorney.

(iv) The consumer committed any crime or other conduct in order to disgrace the consumer.

(v) A sale, referral, or other transfer of any interest in a debt causes or will cause the consumer to:

(A) Lose any claim or defense to payment of the debt; or

(B) Become subject to any practice prohibited by this part.

(vi) Accounts have been turned over to innocent purchasers for value.

(vii) Documents are legal process.

(viii) Documents are not legal process forms or do not require action by the consumer.

(2) A debt collector must not falsely represent:

(i) The character, amount, or legal status of any debt.

(ii) Any services rendered, or compensation that may be lawfully received, by any debt collector for the collection of a debt.

(3) A debt collector must not represent or imply that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(c) *False, deceptive, or misleading collection means.* A debt collector must not:

(1) Threaten to take any action that cannot legally be taken or that is not intended to be taken.

(2) Communicate or threaten to communicate to any person credit information that the debt collector knows or should know is false, including the failure to communicate that a disputed debt is disputed.

(3) Use or distribute any written communication that simulates or that the debt collector falsely represents to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or that creates a false impression about its source, authorization, or approval.

(4) Use any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(d) *False representations or deceptive means.* A debt collector must not use any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(e) *Disclosures required*—(1) *Initial communications.* A debt collector must disclose in its initial communication with a consumer that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose. If the debt collector's initial communication with the consumer is oral, the debt collector

must make the disclosure required by this paragraph again in its initial written communication with the consumer.

(2) *Subsequent communications.* In each communication with the consumer subsequent to the communications described in paragraph (e)(1) of this section, the debt collector must disclose that the communication is from a debt collector.

(3) *Exception.* Disclosures under paragraphs (e)(1) and (2) of this section are not required in a formal pleading made in connection with a legal action.

(4) *Translated disclosures.* A debt collector must make the disclosures required by paragraphs (e)(1) and (2) of this section in the same language or languages used for the rest of the communication in which the debt collector conveyed the disclosures. Any translation of the disclosures a debt collector uses must be complete and accurate.

(f) *Assumed names.* This section does not prohibit a debt collector's employee from using an assumed name when communicating or attempting to communicate with a person, provided that the employee uses the assumed name consistently and that the debt collector can readily identify any employee using an assumed name.

§ 1006.22 Unfair or unconscionable means.

(a) *In general.* A debt collector must not use unfair or unconscionable means to collect or attempt to collect any debt, including, but not limited to, the conduct described in paragraphs (b) through (f) of this section.

(b) *Collection of unauthorized amounts.* A debt collector must not collect any amount unless such amount is expressly authorized by the agreement creating the debt or permitted by law. For purposes of this paragraph, the term ''any amount'' includes any interest, fee, charge, or expense incidental to the principal obligation.

(c) *Postdated payment instruments.* A debt collector must not:

(1) Accept from any person a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten, nor less than three, days (excluding legal public holidays identified in 5 U.S.C. 6103(a), Saturdays, and Sundays) prior to such deposit.

(2) Solicit any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(3) Deposit or threaten to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(d) *Charges resulting from concealment of purpose.* A debt collector must not cause charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(e) *Nonjudicial action regarding property.* A debt collector must not take or threaten to take any nonjudicial action to effect dispossession or disablement of property if:

(1) There is no present right to possession of the property claimed as collateral through an enforceable security interest;

(2) There is no present intention to take possession of the property; or

(3) The property is exempt by law from such dispossession or disablement.

(f) *Restrictions on use of certain media.* A debt collector must not:

(1) Communicate with a consumer regarding a debt by postcard.

(2) Use any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by mail, except that a debt collector may use the debt collector's business name on an envelope if such name does not indicate that the debt collector is in the debt collection business.

(3) Communicate or attempt to communicate with a consumer by sending an email to an email address that the debt collector knows is provided to the consumer by the consumer's employer, unless the email address is one described in § 1006.6(d)(4)(i) or (iii).

(4) Communicate or attempt to communicate with a person in connection with the collection of a debt through a social media platform if the communication or attempt to communicate is viewable by the general public or the person's social media contacts.

(g) *Safe harbor for certain emails and text messages relating to the collection of a debt.* A debt collector who communicates with a consumer by sending an email or text message in accordance with the procedures described in § 1006.6(d)(3) does not violate paragraph (a) of this section by revealing in the email or text message the debt collector's name or other information indicating that the communication relates to the collection of a debt.

§ 1006.26 [Reserved]

§ 1006.30 Other prohibited practices.

(a) [Reserved]

(b) *Prohibition on the sale, transfer for consideration, or placement for collection of certain debts*—(1) *In general.* Except as provided in paragraph (b)(2) of this section, a debt collector must not sell, transfer for consideration, or place for collection a debt if the debt collector knows or should know that the debt has been paid or settled or discharged in bankruptcy.

(2) *Exceptions*—(i) *In general.* A debt collector may transfer for consideration a debt described in paragraph (b)(1) of this section if the debt collector:

(A) Transfers the debt to the debt's owner;

(B) Transfers the debt to a previous owner of the debt, if the transfer is authorized under the terms of the original contract between the debt collector and the previous owner; or

(C) Transfers the debt as a result of a merger, acquisition, purchase and assumption transaction, or a transfer of substantially all of the debt collector's assets.

(ii) *Secured claims in bankruptcy.* A debt collector may sell, transfer for consideration, or place for collection a debt that has been discharged in bankruptcy if the debt is secured by an enforceable lien and the debt collector notifies the transferee that the consumer's personal liability for the debt was discharged in bankruptcy.

(iii) *Securitizations and pledges of debt.* Paragraph (b)(1) of this section does not prohibit the securitization of a debt or the pledging of a portfolio of debt as collateral in connection with a borrowing.

(c) *Multiple debts.* If a consumer makes any single payment to a debt collector with respect to multiple debts owed by the consumer to the debt collector, the debt collector:

(1) Must not apply the payment to any debt that is disputed by the consumer; and

(2) If applicable, must apply the payment in accordance with the consumer's directions.

(d) *Legal actions by debt collectors*—(1) *Action to enforce interest in real property.* A debt collector who brings a legal action against a consumer to enforce an interest in real property securing the consumer's debt must bring the action only in a judicial district or similar legal entity in which such real property is located.

(2) *Other legal actions.* A debt collector who brings a legal action against a consumer other than to enforce an interest in real property securing the consumer's debt must bring such action only in the judicial district or similar legal entity in which the consumer:

(i) Signed the contract sued upon; or

(ii) Resides at the commencement of the action.

(3) *Authorization of actions.* Nothing in this part authorizes debt collectors to bring legal actions.

(e) *Furnishing certain deceptive forms.* A debt collector must not design, compile, and furnish any form that the debt collector knows would be used to cause a consumer falsely to believe that a person other than the consumer's creditor is participating in collecting or attempting to collect a debt that the consumer allegedly owes to the creditor.

§ 1006.34 [Reserved]

§ 1006.38 Disputes and requests for original-creditor information.

(a) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Duplicative dispute* means a dispute submitted by the consumer in writing within the validation period that:

(i) Is substantially the same as a dispute previously submitted by the consumer in writing within the validation period for which the debt collector already has satisfied the requirements of paragraph (d)(2)(i) of this section; and

(ii) Does not include new and material information to support the dispute.

(2) *Validation period* means the thirty-day period after a consumer's receipt of the written notice of debt described in FDCPA section 809 (15 U.S.C. 1692g) as defined by this part.

(b)(1) *Overshadowing of rights to dispute or request original-creditor information.* During the validation period, a debt collector must not engage in any collection activities or communications that overshadow or are inconsistent with the disclosure of the consumer's rights to dispute the debt and to request the name and address of the original creditor. The Bureau may provide by regulation a safe harbor for debt collectors when they use certain Bureau-approved disclosures.

(2) [Reserved]

(c) *Requests for original-creditor information.* (1) Upon receipt of a request for the name and address of the original creditor submitted by the consumer in writing within the validation period, a debt collector must cease collection of the debt until the debt collector sends the name and address of the original creditor to the consumer in writing or electronically in the manner required by § 1006.42. The Bureau may provide by regulation for alternative procedures when the original creditor is the same as the current creditor.

(2) [Reserved]

(d) *Disputes*—(1) *Failure to dispute.* The failure of a consumer to dispute the validity of a debt does not constitute a legal admission of liability by the consumer.

(2) *Response to disputes.* Upon receipt of a dispute submitted by the consumer in writing within the validation period, a debt collector must cease collection of the debt, or any disputed portion of the debt, until the debt collector:

(i) Sends a copy either of verification of the debt or of a judgment to the consumer in writing or electronically in the manner required by § 1006.42; or

(ii) In the case of a dispute that the debt collector reasonably determines is a duplicative dispute, either:

(A) Notifies the consumer in writing or electronically in the manner required by § 1006.42(a)(1) that the dispute is duplicative, provides a brief statement of the reasons for the determination, and refers the consumer to the debt collector's response to the earlier dispute; or

(B) Satisfies paragraph (d)(2)(i) of this section.

§ 1006.42 Sending required disclosures.

(a) *Sending required disclosures*—(1) *In general.* A debt collector who sends disclosures required by the Act and this part in writing or electronically must do so in a manner that is reasonably expected to provide actual notice, and in a form that the consumer may keep and access later.

(2) *Exceptions.* A debt collector need not comply with paragraph (a)(1) of this section when sending the disclosure required by § 1006.6(e) or § 1006.18(e) in writing or electronically, unless the disclosure is included on a notice required by FDCPA section 809(a) (15 U.S.C. 1692g(a)), as implemented by this part, or § 1006.38(c) or (d)(2).

(b) *Requirements for certain disclosures sent electronically.* To comply with paragraph (a) of this section, a debt collector who sends the notice required by FDCPA section 809(a), as implemented by this part, or the disclosures described in § 1006.38(c) or (d)(2)(i), electronically must do so in accordance with section 101(c) of the Electronic Signatures in Global and National Commerce Act (E–SIGN Act) (15 U.S.C. 7001(c)).

Subpart C—[Reserved]

Subpart D—Miscellaneous

§ 1006.100 Record retention.

(a) *In general.* Except as provided in paragraph (b) of this section, a debt collector must retain records that are evidence of compliance or noncompliance with the FDCPA and this part starting on the date that the debt collector begins collection activity on a debt until three years after the debt collector's last collection activity on the debt.

(b) *Special rule for telephone call recordings.* If a debt collector records telephone calls made in connection with the collection of a debt, the debt collector must retain the recording of each such telephone call for three years after the date of the call.

§ 1006.104 Relation to State laws.

Neither the Act nor the corresponding provisions of this part annul, alter, affect, or exempt any person subject to the provisions of the Act or the corresponding provisions of this part from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of the Act or the corresponding provisions of this part, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with the Act or the corresponding provisions of this part if the protection such law affords any consumer is greater than the protection provided by the Act or the corresponding provisions of this part.

§ 1006.108 Exemption for State regulation.

(a) *Exemption for State regulation.* Any State may apply to the Bureau for a determination that, under the laws of that State, any class of debt collection practices within that State is subject to requirements that are substantially similar to those imposed under sections 803 through 812 of the Act (15 U.S.C. 1692a through 1692j) and the corresponding provisions of this part, and that there is adequate provision for State enforcement of such requirements.

(b) *Procedures and criteria.* The procedures and criteria whereby States may apply to the Bureau for exemption of a class of debt collection practices within the applying State from the provisions of the Act and the corresponding provisions of this part as provided in section 817 of the Act (15 U.S.C. 1692o) are set forth in appendix A of this part.

Appendix A to Part 1006—Procedures for State Application for Exemption From the Provisions of the Act

I. Purpose and Definitions

(a) This appendix establishes procedures and criteria whereby States may apply to the Bureau for exemption of a class of debt collection practices within the applying State from the provisions of the Act and the

corresponding provisions of this part as provided in section 817 of the Act (15 U.S.C. 1692o).

(b) For purposes of this appendix:

(1) *Applicant State law* means the State law that, for a class of debt collection practices within that State, is claimed to contain requirements that are substantially similar to the requirements that relevant Federal law imposes on that class of debt collection practices, and that contains adequate provision for State enforcement.

(2) *Class of debt collection practices* includes one or more such classes of debt collection practices referred to in paragraph I(b)(1) of this appendix.

(3) *Relevant Federal law* means sections 803 through 812 of the Act (15 U.S.C. 1692a through 1692j) and the corresponding provisions of this part.

(4) *State law* includes State statutes, any regulations that implement State statutes, and formal interpretations of State statutes or regulations by a court of competent jurisdiction or duly authorized State agency.

II. Application

Any State may apply to the Bureau pursuant to the terms of this appendix for a determination that the applicant State law contains requirements that, for a class of debt collection practices within that State, are substantially similar to the requirements that relevant Federal law imposes on that class of debt collection practices, and that the applicant State law contains adequate provision for State enforcement. The application must be in writing, addressed to the Assistant Director, Office of Regulations, Division of Research, Markets, and Regulations, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552, signed by the Governor, Attorney General, or State official having primary enforcement responsibility under the State law that applies to the class of debt collection practices, and must be supported by the documents specified in this appendix.

III. Supporting Documents

The application must be accompanied by the following, which may be submitted in paper or electronic form:

(a) A copy of the applicant State law.

(b) A comparison of each provision of relevant Federal law with the corresponding provisions of the applicant State law, together with reasons supporting the claim that the corresponding provisions of the applicant State law are substantially similar to the provisions of relevant Federal law, and an explanation as to why any differences between the State statute or regulation and Federal law are not inconsistent with the provisions of relevant Federal law and do not result in a diminution in the protection otherwise afforded consumers; and a statement that no other State laws (including administrative or judicial interpretations) are related to, or would have an effect upon, the State law that is being considered by the Bureau in making its determination.

(c) A comparison of the provisions of the State law that provide for enforcement with the provisions of section 814 of the Act (15 U.S.C. 1692*l*), together with reasons supporting the claim that the applicant State law provides for adequate administrative enforcement.

(d) A statement identifying the office designated or to be designated to enforce the applicant State law. The statement must show how the office provides for adequate enforcement of the applicant State law, including by showing that the office has necessary facilities, personnel, and funding. The statement must include, for example, complete information regarding the fiscal arrangements for administrative enforcement (including the amount of funds available or to be provided), the number and qualifications of personnel engaged or to be engaged in enforcement, and a description of the procedures under which the applicant State law is to be enforced by the State.

IV. Criteria for Determination

The Bureau will consider the criteria set forth below, and any other relevant information, in determining whether the applicant State law is substantially similar to relevant Federal law and whether there is adequate provision for enforcement of the applicant State law. In making that determination, the Bureau primarily will consider each provision of the applicant State law in comparison with each corresponding provision in relevant Federal law, and not the State law as a whole in comparison with the Act as a whole.

(a)(1) In order for the applicant State law to be substantially similar to relevant Federal law, the applicant State law at least must provide that:

(i) Definitions and rules of construction, as applicable, import a meaning and have an application that are substantially similar to those prescribed by relevant Federal law.

(ii) Debt collectors provide all of the applicable notices required by relevant Federal law, with the content and in the terminology, form, and time periods prescribed pursuant to relevant Federal law. The Bureau may determine whether additional notice requirements under the applicant State law affect a determination that the applicant State law is substantially similar to relevant Federal law.

(iii) Debt collectors take all affirmative actions and abide by obligations substantially similar to those prescribed by relevant Federal law under substantially similar conditions and within substantially similar time periods as are prescribed under relevant Federal law;

(iv) Debt collectors abide by prohibitions that are substantially similar to those prescribed by relevant Federal law;

(v) Consumers' obligations or responsibilities are no more costly, lengthy, or burdensome than consumers' corresponding obligations or responsibilities under relevant Federal law; and

(vi) Consumers' rights and protections are substantially similar to those provided by relevant Federal law under conditions or within time periods that are substantially similar to those prescribed by relevant Federal law.

(2) In applying the criteria set forth in paragraph IV(a)(1) of this appendix, the Bureau will not consider adversely any additional requirements of State law that are not inconsistent with the purpose of the Act or the requirements imposed under relevant Federal law.

(b) In determining whether provisions for enforcement of the applicant State law are adequate, consideration will be given to the extent to which, under the applicant State law, provision is made for administrative enforcement, including necessary facilities, personnel, and funding.

V. Public Comment

In connection with any application that has been filed in accordance with the requirements of parts II and III of this appendix and following initial review of the application, a proposed rule concerning the application for exemption will be published by the Bureau in the **Federal Register**, and a copy of such application will be made available for examination by interested persons during business hours at the Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552. A comment period will be allowed from the date of such publication for interested parties to submit written comments to the Bureau regarding that application.

VI. Exemption From Requirements

If the Bureau determines on the basis of the information before it that, under the applicant State law, a class of debt collection practices is subject to requirements substantially similar to those imposed under relevant Federal law and that there is adequate provision for State enforcement, the Bureau will exempt the class of debt collection practices in that State from the requirements of relevant Federal law and section 814 of the Act in the following manner and subject to the following conditions:

(a) A final rule granting the exemption will be published in the **Federal Register**, and the Bureau will furnish a copy of such rule to the State official who made application for such exemption, to each Federal authority responsible for administrative enforcement of the requirements of relevant Federal law, and to the Attorney General of the United States. Any exemption granted will be effective 90 days after the date of publication of such rule in the **Federal Register**.

(b) Any State that receives an exemption must, through its appropriate official, take the following steps:

(i) Inform the Assistant Director, Office of Regulations, Division of Research, Markets, and Regulations, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552 in writing within 30 days of any change in the applicant State law. The report of any such change must contain copies of the full text of that change, together with statements setting forth the information and opinions regarding that change that are specified in paragraph III.

(ii) Provide, not later than two years after the date the exemption is granted, and every two years thereafter, a report to the Bureau in writing concerning the manner in which the State has enforced the applicant State law in the preceding two years and an update of the information required under paragraph III(d) of this appendix.

(c) The Bureau will inform any State that receives such an exemption, through its appropriate official, of any subsequent amendments of the Act or this part that might necessitate the amendment of State law for the exemption to continue.

(d) After an exemption is granted, the requirements of the applicable State law constitute the requirements of relevant Federal law, except to the extent such State law imposes requirements not imposed by the Act or this part.

VII. Adverse Determination

(a) If, after publication of a proposed rule in the **Federal Register** as provided under part V of this appendix, the Bureau finds on the basis of the information before it that it cannot make a favorable determination in connection with the application, the Bureau will notify the appropriate State official of the facts upon which such findings are based and will afford that State authority a reasonable opportunity to submit additional materials that demonstrate the basis for granting an exemption.

(b) If, after having afforded the State authority such opportunity to demonstrate the basis for granting an exemption, the Bureau finds on the basis of the information before it that it still cannot make a favorable determination in connection with the application, the Bureau will publish in the **Federal Register** a final rule containing its determination regarding the application and will furnish a copy of such rule to the State official who made application for such exemption.

VIII. Revocation of Exemption

(a) The Bureau reserves the right to revoke any exemption granted under the provisions of the Act or this part, if at any time it determines that the State law does not, in fact, impose requirements that are substantially similar to relevant Federal law or that there is not, in fact, adequate provision for State enforcement.

(b) Before revoking any such exemption, the Bureau will notify the State of the facts or conduct that, in the Bureau's opinion, warrant such revocation, and will afford that State such opportunity as the Bureau deems appropriate in the circumstances to demonstrate continued eligibility for an exemption.

(c) If, after having been afforded the opportunity to demonstrate or achieve compliance, the Bureau determines that the State has not done so, a proposed rule to revoke such exemption will be published in the **Federal Register**. A comment period will be allowed from the date of such publication for interested persons to submit written comments to the Bureau regarding the intention to revoke.

(d) If such exemption is revoked, a final rule revoking the exemption will be published by the Bureau in the **Federal Register**, and a copy of such rule will be furnished to the State, to the Federal authorities responsible for enforcement of the requirements of the Act, and to the Attorney General of the United States. The revocation becomes effective, and the class of debt collection practices affected within that State become subject to the requirements of sections 803 through 812 of the Act and the corresponding provisions of this part, 90 days after the date of publication of the final rule in the **Federal Register**.

Appendix B to Part 1006—[Reserved]

Appendix C to Part 1006—Issuance of Advisory Opinions

1. *Advisory opinions.* Any act done or omitted in good faith in conformity with any advisory opinion issued by the Bureau, including advisory opinions referenced in this appendix, provides the protection afforded under section 813(e) of the Act. The Bureau will amend this appendix periodically to incorporate references to advisory opinions that the Bureau issues.

2. *Requests for issuance of advisory opinions.* A request for an advisory opinion may be submitted in accordance with the instructions regarding submission and content of requests applicable to any relevant advisory opinion program that the Bureau offers. Requests for advisory opinions will be reviewed consistent with the process outlined in any such program, and any resulting advisory opinions will be published in the **Federal Register** and on *consumerfinance.gov.*

3. *Bureau-issued advisory opinions.* The Bureau has issued the following advisory opinions:

a. *Safe Harbors from Liability under the Fair Debt Collection Practices Act for Certain Actions Taken in Compliance with Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z),* 81 FR 71977 (Oct. 19, 2016).

Supplement I to Part 1006—Official Interpretations

Introduction

1. *Official status.* This commentary is the vehicle by which the Bureau of Consumer Financial Protection supplements Regulation F, 12 CFR part 1006. The provisions of the commentary are issued under the same authorities as the corresponding provisions of Regulation F and have been adopted in accordance with the notice-and-comment procedures of the Administrative Procedure Act (5 U.S.C. 553). Unless specified otherwise, references in this commentary are to sections of Regulation F or the Fair Debt Collection Practices Act, 15 U.S.C. 1692 *et seq.* No commentary is expected to be issued other than by means of this Supplement I.

2. *Procedure for requesting interpretations.* Anyone may request that an official interpretation of the regulation be added to this commentary. A request for such an official interpretation must be in writing and addressed to the Associate Director, Division of Research, Markets, and Regulations, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552. The request must contain a complete statement of all relevant facts concerning the issue, including copies of all pertinent documents. Revisions to this commentary that are adopted in accordance with the rulemaking procedures of section 553 of the Administrative Procedure Act (5 U.S.C. 553) will be incorporated in the commentary following publication in the **Federal Register**.

3. *Comment designations.* Each comment in the commentary is identified by a number and the regulatory section or paragraph that it interprets. The comments are designated with as much specificity as possible according to the particular regulatory provision addressed. For example, comments to § 1006.6(d)(4) are further divided by subparagraph, such as comment 6(d)(4)(i)–1 and comment 6(d)(4)(ii)–1. Comments that have more general application are designated, for example, as comments 38–1 and 38–2. This introduction may be cited as comments I–1, I–2, and I–3.

Subpart A—General

Section 1006.2—Definitions

2(b) Attempt To Communicate

1. *Examples.* Section 1006.2(b) defines an attempt to communicate as any act to initiate a communication or other contact about a debt with any person through any medium, including by soliciting a response from such person. An act to initiate a communication or other contact about a debt is an attempt to communicate regardless of whether the attempt, if successful, would be a communication that conveys information regarding a debt directly or indirectly to any person. For example:

i. Assume that a debt collector places a telephone call to a person about a debt. Regardless of whether the debt collector reaches the person, the debt collector has attempted to communicate with the person.

ii. Assume that a debt collector places a telephone call to a person about a debt and leaves a voicemail message. Regardless of whether the voicemail message consists solely of a limited-content message or includes content that conveys, directly or indirectly, information about a debt, the debt collector has attempted to communicate with the person.

2(d) Communicate or Communication

1. *Any medium.* Section 1006.2(d) provides, in relevant part, that a communication can occur through any medium. ''Any medium'' includes any oral, written, electronic, or other medium. For example, a communication may occur in person or by telephone, audio recording, paper document, mail, email, text message, social media, or other electronic media.

2. *Information regarding a debt.* Section 1006.2(d) provides, in relevant part, that a communication means conveying information regarding a debt. A debt collector does not convey information regarding a debt directly or indirectly to any person if the debt collector leaves only a limited-content message, as defined in § 1006.2(j). A debt collector who provides marketing or advertising that does not contain information about a specific debt or debts has not communicated under § 1006.2(d), even if the debt collector transmits the marketing or advertising message to a consumer, because the debt collector has not conveyed information regarding a debt.

2(h) Debt

1. *Consumer.* Section 1006.2(h) defines debt to mean, in part, any obligation or alleged obligation of a consumer to pay money arising out of a transaction. Section 1006.2(e), in turn, defines consumer to mean any natural person obligated or allegedly obligated to pay any debt. Only natural persons, therefore, can incur debts as defined in § 1006.2(h).

2(i) Debt Collector

1. *In general.* Section 1006.2(i) provides, in part, that a debt collector is any person who uses any instrumentality of interstate commerce or mail in any business the principal purpose of which is the collection of debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due, or asserted to be owed or due, to another. A person who collects or attempts to collect defaulted debts that the person has purchased, but who does not collect or attempt to collect, directly or indirectly, debts owed or due, or asserted to be owed or due, to another, and who does not have a business the principal purpose of which is the collection of debts, is not a debt collector as defined in § 1006.2(i).

2(j) Limited-Content Message

1. *In general.* Section 1006.2(j) provides that a limited-content message is a voicemail message for a consumer that includes all of the content described in § 1006.2(j)(1), that may include any of the content described in § 1006.2(j)(2), and that includes no other content. Any other message is not a limited-content message. If a voicemail message includes content other than the specific items described in § 1006.2(j)(1) and (2), and such other content directly or indirectly conveys any information about a debt, the message is a communication, as defined in § 1006.2(d). For example, a voicemail message that includes a statement that the message is from a debt collector and a request to speak to a particular consumer is not a limited-content message because it includes more than the required or permitted content.

2. *Message for a consumer.* Section 1006.2(j) provides, in part, that a limited-content message is a voicemail message for a consumer. A message knowingly left for a third party is not a limited-content message because it is not for a consumer. For example, assume that a debt collector has a telephone number that the debt collector knows belongs to the consumer's friend. A voicemail message left after calling that number is not a limited-content message, even if the message includes no more than the content described in § 1006.2(j)(1) and (2) because the debt collector knowingly left the message for someone other than the consumer. Other provisions of this part may, in certain circumstances, restrict a debt collector from leaving a limited-content message or otherwise attempting to communicate with a consumer. See §§ 1006.6(b) and (c) and 1006.22(f) and their related commentary for further guidance regarding when a debt collector is prohibited from attempting to communicate with a consumer.

3. *Meaningful disclosure of identity.* A debt collector who leaves only a limited-content message for a consumer does not violate § 1006.14(g)'s requirement to meaningfully disclose the caller's identity with respect to that voicemail message.

2(j)(1) Required Content

1. *Example.* The following example illustrates a limited-content message that includes only the content described in § 1006.2(j)(1): ''This is Robin Smith calling from ABC Inc. Please contact me or Jim Johnson at 1–800–555–1212.''

2(j)(2) Optional Content

1. *In general.* Section 1006.2(j)(2)(iv) provides that a limited-content message may include a statement that, if the consumer replies, the consumer may speak to any of the company's representatives or associates. A message that includes a more detailed description of the representative or associate group is not a limited-content message. For example, a reference to an agent with the ''credit card receivables group'' is not a limited-content message because it includes more than a statement that the consumer's reply may be answered by a representative or associate.

2. *Example.* The following example illustrates a limited-content message that includes the content described in both § 1006.2(j)(1) and (2): ''Hi, this is Robin Smith calling from ABC Inc. It is 4:15 p.m. on Wednesday, September 1. Please contact me or any of our representatives at 1–800–555–1212 today until 6:00 p.m. Eastern time, or any weekday from 8:00 a.m. to 6:00 p.m. Eastern time.''

Subpart B—Rules for FDCPA Debt Collectors

Section 1006.6—Communications in Connection With Debt Collection

6(a) Consumer

Paragraph 6(a)(1)

1. *Spouse.* Section 1006.6(a)(1) provides that, for purposes of § 1006.6, the term consumer includes a consumer's spouse. The surviving spouse of a deceased consumer is a spouse as that term is used in § 1006.6(a)(1).

Paragraph 6(a)(2)

1. *Parent.* Section 1006.6(a)(2) provides that, for purposes of § 1006.6, the term consumer includes a consumer's parent, if the consumer is a minor. A parent of a deceased minor consumer is a parent as that term is used in § 1006.6(a)(2).

Paragraph 6(a)(4)

1. *Personal representative.* Section 1006.6(a)(4) provides that, for purposes of § 1006.6, the term consumer includes the executor or administrator of the consumer's estate, if the consumer is deceased. The terms executor or administrator include the personal representative of the consumer's estate. A personal representative is any person who is authorized to act on behalf of the deceased consumer's estate. Persons with such authority may include personal representatives under the informal probate and summary administration procedures of many States, persons appointed as universal successors, persons who sign declarations or affidavits to effectuate the transfer of estate assets, and persons who dispose of the deceased consumer's financial assets or other assets of monetary value extrajudicially.

6(b) Communications With a Consumer

6(b)(1) Prohibitions Regarding Unusual or Inconvenient Times or Places

1. *Designation of inconvenience.* Section 1006.6(b)(1) prohibits a debt collector from, among other things, communicating or attempting to communicate with a consumer in connection with the collection of any debt at a time or place that the debt collector knows or should know is inconvenient to the consumer, unless an exception in § 1006.6(b)(4) applies. For example, a debt collector knows or should know that a time or place is inconvenient to a consumer if the consumer uses the word ''inconvenient'' to notify the debt collector. In addition, depending on the facts and circumstances, the debt collector knows or should know that a time or place is inconvenient even if the consumer does not specifically state to the debt collector that a time or place is ''inconvenient.'' The debt collector may ask follow-up questions regarding whether a time or place is convenient to clarify statements by the consumer. For example:

i. Assume that a creditor places a debt for collection with a debt collector. To facilitate collection of the debt, the creditor provides the debt collector a file that includes recent notes stating that the consumer cannot be disturbed on Tuesdays and Thursdays through the end of the calendar year. Based on these facts, the debt collector knows or should know that Tuesdays and Thursdays through the end of the calendar year are inconvenient to the consumer. Unless the consumer informs the debt collector that those times are no longer inconvenient, § 1006.6(b)(1)(i) prohibits the debt collector from communicating or attempting to communicate with the consumer on those days through the end of the calendar year.

ii. Assume that a debt collector calls a consumer. The consumer answers the call but states ''I am busy'' or ''I cannot talk now.'' The debt collector asks the consumer when would be a convenient time. The consumer responds, ''on weekdays, except from 3:00 p.m. to 5:00 p.m.'' The debt collector asks the consumer whether there would be a convenient time on weekends. The consumer responds ''no.'' Based on these facts, the debt collector knows or should know that the time period between 3:00 p.m. and 5:00 p.m. on weekdays, and all times on weekends, are inconvenient to the consumer. Thereafter, unless the consumer informs the debt collector that those times are no longer inconvenient, § 1006.6(b)(1)(i) prohibits the debt collector from communicating or attempting to communicate with the consumer at those times.

iii. Assume that a consumer tells a debt collector not to communicate with the consumer at a particular place, such as the consumer's home. The debt collector asks whether the consumer intends to prohibit the debt collector from communicating with the consumer through all media associated with the consumer's home, including, for example, mail. Absent such additional information, the debt collector knows or

should know that communications to the consumer at home, including mail to the consumer's home address and calls to the consumer's home landline telephone number, are inconvenient. Thereafter, unless the consumer informs the debt collector that the place is no longer inconvenient, § 1006.6(b)(1)(ii) prohibits the debt collector from communicating or attempting to communicate with the consumer at the consumer's home. See comment 6(b)(1)(ii)–1 for additional guidance regarding communications or attempts to communicate at an inconvenient place.

2. *Consumer-initiated communication.* If a consumer initiates a communication with a debt collector at a time or from a place that the consumer previously designated as inconvenient, the debt collector may respond once at that time or place through the same medium of communication used by the consumer. (For more on medium of communication, see § 1006.14(h) and its associated commentary.) After that response, § 1006.6(b)(1) prohibits the debt collector from communicating or attempting to communicate further with the consumer at that time or place until the consumer conveys that the time or place is no longer inconvenient, unless an exception in § 1006.6(b)(4) applies. For example:

i. Assume the same facts as in comment 6(b)(1)–1.ii, except that, after the consumer tells the debt collector that weekdays from 3:00 p.m. to 5:00 p.m. and weekends are inconvenient, the consumer sends an email message to the debt collector at 3:30 p.m. on Wednesday. Based on these facts, § 1006.6(b)(1)(i) does not prohibit the debt collector from responding once by email message before 5:00 p.m. on that day. Unless the consumer informs the debt collector that those times are no longer inconvenient, § 1006.6(b)(1)(i) prohibits the debt collector from future communications or attempts to communicate with the consumer on weekdays between 3:00 p.m. and 5:00 p.m. and on weekends. Additionally, if the consumer responds to the debt collector's email message, the debt collector may continue to respond once to each consumer-initiated email message before 5:00 p.m. on that day.

ii. Assume the same facts as in comment 6(b)(1)–1.iii, except that, after the consumer tells the debt collector not to communicate with the consumer at home, the consumer calls the debt collector from the consumer's home landline telephone number. Based on these facts, § 1006.6(b)(1)(ii) does not prohibit the debt collector from responding once by communicating with the consumer on that telephone call. Unless the consumer informs the debt collector that the place is no longer inconvenient, § 1006.6(b)(1)(ii) prohibits the debt collector from future communications or attempts to communicate with the consumer at home.

iii. Assume that a consumer tells a debt collector that all communications to the consumer on Friday every week are inconvenient to the consumer. On a Friday, the consumer visits the debt collector's website and uses the debt collector's mobile application. Based on these facts, while the consumer navigates the website or uses the mobile application, § 1006.6(b)(1)(i) does not prohibit the debt collector from conveying information to the consumer about the debt through the website or mobile application. Once the consumer stops navigating the website or using the mobile application, however, § 1006.6(b)(1)(i) prohibits the debt collector from further communications or attempts to communicate on that day. And unless the consumer informs the debt collector that those times are no longer inconvenient, § 1006.6(b)(1)(i) prohibits the debt collector from future communications or attempts to communicate with the consumer on Fridays.

iv. Assume the same facts as in comment 6(b)(1)–2.iii, except that after the consumer visits the debt collector's website and uses the debt collector's mobile application, the consumer sends an email message to the debt collector at 8:30 p.m. on Friday. Based on these facts, § 1006.6(b)(1)(i) does not prohibit the debt collector from responding once, such as by sending an automated email message reply generated in response to the consumer's email message. Unless the consumer informs the debt collector that those times are no longer inconvenient, § 1006.6(b)(1)(i) prohibits the debt collector from future communications or attempts to communicate with the consumer on Fridays.

Paragraph 6(b)(1)(i)

1. *Time of electronic communication.* Section 1006.6(b)(1)(i) prohibits a debt collector from communicating or attempting to communicate, including through electronic communication media, at any unusual time, or at a time that the debt collector knows or should know is inconvenient to the consumer. For purposes of determining the time of an electronic communication, such as an email or text message, under § 1006.6(b)(1)(i), an electronic communication occurs when the debt collector sends it, not, for example, when the consumer receives or views it.

2. *Consumer's location.* Under § 1006.6(b)(1)(i), in the absence of a debt collector's knowledge of circumstances to the contrary, an inconvenient time for communicating with a consumer is before 8:00 a.m. and after 9:00 p.m. local time at the consumer's location. If a debt collector has conflicting or ambiguous information regarding a consumer's location, then, in the absence of knowledge of circumstances to the contrary, the debt collector complies with § 1006.6(b)(1)(i) if the debt collector communicates or attempts to communicate with the consumer at a time that would be convenient in all of the locations at which the debt collector's information indicates the consumer might be located. The following examples, which assume that the debt collector has no information about times the consumer considers inconvenient or other information about the consumer's location, illustrate the rule.

i. Assume that a debt collector's information indicates that a consumer has a mobile telephone number with an area code associated with the Eastern time zone and a residential address in the Pacific time zone. The convenient times to communicate with the consumer are after 11:00 a.m. Eastern time (8:00 a.m. Pacific time) and before 9:00 p.m. Eastern time (6:00 p.m. Pacific time).

ii. Assume that a debt collector's information indicates that a consumer has a mobile telephone number with an area code associated with the Eastern time zone and a landline telephone number with an area code associated with the Mountain time zone. The convenient times to communicate with the consumer are after 10:00 a.m. Eastern time (8:00 a.m. Mountain time) and before 9:00 p.m. Eastern time (7:00 p.m. Mountain time).

Paragraph 6(b)(1)(ii)

1. *Communications or attempts to communicate at unusual or inconvenient places.* Section 1006.6(b)(1)(ii) prohibits a debt collector from communicating or attempting to communicate with a consumer in connection with the collection of any debt at any unusual place, or at a place that the debt collector knows or should know is inconvenient to the consumer. Some communication media, such as mailing addresses and landline telephone numbers, are associated with a place. Pursuant to § 1006.6(b)(1)(ii), a debt collector must not communicate or attempt to communicate with a consumer through media associated with an unusual place, or with a place that the debt collector knows or should know is inconvenient to the consumer. Other communication media, such as email addresses and mobile telephone numbers, are not associated with a place. Section 1006.6(b)(1)(ii) does not prohibit a debt collector from communicating or attempting to communicate with a consumer through such media unless the debt collector knows that the consumer is at an unusual place, or at a place that the debt collector knows or should know is inconvenient to the consumer. For example:

i. Assume the same facts as in comment 6(b)(1)–1.iii. Unless the debt collector knows that the consumer is at home, a telephone call to the consumer's mobile telephone number or an electronic communication, including, for example, an email message or a text message to the consumer's mobile telephone, does not violate § 1006.6(b)(1)(ii) even if the consumer receives or views the communication while at home.

6(b)(2) Prohibitions Regarding Consumer Represented by an Attorney

1. *Consumer-initiated communications.* A consumer-initiated communication from a consumer represented by an attorney constitutes the consumer's prior consent to that communication under § 1006.6(b)(4)(i); therefore, a debt collector may respond to that consumer-initiated communication. However, the consumer's act of initiating the communication does not negate the debt collector's knowledge that the consumer is represented by an attorney and does not revoke the protections afforded the consumer under § 1006.6(b)(2). After the debt collector's response, the debt collector must not communicate or attempt to communicate further with the consumer unless the debt collector knows the consumer is not represented by an attorney with respect to the debt, either based on information from the consumer or the consumer's attorney, or unless an exception under § 1006.6(b)(2)(i) or (ii) or § 1006.6(b)(4) applies.

6(b)(3) Prohibitions Regarding Consumer's Place of Employment

1. *Communications at consumer's place of employment.* Section 1006.6(b)(3) prohibits a debt collector from communicating or attempting to communicate with a consumer in connection with the collection of any debt at the consumer's place of employment, if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication. A debt collector knows or has reason to know that a consumer's employer prohibits the consumer from receiving such communication if, for example, the consumer tells the debt collector that the consumer cannot take personal calls at work. The debt collector may ask follow-up questions regarding the employer's prohibitions or limitations on contacting the consumer at the place of employment to clarify statements by the consumer.

2. *Employer-provided email.* For special rules regarding employer-provided email addresses, see § 1006.22(f)(3) and its associated commentary.

6(b)(4) Exceptions

Paragraph 6(b)(4)(i)

1. *Prior consent—in general.* Section 1006.6(b)(4)(i) provides, in part, that the prohibitions in § 1006.6(b)(1) through (3) on a debt collector communicating or attempting to communicate with a consumer in connection with the collection of any debt do not apply if the debt collector communicates or attempts to communicate with the prior consent of the consumer. If the debt collector learns during a communication that the debt collector is communicating with the consumer at an inconvenient time or place, for example, the debt collector may ask the consumer during that communication what time or place would be convenient. However, § 1006.6(b)(4)(i) prohibits the debt collector from asking the consumer to consent to the continuation of that inconvenient communication.

2. *Directly to the debt collector.* Section 1006.6(b)(4)(i) requires the prior consent of the consumer to be given directly to the debt collector. For example, a debt collector cannot rely on the prior consent of the consumer given to a creditor or to a previous debt collector.

6(c) Communications With a Consumer—After Refusal To Pay or Cease Communication Notice

6(c)(1) Prohibitions

1. *Notification complete upon receipt.* If, pursuant to § 1006.6(c)(1), a consumer notifies a debt collector in writing or electronically using a medium of electronic communication through which a debt collector accepts electronic communications from consumers that the consumer either refuses to pay a debt or wants the debt collector to cease further communication with the consumer, notification is complete upon the debt collector's receipt of that information. The following example illustrates the rule.

i. Assume that on August 3, a consumer places in the mail a written notification to a debt collector that the consumer either refuses to pay a debt or wants the debt collector to cease further communication with the consumer pursuant to § 1006.6(c)(1). On August 4, the debt collector sends the consumer an email message. The debt collector receives the consumer's written notification on August 6. Because the consumer's notification is complete upon the debt collector's receipt of that information on August 6, the debt collector's email message communication on August 4 does not violate § 1006.6(c)(1).

2. *Interpretation of the E–SIGN Act.* Comment 6(c)(1)–1 constitutes the Bureau's interpretation of section 101 of the E–SIGN Act as applied to FDCPA section 805(c). Under this interpretation, section 101(a) of the E–SIGN Act enables a consumer to satisfy the requirement in FDCPA section 805(c) that the consumer's notification of the debt collector be ''in writing'' through an electronic request. Further, because the consumer may only satisfy the writing requirement using a medium of electronic communication through which a debt collector accepts electronic communications from consumers, section 101(b) of the E–SIGN Act is not contravened.

6(c)(2) Exceptions

1. *Written early intervention notice for mortgage servicers.* The Bureau has interpreted the written early intervention notice required by 12 CFR 1024.39(d)(3) to fall within the exceptions to the cease communication provision in FDCPA section 805(c)(2) and (3). See 12 CFR 1024.39(d)(3), its commentary, and the Bureau's 2016 FDCPA Interpretive Rule (81 FR 71977 (Oct. 19, 2016)).

2. *Other mortgage servicing rule provisions.* Notwithstanding a consumer's cease communication request pursuant to § 1006.6(c)(1), a mortgage servicer who is subject to the FDCPA with respect to a mortgage loan is not liable under the FDCPA for complying with certain servicing rule provisions, including requirements to provide a consumer with disclosures regarding the forced placement of hazard insurance as required by 12 CFR 1024.37, a disclosure regarding an adjustable-rate mortgage's initial interest rate adjustment as required by 12 CFR 1026.20(d), and a periodic statement for each billing cycle as required by 12 CFR 1026.41. See CFPB Bulletin 2013–12 (Oct. 15, 2013) providing implementation guidance for certain mortgage servicing rules.

6(d) Communications With Third Parties

6(d)(2) Exceptions

1. *Prior consent.* See the commentary to § 1006.6(b)(4)(i) for guidance concerning a consumer giving prior consent directly to a debt collector.

6(d)(3) Reasonable Procedures for Email and Text Message Communications

Paragraph 6(d)(3)(ii)

1. *Knowledge of prohibited disclosure.* For purposes of § 1006.6(d)(3)(ii), a debt collector knows that sending an email to an email address or a text message to a telephone number has led to a disclosure prohibited by § 1006.6(d)(1) if any person has informed the debt collector of that fact.

6(d)(4) Procedures for Email Addresses

6(d)(4)(i) Procedures Based on Communication Between the Consumer and the Debt Collector

Paragraph 6(d)(4)(i)(B)

1. *Prior consent—in general.* Section 1006.6(d)(4)(i)(B) provides that, for purposes of § 1006.6(d)(3)(i), a debt collector may send an email to an email address if, among other things, the debt collector has received directly from the consumer prior consent to use the email address to communicate with the consumer about the debt. For purposes of § 1006.6(d)(4)(i)(B), a consumer may provide consent directly to a debt collector through any medium of communication, such as in writing, electronically, or orally.

2. *Prior consent—consumer-provided email address.* If a consumer provides an email address to a debt collector (including on the debt collector's website or online portal), the debt collector may treat the consumer as having consented directly to the debt collector's use of the email address to communicate with the consumer about the debt for purposes of § 1006.6(d)(4)(i)(B) if the debt collector discloses clearly and conspicuously that the debt collector may use the email address to communicate with the consumer about the debt.

6(d)(4)(ii) Procedures Based on Communication by the Creditor

Paragraph 6(d)(4)(ii)(B)

1. *Communications about the account.* Section 1006.6(d)(4)(ii)(B) provides that, for purposes of § 1006.6(d)(3)(i), a debt collector may send an email to an email address if, among other things, the creditor used the email address to communicate with the consumer about the account giving rise to the debt. For purposes of § 1006.6(d)(4)(ii)(B), communications about the account include, for example, required disclosures, bills, invoices, periodic statements, payment reminders, and payment confirmations. Communications about the account do not include, for example, marketing or advertising materials unrelated to the consumer's account.

Paragraph 6(d)(4)(ii)(C)

1. *Clear and conspicuous.* Clear and conspicuous means readily understandable. In the case of written and electronic disclosures, the location and type size also must be readily noticeable and legible to consumers, although no minimum type size is mandated.

2. *Sample language.* Section 1006.6(d)(4)(ii)(C) provides that, for purposes of § 1006.6(d)(3)(i), a debt collector may send an email to an email address if, among other things, the creditor sent the consumer a written or electronic notice that clearly and conspicuously disclosed that the debt would be transferred to the debt collector; that the debt collector might use the email address to communicate with the consumer about the debt; that, if others have access to this email address, then it is possible they may see the emails; instructions for a reasonable and simple method by which the consumer could

opt out of such communications; and the date by which the debt collector or creditor must receive the consumer's request to opt out.

i. When a creditor sends the notice in writing, the creditor may use, but is not required to use, the following language to satisfy § 1006.6(d)(4)(ii)(C): ''We are transferring your account to ABC debt collector, and we are providing ABC debt collector with the following email address for you: [email address]. ABC debt collector may use this email address to communicate with you about the debt. If others have access to this email address, then it is possible they may see the emails. If you would like to opt out of communications by ABC debt collector to [email address], please fill out the enclosed form and return it in the enclosed envelope so that we receive it by [date].''

ii. When a creditor sends the notice electronically, the creditor may use, but is not required to use, the following language to satisfy § 1006.6(d)(4)(ii)(C): ''We are transferring your account to ABC debt collector, and we are providing ABC debt collector with the following email address for you: [email address]. ABC debt collector may use this email address to communicate with you about the debt. If others have access to this email address, then it is possible they may see the emails. If you would like to opt out of communications by ABC debt collector to [email address], please click here by [date].''

3. *Combined notice.* A notice provided by the creditor under § 1006.6(d)(4)(ii)(C) may be contained in a larger communication that conveys other information, as long as the notice is clear and conspicuous.

Paragraph 6(d)(4)(ii)(C)(1)

1. *Identification of the debt collector.* Under § 1006.6(d)(4)(ii)(C)(*1*), the notice must clearly and conspicuously disclose, among other things, that the debt has been or will be transferred to the debt collector. To satisfy this requirement, the notice must identify the name of the specific debt collector to which the debt has been or will be transferred.

Paragraph 6(d)(4)(ii)(C)(4)

1. *Reasonable and simple method to opt out.* Under § 1006.6(d)(4)(ii)(C)(*4*), the notice must clearly and conspicuously disclose instructions for a reasonable and simple method by which the consumer can opt out of the debt collector's use of the email address to communicate about the debt. The following examples illustrate the rule.

i. When the creditor sends the notice in writing, reasonable and simple methods for opting out include providing a reply form and a pre-addressed envelope together with the opt-out notice. Requiring a consumer to call or write to obtain a form for opting out, rather than including the form with the opt-out notice, does not meet the requirement to provide a reasonable and simple method for opting out.

ii. When the creditor sends the notice electronically, reasonable and simple methods for opting out include providing an electronic means to opt out, such as a hyperlink, or allowing the consumer to opt out by replying to the communication with the word ''stop.'' Requiring a consumer who receives the opt-out notice electronically to opt out by postal mail, telephone, or visiting a website without providing a link does not meet the requirement to provide a reasonable and simple method for opting out.

Paragraph 6(d)(4)(ii)(C)(5)

1. *Recipient of opt-out request.* Under § 1006.6(d)(4)(ii)(C)(*5*), the notice must clearly and conspicuously disclose the date by which a debt collector or creditor must receive a consumer's request to opt out, which must be at least 35 days after the date the notice is sent. The notice may instruct the consumer to respond to the debt collector or to the creditor but not to both.

Paragraph 6(d)(4)(ii)(D)

1. *Effect of opt-out request after expiration of opt-out period.* If a consumer requests after the expiration of the opt-out period that the debt collector not communicate using the email address identified in the opt-out notice, such as by returning the notice or opting out under § 1006.6(e), § 1006.14(h)(1) prohibits the debt collector from communicating or attempting to communicate with the consumer using that email address. If the consumer requests after the expiration of the opt-out period that the debt collector not communicate with the consumer by email, § 1006.14(h)(1) prohibits the debt collector from communicating or attempting to communicate with the consumer by email, including by using the specific email address identified in the notice. For more on prohibited communication media and certain exceptions, see § 1006.14(h) and its associated commentary. If after the expiration of the opt-out period the consumer notifies the debt collector in writing or electronically using a medium of electronic communication through which a debt collector accepts electronic communications from consumers that the consumer refuses to pay the debt or wants the debt collector to cease further communication with the consumer, § 1006.6(c)(1) prohibits the debt collector from communicating or attempting to communicate with the consumer with respect to the debt, subject to the exceptions in § 1006.6(c)(2). For more on communications with a consumer after refusal to pay or a cease communication notice, see § 1006.6(c) and its associated commentary.

2. *Scope of opt-out request.* In the absence of evidence that the consumer refuses to pay the debt or wants the debt collector to cease all communication with the consumer, a consumer's request under § 1006.6(d)(4)(ii)(D) to opt out of a debt collector's use of a particular email address to communicate with the consumer by email does not constitute a notification to cease further communication with respect to the debt under § 1006.6(c)(1).

Paragraph 6(d)(4)(ii)(E)

1. *Domain name available for use by the general public.* Under § 1006.6(d)(4)(ii)(E), the domain name of an email address is available for use by the general public when multiple members of the general public are permitted to use the same domain name, whether for free or through a paid subscription. Such a name does not include one that is reserved for use by specific registrants, such as a domain name branded for use by a particular commercial entity (*e.g., john.doe@springsidemortgage.com*) or reserved for particular types of institutions (*e.g., john.doe@agency.gov, john.doe@university.edu,* or *john.doe@nonprofit.org*).

2. *Knowledge of employer-provided email address.* For purposes of § 1006.6(d)(4)(ii)(E), a debt collector knows that an email address is provided by the consumer's employer if any person has informed the debt collector that the address is employer provided. However, § 1006.6(d)(4)(ii)(E) does not require a debt collector to conduct a manual review of consumer accounts to determine whether an email address might be employer provided.

6(d)(4)(iii) Procedures Based on Communication by the Prior Debt Collector

1. *Immediately prior debt collector.* Section 1006.6(d)(4)(iii) provides that, for purposes of § 1006.6(d)(3)(i), a debt collector may send an email to an email address if, among other things, the immediately prior debt collector used the email address to communicate with the consumer about the debt. For purposes of § 1006.6(d)(4)(iii), the immediately prior debt collector is the debt collector immediately preceding the current debt collector. For example, if ABC debt collector returns a debt to the creditor and the creditor places the debt with XYZ debt collector, ABC debt collector is the immediately prior debt collector for purposes of § 1006.6(d)(4)(iii).

2. *Examples.* The following examples illustrate the rule.

i. After obtaining a consumer's email address in accordance with the procedures in § 1006.6(d)(4)(i) or (ii), ABC debt collector communicates with the consumer about the debt using that email address and the consumer does not opt out. ABC debt collector returns the debt to the creditor, who places it with XYZ debt collector. XYZ debt collector communicates with the consumer about the debt using the email address obtained by ABC debt collector. Assuming that the requirements of § 1006.6(d)(3)(ii) are satisfied, XYZ debt collector may have a bona fide error defense to civil liability for any unintentional third-party disclosure that occurs during that communication because a prior debt collector (*i.e.,* ABC debt collector) obtained the email address in accordance with the procedures in § 1006.6(d)(4)(i) or (ii), the immediately prior debt collector (*i.e.,* ABC debt collector) used the email address to communicate with the consumer about the debt, and the consumer did not opt out of such communications by ABC debt collector.

ii. After obtaining a consumer's email address in accordance with the procedures in § 1006.6(d)(4)(i) or (ii), ABC debt collector communicates with the consumer about the debt using that email address and the consumer does not opt out. ABC debt collector returns the debt to the creditor, who places it with EFG debt collector. EFG debt collector communicates with the consumer about the debt using the email address obtained by ABC debt collector, and the consumer does not opt out. EFG debt collector returns the debt to the creditor, who places it with XYZ debt collector. XYZ debt

collector communicates with the consumer about the debt using the email address obtained by ABC debt collector and used by EFG debt collector. Assuming that the requirements of § 1006.6(d)(3)(ii) are satisfied, XYZ debt collector may have a bona fide error defense to civil liability for any unintentional third-party disclosure that occurs during that communication because a prior debt collector (*i.e.,* ABC debt collector) obtained the email address in accordance with the procedures in § 1006.6(d)(4)(i) or (ii), the immediately prior debt collector (*i.e.,* EFG debt collector) used the email address to communicate with the consumer about the debt, and the consumer did not opt out of such communications by EFG debt collector.

iii. After obtaining a consumer's email address in accordance with the procedures in § 1006.6(d)(4)(i) or (ii), ABC debt collector communicates with the consumer about the debt using that email address and the consumer does not opt out. ABC debt collector returns the debt to the creditor, who places it with EFG debt collector, who chooses not to communicate with the consumer by email. EFG debt collector returns the debt to the creditor, who places it with XYZ debt collector. XYZ debt collector communicates with the consumer about the debt using the email address obtained by ABC debt collector. Section 1006.6(d)(4)(iii) does not provide XYZ debt collector with a bona fide error defense to civil liability for any unintentional third-party disclosure that occurs during that communication because the immediately prior debt collector (*i.e.,* EFG debt collector) did not use the email address to communicate with the consumer about the debt.

6(d)(5) Procedures for Telephone Numbers for Text Messages

1. *Complete and accurate database.* Section 1006.6(d)(5)(i) and (ii) provides that, for purposes of § 1006.6(d)(3)(i), a debt collector may send a text message to a telephone number if, among other things, the debt collector confirms, using a complete and accurate database, that the telephone number has not been reassigned from the consumer to another user. For purposes of § 1006.6(d)(5)(i) and (ii), the database established by the FCC in *In re Advanced Methods to Target & Eliminate Unlawful Robocalls* (33 FCC Rcd. 12024 (Dec. 12, 2018)) qualifies as a complete and accurate database, as does any commercially available database that is substantially similar in terms of completeness and accuracy to the FCC's database.

Paragraph 6(d)(5)(i)

1. *Response to telephone call by consumer.* Section 1006.6(d)(5)(i) provides that, for purposes of § 1006.6(d)(3)(i), a debt collector may send a text message to a telephone number if, among other things, the consumer used the telephone number to communicate by text message with the debt collector about the debt. Section 1006.6(d)(5)(i) does not apply if the consumer used the telephone number to communicate only by telephone call with the debt collector about the debt.

Paragraph 6(d)(5)(ii)

1. *Prior consent.* See comment 6(d)(4)(i)(B)–1 for guidance concerning how a consumer may provide prior consent directly to a debt collector. See comment 6(d)(4)(i)(B)–2 for guidance concerning when a debt collector may treat a consumer who provides a telephone number for text messages as having consented directly to the debt collector.

6(e) Opt-Out Notice for Electronic Communications or Attempts To Communicate

1. *In general.* Section 1006.6(e) requires a debt collector who communicates or attempts to communicate with a consumer electronically in connection with the collection of a debt using a specific email address, telephone number for text messages, or other electronic-medium address to include in such communication or attempt to communicate a clear and conspicuous statement describing a reasonable and simple method by which the consumer can opt out of further electronic communications or attempts to communicate by the debt collector to that address or telephone number. See comment 6(d)(4)(ii)(C)–1 for guidance on the meaning of clear and conspicuous. See comment 6(d)(4)(ii)(C)(*4*)–1 for guidance on the meaning of reasonable and simple. The following examples illustrate the rule.

i. Assume that a debt collector sends a text message to a consumer's mobile telephone number. The text message includes the following instruction: ''Reply STOP to stop texts to this telephone number.'' Assuming that it is readily noticeable and legible to consumers, this instruction constitutes a clear and conspicuous statement describing a reasonable and simple method to opt out of receiving further text messages from the debt collector to that telephone number consistent with § 1006.6(e). No minimum type size is mandated.

ii. Assume that a debt collector sends the consumer an email that includes a hyperlink labeled: ''Click here to opt out of further emails to this email address.'' Assuming that it is readily noticeable and legible to consumers, this instruction constitutes a clear and conspicuous statement describing a reasonable and simple method to opt out of receiving further emails from the debt collector to that email address consistent with § 1006.6(e). No minimum type size is mandated.

iii. Assume that a debt collector sends the consumer an email that includes instructions in a textual format explaining that the consumer may opt out of receiving further email communications from the debt collector to that email address by replying with the word ''stop'' in the subject line. Assuming that it is readily noticeable and legible to consumers, this instruction constitutes a clear and conspicuous statement describing a reasonable and simple method to opt out of receiving further emails from the debt collector to that email address consistent with § 1006.6(e). No minimum type size is mandated.

Section 1006.10—Acquisition of Location Information

10(a) Definition

1. *Location information about deceased consumers.* If a consumer obligated or allegedly obligated to pay any debt is deceased, location information includes the information described in § 1006.10(a) for a person who is authorized to act on behalf of the deceased consumer's estate, as described in § 1006.6(a)(4) and its associated commentary.

10(b) Form and Content of Location Communications

Paragraph 10(b)(2)

1. *Executors, administrators, or personal representatives of a deceased consumer's estate.* Section 1006.10(b)(2) prohibits a debt collector who is communicating with any person other than the consumer for the purpose of acquiring location information about the consumer from stating that the consumer owes any debt. If the consumer obligated or allegedly obligated to pay the debt is deceased, and the debt collector is attempting to locate the person who is authorized to act on behalf of the deceased consumer's estate, the debt collector does not violate § 1006.10(b)(2) by stating that the debt collector is seeking to identify and locate the person who is authorized to act on behalf of the deceased consumer's estate. The debt collector may also state that the debt collector is seeking to identify and locate the person handling the financial affairs of the deceased consumer. For more on executors, administrators, and personal representatives, see § 1006.6(a)(4) and its associated commentary.

Section 1006.14—Harassing, Oppressive, or Abusive Conduct

14(a) In General

1. *General prohibition.* Section 1006.14(a), which implements FDCPA section 806 (15 U.S.C. 1692d), sets forth a general standard that prohibits a debt collector from engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. The general prohibition covers the specific conduct described in § 1006.14(b) through (h), as well as any conduct by the debt collector that is not specifically prohibited by § 1006.14(b) through (h) but the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Such conduct can occur regardless of the communication media the debt collector uses, including in-person interactions, telephone calls, audio recordings, paper documents, mail, email, text messages, social media, or other electronic media, even if not specifically addressed by § 1006.14(b) through (h). The following example illustrates the rule.

i. Assume that, in connection with the collection of a debt, a debt collector sends a consumer numerous, unsolicited text messages per day for several consecutive days. The consumer does not respond. Assume further that the debt collector does not communicate or attempt to communicate with the consumer using any other

communication medium and that, by sending the text messages, the debt collector has not violated § 1006.14(b) through (h). Even though the debt collector's conduct does not violate any specific prohibition under § 1006.14(b) through (h), it is likely that the natural consequence of the debt collector's text messages is to harass, oppress, or abuse the person receiving the text messages; when such natural consequence occurs, the debt collector has violated § 1006.14(a) and FDCPA section 806.

2. *Cumulative effect of conduct.* Whether a debt collector's conduct violates the general standard in § 1006.14(a) may depend on the cumulative effect of the debt collector's conduct through any communication medium the debt collector uses, including in-person interactions, telephone calls, audio recordings, paper documents, mail, email, text messages, social media, or other electronic media. Depending on the facts and circumstances, conduct that on its own would violate neither the general prohibition in § 1006.14(a), nor any specific prohibition in § 1006.14(b) through (h), nonetheless may violate § 1006.14(a) when such conduct is evaluated cumulatively with other conduct. The following example illustrates the rule as applied to a debt collector who uses multiple communication media to communicate or attempt to communicate with a person.

i. Assume that a debt collector places seven unanswered telephone calls within seven consecutive days to a consumer in connection with the collection of a debt. During this same period, the debt collector also sends multiple additional unsolicited emails about the debt to the consumer. The consumer does not respond. The frequency of the debt collector's telephone calls during the seven-day period does not exceed the telephone call frequencies described in § 1006.14(b)(2)(i), so the debt collector is presumed to comply with § 1006.14(b)(1). Assume further that no evidence is offered to rebut the presumption of compliance, such that the debt collector complies with § 1006.14(b)(1). Also assume that, for purposes of this illustrative example only, the frequency of the debt collector's emails alone does not violate § 1006.14(a). It nevertheless is likely that the cumulative effect of the debt collector's telephone calls and emails is harassment; when such natural consequence occurs, the debt collector has violated § 1006.14(a) and FDCPA section 806.

14(b) Repeated or Continuous Telephone Calls or Telephone Conversations

1. *Placing telephone calls repeatedly or continuously.* Section 1006.14(b) prohibits a debt collector from, in connection with the collection of a debt, placing telephone calls or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number, and it describes when a debt collector is presumed to have complied with or violated that prohibition. For purposes of § 1006.14(b)(1) through (4), ''placing a telephone call'' includes conveying a ringless voicemail but does not include sending an electronic message (*e.g.,* a text message or an email) that may be received on a mobile telephone.

14(b)(1) In General

1. *Effect of compliance.* A debt collector who complies with § 1006.14(b)(1) and FDCPA section 806(5) (15 U.S.C. 1692d(5)) complies with § 1006.14(a) and FDCPA section 806 (15 U.S.C. 1692d) solely with respect to the frequency of its telephone calls. The debt collector nevertheless could violate § 1006.14(a) and FDCPA section 806 if the natural consequence of another aspect of the debt collector's telephone calls, unrelated to frequency, is to harass, oppress, or abuse any person in connection with the collection of a debt. See also comment 14(a)–2 regarding the cumulative effect of the debt collector's conduct.

2. *Example.* Assume that a debt collector communicates or attempts to communicate with a consumer about a particular debt only by telephone. The debt collector does not exceed either of the telephone call frequencies described in § 1006.14(b)(2)(i). Under § 1006.14(b)(2)(i), the debt collector is presumed to comply with § 1006.14(b)(1). Assume, further, that no evidence is offered to rebut that presumption of compliance. Pursuant to § 1006.14(b)(1), the debt collector complies with § 1006.14(a) and FDCPA section 806, but only with respect to the frequency of its telephone calls. Assume, however, that one of the debt collector's telephone calls results in the debt collector leaving a voicemail that contains obscene language. Even though the debt collector does not violate § 1006.14(a) and FDCPA section 806 based solely on the frequency of the telephone calls, the debt collector's obscene voicemail would violate § 1006.14(a) and (d) and FDCPA section 806 and 806(2) (15 U.S.C. 1692, 1692d(2)).

14(b)(2) Telephone Call Frequencies; Presumptions of Compliance and Violation

Paragraph 14(b)(2)(i)

1. *Presumption of compliance; examples.* Section 1006.14(b)(2)(i) provides that a debt collector is presumed to comply with § 1006.14(b)(1) and FDCPA section 806(5) (15 U.S.C. 1692d(5)) if the debt collector places a telephone call to a particular person in connection with the collection of a particular debt neither: More than seven times within seven consecutive days (§ 1006.14(b)(2)(i)(A)); nor within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt (§ 1006.14(b)(2)(i)(B)). For the presumption of compliance to apply, the debt collector's telephone call frequencies must not exceed either prong of § 1006.14(b)(2)(i). The telephone call frequencies are subject to the exclusions in § 1006.14(b)(3). In addition, for purposes of § 1006.14(b)(2)(i)(B), the date of the telephone conversation is the first day of the seven-consecutive-day period. The following examples illustrate the rule.

i. On Wednesday, April 1, a debt collector first attempts to communicate with a consumer in connection with the collection of a credit card debt by placing a telephone call and leaving a limited-content message. Between Thursday, April 2, and Tuesday, April 7, the debt collector places six more telephone calls to the consumer about the debt, all of which go unanswered. As of Tuesday, April 7, the debt collector has placed seven telephone calls to the consumer in connection with the collection of the credit card debt within the period of seven consecutive days that started on Wednesday, April 1. Assume the debt collector does not place any additional telephone calls about the debt until Wednesday, April 8. Under § 1006.14(b)(2)(i), the debt collector is presumed to comply with § 1006.14(b)(1) and FDCPA section 806(5).

ii. On Thursday, August 13, a consumer places a telephone call to, and initiates a telephone conversation with, a debt collector regarding a particular debt. Assume that the debt collector does not place a telephone call to the consumer in connection with the collection of that debt again prior to Thursday, August 20. The debt collector is presumed to comply with § 1006.14(b)(1) and FDCPA section 806(5).

iii. On Tuesday, October 6, a debt collector first attempts to communicate with a particular third party for the purpose of acquiring location information about a consumer by placing a telephone call to that third party. The call is unanswered. The debt collector places up to six more unanswered telephone calls to that third party for the purpose of acquiring location information about the consumer through Monday, October 12. The debt collector is presumed to comply with § 1006.14(b)(1) and FDCPA section 806(5). See § 1006.10(c) for further guidance concerning when a debt collector is prohibited from communicating with a person other than the consumer for the purpose of acquiring location information.

2. *Factors to rebut the presumption of compliance.* To rebut the presumption of compliance, it must be proven that a debt collector who did not place a telephone call in excess of either of the telephone call frequencies described in § 1006.14(b)(2)(i) nevertheless placed a telephone call or engaged a person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number. For purposes of determining whether the presumption of compliance has been rebutted, it is assumed that debt collectors intend the natural consequence of their actions. Comments 14(b)(2)(i)–2.i through .iv provide a non-exhaustive list of factors that may rebut the presumption of compliance. The factors may be considered either individually or in combination with one another (or other non-specified factors). The factors may be viewed in light of any other relevant facts and circumstances and therefore may apply to varying degrees. Factors that may rebut the presumption of compliance include:

i. The frequency and pattern of telephone calls the debt collector places to a person, including the intervals between them. The considerations relevant to this factor include whether the debt collector placed telephone calls to a person in rapid succession (*e.g.,* two unanswered telephone calls to the same telephone number within five minutes) or in a highly concentrated manner (*e.g.,* seven telephone calls to the same telephone number within one day). For example, assume the same facts as in comment 14(b)(2)(i)–1.i, except assume that, after the

debt collector placed the first telephone call to the consumer about the credit card debt on Wednesday, April 1, the debt collector placed six additional telephone calls to the consumer about that debt on Friday, April 3. Under § 1006.14(b)(2)(i), the debt collector is presumed to comply with § 1006.14(b)(1) and FDCPA section 806(5), but the high concentration of telephone calls on Friday, April 3, is a factor that may rebut the presumption of compliance.

ii. The frequency and pattern of any voicemails that the debt collector leaves for a person, including the intervals between them. The considerations relevant to this factor include whether the debt collector left voicemails for a person in rapid succession (*e.g.,* two voicemails within five minutes left at the same telephone number) or in a highly concentrated manner (*e.g.,* seven voicemails left at the same telephone number within one day).

iii. The content of a person's prior communications with the debt collector. Among the considerations relevant to this factor are whether the person previously informed the debt collector, for example, that the person did not wish to be contacted again about the particular debt, that the person was refusing to pay the particular debt, or that the person did not owe the particular debt. This factor also includes a consumer's cease communication notification described in § 1006.6(c) and a consumer's request under § 1006.14(h) that the debt collector not use telephone calls to communicate or attempt to communicate with the consumer. The amount of time elapsed since any such prior communications also may be relevant to this factor.

iv. The debt collector's conduct in prior communications or attempts to communicate with the person. Among the considerations relevant to this factor are whether, during a prior communication or attempt to communicate with a person, the debt collector, for example, used obscene, profane, or otherwise abusive language (*see* § 1006.14(d)), used or threatened to use violence or other criminal means to harm the person (*see* § 1006.14(c)), or called at an inconvenient time or place (*see* § 1006.6(b)(1)). The amount of time elapsed since any such prior communications or attempts to communicate also may be relevant to this factor.

3. *Misdirected telephone calls.* Section 1006.14(b)(2)(i) provides that a debt collector is presumed to comply with § 1006.14(b)(1) and FDCPA section 806(5) (15 U.S.C. 1692d(5)) if the debt collector's telephone call frequencies do not exceed the telephone call frequencies described in § 1006.14(b)(2)(i). If, within a period of seven consecutive days, a debt collector attempts to communicate with a particular person by placing telephone calls to a particular telephone number, and the debt collector then learns that the telephone number is not that person's number, the telephone calls that the debt collector made to that number are not considered to have been telephone calls placed to that person during that seven-consecutive-day period for purposes of § 1006.14(b)(2)(i). For example:

i. Assume that a debt collector first attempts to communicate with a consumer on Monday, and again on Wednesday, by placing one unanswered telephone call to a particular telephone number on each of those days. On Thursday, the debt collector learns that the telephone number belongs to someone else and that the consumer does not answer telephone calls to that number. For purposes of § 1006.14(b)(2)(i), the debt collector has not yet placed any telephone calls to that consumer during that seven-consecutive-day period.

Paragraph 14(b)(2)(ii)

1. *Presumption of a violation; examples.* Section 1006.14(b)(2)(ii) provides that a debt collector is presumed to violate § 1006.14(b)(1) and FDCPA section 806(5) (15 U.S.C. 1692d(5)) if the debt collector places a telephone call to a particular person in connection with the collection of a particular debt in excess of either of the telephone call frequencies described in § 1006.14(b)(2)(i). The telephone call frequencies are subject to the exclusions in § 1006.14(b)(3). The following examples illustrate the rule.

i. On Wednesday, April 1, a debt collector first attempts to communicate with a consumer in connection with the collection of a mortgage debt by placing a telephone call and leaving a limited-content message. On each of the next three business days (*i.e.,* on Thursday, April 2, Friday, April 3, and Monday, April 6), the debt collector places two additional telephone calls to the consumer about the debt, all of which go unanswered. On Tuesday, April 7, the debt collector places an additional telephone call to the consumer about the debt. The debt collector has placed a total of eight telephone calls to the consumer about the debt during the seven-day period starting Wednesday, April 1. None of the calls was subject to the exclusions in § 1006.14(b)(3). The debt collector is presumed to violate § 1006.14(b)(1) and FDCPA section 806(5).

ii. On Tuesday, August 11, a debt collector first attempts to communicate with a consumer in connection with the collection of a credit card debt by placing a telephone call to the consumer that the consumer does not answer. On Friday, August 14, the debt collector again places a telephone call to the consumer and has a telephone conversation with the consumer in connection with the collection of the debt. Subject to the exclusions in § 1006.14(b)(3), the debt collector is presumed to violate § 1006.14(b)(1) and FDCPA section 806(5) if the debt collector places a telephone call to the consumer in connection with the collection of that debt again prior to Friday, August 21.

2. *Factors to rebut the presumption of a violation.* To rebut the presumption of a violation, it must be proven that a debt collector who placed telephone calls in excess of either of the frequencies described in § 1006.14(b)(2)(i) nevertheless did not place a telephone call or engage any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number. For purposes of determining whether the presumption of a violation has been rebutted, it is assumed that debt collectors intend the natural consequence of their actions. Comments 14(b)(2)(ii)–2.i through .iv provide a non-exhaustive list of factors that may rebut the presumption of a violation. The factors may be considered either individually or in combination with one another (or other non-specified factors). The factors may be viewed in light of any other relevant facts and circumstances and therefore may apply to varying degrees. Factors that may rebut the presumption of a violation include:

i. Whether a debt collector placed a telephone call to comply with, or as required by, applicable law. For example, assume the same facts as in comment 14(b)(2)(ii)–1.i, except assume that the debt collector placed the final telephone call of the seven-consecutive-day period to inform the consumer of available loss mitigation options in compliance with the Bureau's mortgage servicing rules under Regulation X, 12 CFR 1024.39(a). The debt collector's compliance with applicable law is a factor that may rebut the presumption of a violation.

ii. Whether a debt collector placed a telephone call that was directly related to active litigation involving the collection of a particular debt. For example, assume the same facts as in comment 14(b)(2)(ii)–1.ii, except assume that, after the debt collector and the consumer had a telephone conversation about the credit card debt on Friday, August 14, the debt collector placed another telephone call to the consumer before Friday, August 21, to complete a court-ordered communication with the consumer about the debt, or as part of negotiations to settle active debt collection litigation regarding the debt. The direct relationship between the additional telephone call and the active debt collection litigation is a factor that may rebut the presumption of a violation.

iii. Whether a debt collector placed a telephone call in response to a consumer's request for additional information when the exclusion in § 1006.14(b)(3)(i) for telephone calls made with the consumer's prior consent given directly to the debt collector did not apply. For example, assume the same facts as in comment 14(b)(2)(ii)–1.ii, except assume that, during the telephone conversation about the credit card debt on Friday, August 14, the consumer told the debt collector that the consumer would like more information about the amount of the debt but that the consumer could not talk at that moment. The consumer ended the telephone call before the debt collector could seek prior consent under § 1006.14(b)(3)(i) to call back with the requested information. The debt collector placed another telephone call to the consumer prior to Friday, August 21, to provide the requested information. The fact that the debt collector placed the additional telephone call in response to the consumer's request is a factor that may rebut the presumption of a violation.

iv. Whether a debt collector placed a telephone call to convey information to the consumer that, as shown through evidence, would provide the consumer with an opportunity to avoid a demonstrably negative effect relating to the collection of the particular debt, where the negative effect was not in the debt collector's control, and where time was of the essence. For example, in each of the following three scenarios, assume the

same facts as in comment 14(b)(2)(ii)–1.ii, and also assume that:

A. During the telephone conversation about the credit card debt on Friday, August 14, the debt collector and the consumer engaged in a lengthy conversation regarding settlement terms, and, toward the end of the conversation, the telephone call dropped. The debt collector immediately placed an additional telephone call to the consumer to complete the conversation. The fact that the debt collector placed the telephone call to permit the debt collector and the consumer to complete the conversation about settlement terms, which provided the consumer an opportunity to avoid a demonstrably negative effect that was not in the debt collector's control (*i.e.,* having to repeat a substantive conversation with a potentially different representative of the debt collector) and where time was of the essence (*i.e.,* to prevent the delay of settlement negotiations by seven days) is a factor that may rebut the presumption of a violation.

B. The consumer previously entered into a payment plan with the debt collector regarding the credit card debt. The conditions for the payment plan were set by the creditor, and among those conditions is that only the creditor, in its sole discretion, may approve waivers of late fees. On Monday, August 17, the debt collector learned that the consumer's payment failed to process, and the applicable grace period was set to expire on Tuesday, August 18. The debt collector placed a telephone call to the consumer on Monday to remind the consumer that a late fee would be applied by the creditor for non-payment unless the consumer made the payment by the next day. The fact that the debt collector placed the telephone call to alert the consumer to the pending penalty, giving the consumer an opportunity to avoid a demonstrably negative effect that was not in the debt collector's control and where time was of the essence, is a factor that may rebut the presumption of a violation.

C. On Monday, August 17, the debt collector placed a telephone call to the consumer to offer the consumer a ''one-time only'' discount on the payment of the credit card debt. The debt collector stated that the offer would expire the next day when, in fact, the debt collector could have offered the same or a similar discount through the end of August. Because the negative effect on the consumer was in the debt collector's control, the discount offer is not a factor that may rebut the presumption of a violation.

14(b)(3) Certain Telephone Calls Excluded From Telephone Call Frequencies

Paragraph 14(b)(3)(i)

1. *Prior consent.* Section 1006.14(b)(3)(i) excludes from the telephone call frequencies described in § 1006.14(b)(2) certain telephone calls placed to a person who gives prior consent. See § 1006.6(b)(4)(i) and its associated commentary for guidance about giving prior consent directly to a debt collector. Nothing in § 1006.14(b)(3)(i) regarding prior consent for telephone call frequencies permits a debt collector to communicate, or attempt to communicate, with a consumer as prohibited by §§ 1006.6(b) and 1006.14(h).

2. *Duration of prior consent.* For purposes of § 1006.14(b)(3)(i), if a person gives prior consent for additional telephone calls about a particular debt directly to a debt collector, any telephone calls that the debt collector thereafter places to the person about that particular debt do not count toward the telephone call frequencies described in § 1006.14(b)(2) for a period of up to seven consecutive days. A person's prior consent may expire before the conclusion of the seven-consecutive-day period. A person's prior consent expires when any of the following occurs: (1) The person consented to the additional telephone calls for a shorter time period and such time period has ended; (2) the person revokes such prior consent; or (3) the debt collector has a telephone conversation with the person regarding the particular debt.

3. *Examples.* The following examples illustrate how § 1006.14(b)(3)(i) applies:

i. On Friday, April 3, a debt collector places a telephone call to a consumer. During the ensuing telephone conversation in connection with the collection of a debt, the consumer tells the debt collector to ''call back on Monday.'' Absent an exception, under § 1006.14(b)(2)(ii), the debt collector would be presumed to violate § 1006.14(b)(1) and FDCPA section 806(5) (15 U.S.C. 1692d(5)) if the debt collector called the consumer on Monday, April 6, because the additional telephone call would exceed the frequency described in § 1006.14(b)(2)(i)(B). Under § 1006.14(b)(3)(i), however, in the scenario described (and absent any other facts), the debt collector could, pursuant to the consumer's prior consent, place telephone calls to the consumer on Monday, April 6, and not lose a presumption of compliance with § 1006.14(b)(1) and FDCPA section 806(5).

ii. Assume the same facts as in the preceding example, except that the consumer does not specify a particular day the debt collector may call back. Assume further that, on Monday, April 6, the debt collector calls the consumer back and has a telephone conversation with the consumer. The exception in § 1006.14(b)(3)(i) does not apply to subsequent telephone calls placed by the debt collector to the consumer, absent additional prior consent from the consumer. For example, if the debt collector, without additional prior consent, placed a telephone call to the consumer on Wednesday, April 8, that telephone call would count toward the telephone call frequencies described in § 1006.14(b)(2), and, pursuant to § 1006.14(b)(2)(ii), the debt collector would be presumed to violate § 1006.14(b)(1) and FDCPA section 806(5).

iii. Between Monday, June 1, and Wednesday, June 3, a debt collector places three unanswered telephone calls to a consumer in connection with the collection of a debt. Also on Wednesday, June 3, the debt collector sends the consumer an email message in connection with the collection of the debt. The consumer responds by email on Thursday, June 4, requesting additional information about available repayment options related to the debt and writes, ''You can call me at 123–456–7891 to discuss the repayment options.'' The debt collector receives the consumer's prior consent by email on Thursday, June 4, and thereafter places eight unanswered telephone calls to the consumer between Monday, June 8, and Wednesday, June 10. Because the consumer provided prior consent directly to the debt collector, the exclusion in § 1006.14(b)(3)(i) applies to the eight telephone calls placed by the debt collector during the seven-consecutive-day period that began with receipt of the consumer's consent on Thursday, June 4. Those telephone calls therefore do not count toward the telephone call frequencies described in § 1006.14(b)(2)(i). However, any telephone calls placed by the debt collector after the end of the seven-day period (*i.e.,* on or after Thursday, June 11) would count toward the telephone call frequencies described in § 1006.14(b)(2)(i), unless the consumer again gives prior consent directly to the debt collector.

Paragraph 14(b)(3)(ii)

1. *Unconnected telephone calls.* Section 1006.14(b)(3)(ii) provides that telephone calls placed to a person do not count toward the telephone call frequencies described in § 1006.14(b)(2)(i) if they do not connect to the dialed number. A debt collector's telephone call does not connect to the dialed number if, for example, the debt collector receives a busy signal or an indication that the dialed number is not in service. Conversely, a telephone call placed to a person counts toward the telephone call frequencies described in § 1006.14(b)(2)(i) if it connects to the dialed number, unless an exclusion in § 1006.14(b)(3) applies. A debt collector's telephone call connects to the dialed number if, for example, the telephone call is answered, even if it subsequently drops; if the telephone call causes a telephone to ring at the dialed number but no one answers it; or if the telephone call is connected to a voicemail or other recorded message, even if it does not cause a telephone to ring and even if the debt collector is unable to leave a voicemail.

14(b)(4) Definition

1. *Particular debt.* Section 1006.14(b)(2) establishes presumptions of compliance and violation with respect to § 1006.14(b)(1) and FDCPA section 806(5) (15 U.S.C. 1692d(5)) based on the frequency with which a debt collector places telephone calls to, or engages in telephone conversation with, a person in connection with the collection of a particular debt. Section 1006.14(b)(4) provides that, except in the case of student loan debt, the term particular debt means each of a consumer's debts in collection. For student loan debt, § 1006.14(b)(4) provides that the term particular debt means all student loan debts that a consumer owes or allegedly owes that were serviced under a single account number at the time the debts were obtained by a debt collector.

i. *Placing a telephone call in connection with the collection of a particular debt.* Under § 1006.14(b)(2)(i)(A), if a debt collector places a telephone call to a person and initiates a conversation or leaves a voicemail about one particular debt, the debt collector

counts the telephone call as a telephone call in connection with the collection of the particular debt, subject to the exclusions in § 1006.14(b)(3). If a debt collector places a telephone call to a person and initiates a conversation or leaves a voicemail about more than one particular debt, the debt collector counts the telephone call as a telephone call in connection with the collection of each such particular debt, subject to the exclusions in § 1006.14(b)(3). If a debt collector places a telephone call to a person but neither initiates a conversation about a particular debt nor leaves a voicemail that refers to a particular debt, or if the debt collector's telephone call is unanswered, the debt collector counts the telephone call as a telephone call in connection with the collection of at least one particular debt, unless an exclusion in § 1006.14(b)(3) applies.

ii. *Engaging in a telephone conversation in connection with the collection of a particular debt.* Under § 1006.14(b)(2)(i)(B), if a debt collector and a person discuss one particular debt during a telephone conversation, the debt collector has engaged in a telephone conversation in connection with the collection of the particular debt, regardless of which party initiated the discussion about the particular debt, subject to the exclusions in § 1006.14(b)(3). If a debt collector and a person discuss more than one particular debt during a telephone conversation, the debt collector has engaged in a telephone conversation in connection with the collection of each such particular debt, regardless of which party initiated the discussion about the particular debts, subject to the exclusions in § 1006.14(b)(3). If no particular debt is discussed during a telephone conversation between a debt collector and a person, the debt collector counts the conversation as a telephone conversation in connection with the collection of at least one particular debt, unless an exclusion in § 1006.14(b)(3) applies.

2. *Examples.* The following examples illustrate the rule.

i. A debt collector is attempting to collect a medical debt and two credit card debts (denominated A and B for this example) from the same consumer. Under § 1006.14(b)(2)(i)(A), a debt collector may count an unanswered telephone call as one telephone call placed toward any one particular debt, even if the debt collector intended to discuss more than one particular debt had the telephone call resulted in a telephone conversation. Therefore, if the debt collector, within a period of seven consecutive days, places a total of 21 unanswered telephone calls, seven of which the debt collector counted as unanswered telephone calls to the consumer in connection with the collection of the medical debt, seven of which the debt collector counted as unanswered telephone calls to the consumer in connection with the collection of credit card debt A, and seven of which the debt collector counted as unanswered telephone calls to the consumer in connection with the collection of credit card debt B, the debt collector is presumed to comply with § 1006.14(b)(1) and FDCPA section 806(5), even if, for example, the debt collector intended to discuss both credit card debt A and credit card debt B had any of the telephone calls with respect to the credit card debts resulted in a telephone conversation.

ii. A debt collector is attempting to collect a medical debt and a credit card debt from the same consumer. The debt collector places a telephone call to the consumer, intending to discuss both particular debts, but the consumer does not answer, and the telephone call goes to voicemail. The debt collector leaves a limited-content message, as defined in § 1006.2(j). Because the limited-content message does not specifically refer to any particular debt, under § 1006.14(b)(2)(i)(A), a debt collector may count the voicemail as one telephone call placed toward either of the particular debts, even though the debt collector intended to discuss both particular debts if the telephone call had resulted in a telephone conversation.

iii. A debt collector is attempting to collect a medical debt and a credit card debt from the same consumer. On Monday, November 9, the debt collector places a telephone call to, and engages in a telephone conversation with, the consumer solely in connection with the collection of the medical debt. The debt collector does not place any telephone calls to the consumer in connection with the collection of the credit card debt. Regarding the medical debt, under § 1006.14(b)(2)(i)(A) and (B) respectively, the debt collector has placed a telephone call to, and has and engaged in a telephone conversation with, the consumer in connection with the collection of the particular debt, unless an exclusion in § 1006.14(b)(3) applies. Regarding the credit card debt, under § 1006.14(b)(2)(i)(A) and (B) respectively, the debt collector has neither placed a telephone call to, nor engaged in a telephone conversation with, the consumer in connection with the collection of the particular debt.

iv. Assume the same facts as in the preceding example, except that on Monday, November 9, the debt collector engages in a telephone conversation with the consumer in connection with the collection of both the medical debt and the credit card debt. Under § 1006.14(b)(2)(i)(A) and (B) respectively, the debt collector has placed a telephone call to, and has engaged in a telephone conversation with, the consumer in connection with the collection of both the medical debt and the credit card debt, unless an exclusion in § 1006.14(b)(3) applies.

v. A debt collector is attempting to collect a medical debt and a credit card debt from the same consumer. Beginning on Monday, November 9, and through Wednesday, November 11, the debt collector places two unanswered telephone calls to the consumer which the debt collector counts as telephone calls in connection with the collection of the medical debt, and four unanswered telephone calls to the consumer which the debt collector counts as telephone calls in connection with the collection of the credit card debt. On Thursday, November 12, the debt collector places a telephone call to, and engages in a general telephone conversation with, the consumer, but the debt collector and the consumer do not discuss either particular debt. Under § 1006.14(b)(2)(i)(A) and (B) respectively, the debt collector may count the November 12 telephone call and ensuing conversation toward either the medical debt or the credit card debt. For example, if the debt collector counts the November 12 telephone call and ensuing conversation toward the collection of only the medical debt, then, during this time period, the debt collector has placed three telephone calls and has had one conversation in connection with the collection of the medical debt, and has placed four telephone calls and has had no conversations in connection with the collection of the credit card debt.

vi. A debt collector is attempting to collect a medical debt and a credit card debt from the same consumer. On Monday, November 9, the debt collector places a telephone call to, and initiates a telephone conversation with, the consumer about the collection of the medical debt. The consumer states that the consumer does not want to discuss the medical debt, and instead initiates a discussion about the credit card debt. Under § 1006.14(b)(2)(i)(A) and (B) respectively, the debt collector has both placed a telephone call to, and engaged in a telephone conversation with, the consumer in connection with the collection of the medical debt, even though the consumer was unwilling to engage in the discussion initiated by the debt collector regarding the medical debt. Under § 1006.14(b)(2)(i)(A) and (B) respectively, the debt collector has not placed a telephone call to the consumer in connection with the credit card debt, but the debt collector has engaged in a telephone conversation in connection with the collection of the credit card debt, even though the consumer, not the debt collector, initiated the discussion about the credit card debt.

vii. A debt collector is attempting to collect three student loan debts that were serviced under a single account number at the time that they were obtained by a debt collector and that are owed or allegedly owed by the same consumer. All three debts are treated as a single debt for purposes of § 1006.14(b)(2). The debt collector is presumed to comply with § 1006.14(b)(1) and FDCPA section 806(5) if the debt collector places seven or fewer telephone calls within seven consecutive days to the consumer in connection with the collection of the three student loan debts, and the debt collector does not place a telephone call within a period of seven consecutive days after having had a telephone conversation with the consumer in connection with the collection of any one of the three student loan debts, unless an exclusion in § 1006.14(b)(3) applies.

14(h) Prohibited Communication Media

14(h)(1) In General

1. *Communication media designations.* Section 1006.14(h)(1) prohibits a debt collector from communicating or attempting to communicate with a person in connection with the collection of any debt through a medium of communication if the person has requested that the debt collector not use that medium to communicate with the person.

The debt collector may ask follow-up questions regarding preferred communication media to clarify statements by the person. For examples of communication media, see comment 2(d)–1.

2. *Specific address or telephone number.* Within a medium of communication, a person may request that a debt collector not use a specific address or telephone number. For example, if a person has two mobile telephone numbers, the person may request that the debt collector not use one or both mobile telephone numbers.

3. *Examples.* The following examples illustrate the prohibition in § 1006.14(h)(1).

i. Assume that a person tells a debt collector to ''stop calling'' the person. Based on these facts, the person has requested that the debt collector not use telephone calls to communicate with the person and, thereafter, § 1006.14(h)(1) prohibits the debt collector from communicating or attempting to communicate with the person through telephone calls.

ii. Assume that, in response to receipt of either the opt-out procedures described in § 1006.6(d)(4)(ii) or the opt-out notice in § 1006.6(e), a consumer requests to opt out of receiving electronic communications from a debt collector at a particular email address or telephone number. Based on these facts, the consumer has requested that the debt collector not use that email address or telephone number to electronically communicate with the consumer for any debt and, thereafter, § 1006.14(h)(1) prohibits the debt collector from electronically communicating or attempting to communicate with the consumer through that email address or telephone number.

14(h)(2) Exceptions

1. *Legally required communication media.* Under § 1006.14(h)(2)(iii), if otherwise required by applicable law, a debt collector may communicate or attempt to communicate with a person in connection with the collection of any debt through a medium of communication that the person has requested the debt collector not use to communicate with the person. For example, assume that a debt collector who is also a mortgage servicer subject to the periodic statement requirement for residential mortgage loans under Regulation Z, 12 CFR 1026.41, is engaging in debt collection communications with a person about the person's residential mortgage loan. The person tells the debt collector to stop mailing letters to the person, and the person has not consented to receive statements electronically in accordance with 12 CFR 1026.41(c). Although the person has requested that the debt collector not use mail to communicate with the person, § 1006.14(h)(2)(iii) permits the debt collector to mail the person periodic statements, because the periodic statements are required by applicable law.

Section 1006.18—False, Deceptive, or Misleading Representations or Means

18(d) False Representations or Deceptive Means

1. *Social media.* Under § 1006.18(d), a debt collector may not use any false representation or deceptive means to collect any debt or to obtain information concerning a consumer. In the social media context, the following examples illustrate the rule:

i. Assume that a debt collector sends a private message, in connection with the collection of a debt, requesting to be added as one of the consumer's contacts on a social media platform marketed for social or professional networking purposes. A debt collector makes a false representation or implication if the debt collector does not disclose his or her identity as a debt collector in the request.

ii. Assume that a debt collector communicates privately with a friend or coworker of a consumer on a social media platform, for the purpose of acquiring location information about the consumer. Pursuant to § 1006.10(b)(1), the debt collector must identify himself or herself individually by name when communicating for the purpose of acquiring location information. To avoid violating § 1006.18(d), the debt collector must communicate using a profile that accurately identifies the debt collector's individual name. (But see § 1006.18(f) and its associated commentary regarding use of assumed names.) The debt collector also must comply with the other applicable requirements for obtaining location information in § 1006.10 (*e.g.,* with respect to stating that the debt collector is confirming or correcting location information concerning the consumer and, only if expressly requested, identifying the name of the debt collector's employer), for communicating with third parties in § 1006.6(d)(1), and for communicating through social media in § 1006.22(f)(4).

18(e) Disclosures Required

1. *Communication.* A limited-content message, as defined in § 1006.2(j), is not a communication, as that term is defined in § 1006.2(d). Thus, a debt collector who leaves only a limited-content message for a consumer need not make the disclosures required by § 1006.18(e)(1) and (2). However, if a debt collector leaves a voicemail message for a consumer that includes content in addition to the content described in § 1006.2(j)(1) and (2) and that directly or indirectly conveys any information regarding a debt, the voicemail message is a communication, and the debt collector is required to make the § 1006.18(e) disclosures. See the commentary to § 1006.2(d) and (j) for additional clarification regarding the definitions of communication and limited-content message.

18(e)(1) Initial Communications

1. *Example.* A debt collector must make the disclosure required by § 1006.18(e)(1) in the debt collector's initial communication with a consumer, regardless of the medium of communication and regardless of whether the debt collector or the consumer initiated the communication. For example, assume that a debt collector who has not previously communicated with a consumer attempts to communicate with the consumer by leaving a limited-content message, as defined in § 1006.2(j). After listening to the debt collector's limited-content message, the consumer initiates a telephone call to, and communicates with, the debt collector. Pursuant to § 1006.18(e)(1), because the consumer-initiated call is the initial communication between the debt collector and the consumer, the debt collector must disclose to the consumer during that telephone call that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.

18(e)(4) Translated Disclosures

1. *Example.* Section 1006.18(e)(4) provides that a debt collector must make the disclosures required by § 1006.18(e)(1) and (2) in the same language or languages used for the rest of the communication in which the disclosures are conveyed. The following example illustrates the rule:

i. ABC debt collector is collecting a debt. ABC debt collector's initial communication with the consumer takes place in Spanish. Section 1006.18(e)(4) requires ABC debt collector to provide in Spanish the disclosure required by § 1006.18(e)(1). Thereafter, ABC debt collector has a communication with the consumer that takes place partly in English and partly in Spanish. During this communication, the debt collector must provide the disclosure required by § 1006.18(e)(2) in both English and Spanish.

18(f) Assumed Names

1. *Readily identifiable by the employer.* Section 1006.18(f) provides, in part, that § 1006.18 does not prohibit a debt collector's employee from using an assumed name when communicating or attempting to communicate with a person, provided that the debt collector can readily identify any employee using an assumed name. A debt collector may use any method of managing assumed names that enables the debt collector to determine the true identity of any employee using an assumed name. For example, a debt collector may require an employee to use the same assumed name when communicating or attempting to communicate with any person and may prohibit any other employee from using the same assumed name.

Section 1006.22—Unfair or Unconscionable Means

22(f) Restrictions on Use of Certain Media

Paragraph 22(f)(2)

1. *Language or symbol.* Section 1006.22(f)(2) provides, in relevant part, that a debt collector must not use any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by mail. For purposes of § 1006.22(f)(2), the phrase ''language or symbol'' does not include language and symbols that facilitate communications by mail, such as: The debtor's name and address; postage; language such as ''forwarding and address correction requested''; and the United States Postal Service's Intelligent Mail barcode.

Paragraph 22(f)(3)

1. *Email addresses described in § 1006.6(d)(4).* Section 1006.22(f)(3) generally prohibits a debt collector from communicating or attempting to

communicate with a consumer by sending an email to an email address that the debt collector knows is provided to the consumer by the consumer's employer. The prohibition does not apply if the debt collector sends the email to an email address described in § 1006.6(d)(4)(i) or (iii), which specifically contemplate debt collectors sending emails to any email address—including an email address that a debt collector knows is employer provided—if the consumer has used the email address to communicate with the debt collector about a debt (§ 1006.6(d)(4)(i)(A)), has provided prior consent directly to the debt collector to use the email address (§ 1006.6(d)(4)(i)(B)), or has obtained the email address from a prior debt collector who satisfied either § 1006.6(d)(4)(i) or (ii). A debt collector who sends an email to an email address described in § 1006.6(d)(4)(ii) complies with the prohibition in § 1006.22(f)(3) because the procedures in § 1006.6(d)(4)(ii) do not permit debt collectors to send emails to email addresses that the debt collector knows are employer provided.

Paragraph 22(f)(4)

1. *Social media.* Section 1006.22(f)(4) prohibits a debt collector from communicating or attempting to communicate with a person in connection with the collection of a debt through a social media platform if the communication or attempt to communicate is viewable by the general public or the person's social media contacts. For example, § 1006.22(f)(4) prohibits a debt collector from posting, in connection with the collection of a debt, any message for a person on a social media web page if that web page is viewable by the general public or the person's social media contacts. Section 1006.22(f)(4) does not prohibit a debt collector from sending a message to a person if the message is not viewable by the general public or the person's social media contacts. Section 1006.6(b) or § 1006.14(h) nonetheless may prohibit the debt collector from sending such a message, and a debt collector who communicates by sending such a message about the debt to the wrong person violates § 1006.6(d)(1). See also comment 18(d)–1 with respect to communications and attempts to communicate with consumers and third parties on social media platforms.

Section 1006.30—Other Prohibited Practices

30(b) Prohibition on the Sale, Transfer for Consideration, or Placement for Collection of Certain Debts

30(b)(1) In General

1. *Transfer for consideration.* Section 1006.30(b)(1) prohibits, among other things, a debt collector from transferring for consideration a debt that has been paid or settled or discharged in bankruptcy. A debt collector transfers a debt for consideration when the debt collector receives or expects to receive compensation for the transfer of the debt. A debt collector does not transfer a debt for consideration when the debt collector sends information about the debt, as opposed to the debt itself, to another party. For example, a debt collector does not transfer a debt for consideration when the debt collector sends a file with data about the debt to another person for analytics, ''scrubbing,'' or archiving. A debt collector also does not transfer a debt for consideration when the debt collector reports to a credit reporting agency information that a debt has been paid or settled or discharged in bankruptcy.

2. *Debt that resulted from identity theft.* Section 615(f)(1) of the Fair Credit Reporting Act (15 U.S.C. 1681m(f)(1)) states that no person shall sell, transfer for consideration, or place for collection a debt if such person has been notified under section 605B of the Fair Credit Reporting Act (15 U.S.C. 1681c–2) that the debt has resulted from identity theft. Nothing in § 1006.30(b)(1) alters a debt collector's obligation to comply with the prohibition set forth in section 615(f)(1) of the Fair Credit Reporting Act.

30(b)(2) Exceptions

30(b)(2)(i) In General

Paragraph 30(b)(2)(i)(A)

1. *In general.* Under § 1006.30(b)(2)(i)(A), a debt collector who is collecting a debt described in § 1006.30(b)(1) may transfer the debt to the debt's owner. However, unless another exception under § 1006.30(b)(2) applies, the debt collector may not transfer the debt or the right to collect the debt to another entity on behalf of the debt owner.

Section 1006.38—Disputes and Requests for Original-Creditor Information

1. *In writing.* Section 1006.38 contains requirements related to a dispute or request for the name and address of the original creditor timely submitted in writing by the consumer. A consumer has disputed the debt or requested the name and address of the original creditor in writing for purposes of § 1006.38(c) or (d)(2) if the consumer, for example:

i. Mails the written dispute or request to the debt collector;

ii. Provides the dispute or request to the debt collector using a medium of electronic communication through which the debt collector accepts electronic communications from consumers, such as an email address or a website portal; or

iii. Delivers the written dispute or request in person or by courier to the debt collector.

2. *Interpretation of the E-SIGN Act.* Comment 38–1.ii constitutes the Bureau's interpretation of section 101 of the E-SIGN Act as applied to section 809(b) of the FDCPA. Under this interpretation, section 101(a) of the E-SIGN Act enables a consumer to satisfy through an electronic request the requirement in section 809(b) of the FDCPA that the consumer's notification of the debt collector be ''in writing.'' Further, because the consumer may only use a medium of electronic communication through which a debt collector accepts electronic communications from consumers, section 101(b) of the E-SIGN Act is not contravened.

38(a) Definitions

38(a)(1) Duplicative Dispute

1. *Substantially the same.* Section 1006.38(a)(1) provides that a dispute is a duplicative dispute if, among other things, the dispute is substantially the same as a dispute previously submitted by the consumer in writing within the validation period for which the debt collector has already satisfied the requirements of § 1006.38(d)(2)(i). A later dispute can be substantially the same as an earlier dispute even if the later dispute does not repeat verbatim the language of the earlier dispute.

2. *New and material information.* Section 1006.38(a)(1) provides that a dispute that is substantially the same as a dispute previously submitted by the consumer in writing within the validation period for which the debt collector has already satisfied the requirements of § 1006.38(d)(2)(i) is not a duplicative dispute if the consumer provides new and material information to support the dispute. Information is new if the consumer did not provide the information when submitting an earlier dispute. Information is material if it is reasonably likely to change the verification the debt collector provided or would have provided in response to the earlier dispute. The following example illustrates the rule:

i. ABC debt collector is collecting a debt from a consumer and sends the consumer a validation notice. In response, the consumer submits a written dispute to ABC debt collector within the validation period asserting that the consumer does not owe the debt. The consumer does not include any information in support of the dispute. Pursuant to § 1006.38(d)(2)(i), ABC debt collector provides the consumer a copy of verification of the debt. The consumer then sends a cancelled check showing the consumer paid the debt. The cancelled check is new and material information.

38(d) Disputes

38(d)(2) Response to Disputes

Paragraph 38(d)(2)(ii)

1. *Duplicative dispute notice.* Section 1006.38(d)(2)(ii) provides that, in the case of a dispute that a debt collector reasonably determines is a duplicative dispute, the debt collector must cease collection of the debt, or any disputed portion of the debt, until the debt collector either notifies the consumer that the dispute is duplicative (§ 1006.38(d)(2)(ii)(A)) or provides a copy either of verification of the debt or of a judgment to the consumer (§ 1006.38(d)(2)(ii)(B)). If the debt collector notifies the consumer that the dispute is duplicative, § 1006.38(d)(2)(ii)(A) requires that the notice provide a brief statement of the reasons for the debt collector's determination that the dispute is duplicative and refer the consumer to the debt collector's response to the earlier dispute. A debt collector complies with the requirement to provide a brief statement of the reasons for its determination if the notice states that the dispute is substantially the same as an earlier dispute submitted by the consumer and the consumer has not included any new and material information in support of the earlier dispute. A debt collector complies with the requirement to refer the consumer to the debt collector's response to the earlier dispute if the notice states that the debt collector responded to the earlier dispute and provides the date of that response.

Section 1006.42—Sending Required Disclosures

42(a) Sending Required Disclosures

42(a)(1) In General

1. *Relevant factors.* Section 1006.42(a)(1) provides, in part, that a debt collector who sends disclosures required by the Act or this part in writing or electronically must, among other things, do so in a manner that is reasonably expected to provide actual notice. In determining whether a debt collector has complied with this requirement, relevant factors include whether the debt collector:

i. Identified the purpose of the communication by including, in the subject line of an electronic communication transmitting the disclosure, the name of the creditor to whom the debt currently is owed or allegedly is owed and one additional piece of information identifying the debt, other than the amount, such as a truncated account number; the name of the original creditor; the name of any store brand associated with the debt; the date of sale of a product or service giving rise to the debt; the physical address of service; and the billing or mailing address on the account;

ii. Permitted receipt of notifications of undeliverability from communications providers, monitored for any such notifications, and treated any such notifications as precluding a reasonable expectation of actual notice for that delivery attempt; and

iii. Identified itself as the sender of the communication by including a business name that the consumer would be likely to recognize, such as the name included in the notice described in § 1006.6(d)(4)(ii)(C), or the name that the debt collector has used in a prior limited-content message left for the consumer or in an email message sent to the consumer.

2. *Notice of undeliverability.* A debt collector who sends a required disclosure in writing or electronically and who receives a notice that the disclosure was not delivered has not sent the disclosure in a manner that is reasonably expected to provide actual notice under § 1006.42(a)(1).

3. *Safe harbor for notices sent by mail.* Subject to comment 42(a)(1)–2, a debt collector satisfies § 1006.42(a)(1) if the debt collector mails a printed copy of a disclosure to the consumer's last known address, unless the debt collector, at the time of mailing, knows or should know that the consumer does not currently reside at, or receive mail at, that location.

4. *Effect of consumer opt out.* If a consumer has opted out of debt collection communications to a particular email address or telephone number by, for example, following the instructions provided pursuant to § 1006.6(e), then a debt collector cannot use that email address or telephone number to send required disclosures.

Subpart C—[Reserved]

Subpart D—Miscellaneous

Section 1006.100—Record Retention

1. *Three-year retention period.* Section 1006.100 requires a debt collector to maintain records that are evidence of compliance or noncompliance with the FDCPA and this part starting on the date that the debt collector begins collection activity on a debt until three years after the debt collector's last collection activity on the debt or, in the case of telephone call recordings, until three years after the dates of the telephone calls. Nothing in § 1006.100 prohibits a debt collector from retaining records that are evidence of compliance or noncompliance with the FDCPA and this part for more than three years after the applicable date.

100(a) In General

1. *Records that evidence compliance.* Section 1006.100(a) provides, in part, that a debt collector must retain records that are evidence of compliance or noncompliance with the FDCPA and this part. Thus, under § 1006.100(a), a debt collector must retain records that evidence that the debt collector performed the actions and made the disclosures required by the FDCPA and this part, as well as records that evidence that the debt collector refrained from conduct prohibited by the FDCPA and this part. If a record is of a type that could evidence compliance or noncompliance depending on the conduct of the debt collector that is revealed within the record, then the record is one that is evidence of compliance or noncompliance and the debt collector must retain it. Such records include, but are not limited to, records that evidence that the debt collector's communications and attempts to communicate in connection with the collection of a debt complied (or did not comply) with the FDCPA and this part. For example, a debt collector must retain:

i. Telephone call logs as evidence of compliance or noncompliance with the prohibition against harassing telephone calls in § 1006.14(b)(1); and

ii. Copies of documents provided to consumers as evidence that the debt collector provided the information required by FDCPA section 809(a) (15 U.S.C. 1692g(a)), as implemented by Bureau regulation, and § 1006.38 and met the delivery requirements of § 1006.42.

2. *No requirement to create additional records.* A debt collector need not create and maintain additional records, for the sole purpose of evidencing compliance, that the debt collector would not have created in the ordinary course of its business in the absence of the record retention requirement set forth in § 1006.100(a). For example, § 1006.100(a) does not require a debt collector to create call logs showing that it has not attempted to communicate with any consumers at times that the consumers designated as inconvenient. However, if the debt collector maintains call logs, the call logs are evidence of compliance or noncompliance with the FDCPA and this part and the collector must retain them.

3. *Methods of retaining evidence.* Section 1006.100(a) does not require a debt collector to retain actual paper copies of documents. Records may be retained by any method that reproduces the records accurately (including computer programs) and that ensures that the debt collector can easily access the records (including a contractual right to access records possessed by another entity).

4. *When the three-year record retention clock starts to run.* Section 1006.100(a) provides, in part, that a debt collector must retain records that are evidence of compliance or noncompliance until three years after the debt collector's last collection activity on a debt. An event such as the debt collector transferring the debt for consideration to another party would start the running of the debt collector's three-year record retention clock with respect to the debt, provided that the transfer of the debt represents the debt collector's last collection activity on the debt. In contrast, the debt's discharge in bankruptcy, or the consumer's curing of default on the debt, would not represent the time at which the three-year record-retention clock starts to run if the debt collector continues collection activity on the debt after that time, which might occur when the debt is secured and an enforceable lien on the collateral that secured the debt survives the bankruptcy discharge (and collection activity pursuant to the lien continues after the discharge).

100(b) Special Rule for Telephone Call Recordings

1. *Recorded telephone calls.* Nothing in § 1006.100 requires a debt collector to record telephone calls. However, if a debt collector records telephone calls, the recordings are evidence of compliance or noncompliance with the FDCPA and this part, and, under § 1006.100(b), the debt collector must retain the recording of each such telephone call for three years after the date of the call.

Dated: October 30, 2020.

Laura Galban,

Federal Register Liaison, Bureau of Consumer Financial Protection.

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Part IV

Department of the Treasury

Internal Revenue Service

26 CFR Part 1

Withholding of Tax and Information Reporting With Respect to Interests in Partnerships Engaged in a U.S. Trade or Business; Final Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9926]

RIN 1545–BO60

Withholding of Tax and Information Reporting With Respect to Interests in Partnerships Engaged in a U.S. Trade or Business

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final rule.

SUMMARY: This document contains final regulations that provide guidance related to the withholding of tax and information reporting with respect to certain dispositions of interests in partnerships engaged in a trade or business within the United States. The final regulations affect certain foreign persons that recognize gain or loss from the sale or exchange of an interest in a partnership that is engaged in a trade or business within the United States, and persons that acquire those interests. The final regulations also affect partnerships that, directly or indirectly, have foreign persons as partners.

DATES:

Effective date: These regulations are effective on November 30, 2020.

Applicability dates: For dates of applicability, see §§ 1.864(c)(8)–2(e), 1.1445–2(e), 1.1445–5(h), 1.1445–8(j), 1.1446–7, 1.1446(f)–1(e), 1.1446(f)–2(f), 1.1446(f)–3(f), 1.1446(f)–4(f), 1.1446(f)–5(d), 1.1461–1(i), 1.1461–2(d), 1.1461–3, 1.1463–1, 1.1464–1(c), 1.6050K–1(h), and 1.6302–2(g).

FOR FURTHER INFORMATION CONTACT: In general, Chadwick Rowland or Ronald M. Gootzeit (202) 317–6937; concerning § 1.1446(f)–4, Charles Rioux (202) 317–6933 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Section 1446(f), which was added to the Internal Revenue Code (the Code) by the Tax Cuts and Jobs Act, Public Law 115–97 (2017) (the Act), provides rules for withholding on the transfer of a partnership interest described in section 864(c)(8). On December 29, 2017, the Department of the Treasury (the Treasury Department) and the IRS released Notice 2018–08, 2018–7 I.R.B. 352, which temporarily suspended the requirement to withhold on amounts realized in connection with the sale, exchange, or disposition of certain interests in a publicly traded partnership that are publicly traded on an established securities market or readily tradable on a secondary market (or the substantial equivalent thereof) (PTP interests). On April 2, 2018, the Treasury Department and the IRS released Notice 2018–29, 2018–16 I.R.B. 495, which provided temporary guidance and announced an intent to issue proposed regulations under section 1446(f) with respect to the sale, exchange, or disposition of certain interests in non-publicly traded partnerships. On May 13, 2019, the Treasury Department and the IRS published proposed regulations (REG–105476–18) primarily under section 1446(f) relating to the withholding of tax and information reporting in the **Federal Register** (84 FR 21198) (the proposed regulations). The proposed regulations implemented section 1446(f) by providing guidance related to the withholding of tax and information reporting with respect to certain dispositions by a foreign person of an interest in a partnership that is engaged in a trade or business within the United States. In general, the proposed regulations provided rules that apply to transfers of interests in non-publicly traded partnerships (non-PTP interests) and transfers of PTP interests.

Section 864(c)(8) was also added to the Code by the Act. On December 27, 2018, the Treasury Department and the IRS published proposed regulations (REG–113604–18) under section 864(c)(8) in the **Federal Register** (83 FR 66647) (the proposed section 864(c)(8) regulations). The proposed section 864(c)(8) regulations provided rules for determining the amount of gain or loss treated as effectively connected with the conduct of a trade or business within the United States (effectively connected gain or effectively connected loss) under section 864(c)(8), including certain rules that coordinate section 864(c)(8) with other relevant sections of the Code. On November 6, 2020, the Treasury Department and the IRS published final regulations (TD 9919) under section 864(c)(8) in the **Federal Register** (85 FR 70958) (the final section 864(c)(8) regulations).

All written comments received in response to the proposed regulations are available at *www.regulations.gov* or upon request. Additionally, a public hearing was scheduled for August 26, 2019, but it was not held because there were no requests to speak.

Summary of Comments and Explanation of Revisions

I. Overview

The final regulations retain the basic approach and structure of the proposed regulations with certain revisions based on comments received. This Summary of Comments and Explanation of Revisions discusses the comments received with respect to the proposed regulations and any revisions made in response to those comments, as well as other revisions made that were not directly in response to those comments. Sections VI.A and VII.C of this Summary of Comments and Explanation of Revisions also describe certain requirements specific to entities acting as qualified intermediaries for section 1446 withholding purposes that are anticipated to be included in a revised qualified intermediary agreement and that are not included in these final regulations.[1]

II. Reporting Requirements for Foreign Transferors and Partnerships With Foreign Transferors

Proposed § 1.864(c)(8)–2 provided rules that facilitate the transfer of information between a foreign partner and the partnership whose interest is transferred for purposes of determining the transferor's tax liability under section 864(c)(8). These rules required a notifying transferor (generally, any foreign person and certain domestic partnerships that have a foreign person as a direct or indirect partner) that transfers (within the meaning of proposed § 1.864(c)(8)–1(g)(5)) an interest in a partnership (other than certain PTP interests) in a transaction described in section 864(c)(8) to notify the partnership within 30 days of the transfer. Proposed § 1.864(c)(8)–2(a). After receiving the notification from a notifying transferor, a specified partnership (generally, a partnership that is engaged in a trade or business within the United States or a partnership that owns, directly or indirectly, an interest in a partnership so engaged) is required to furnish to a notifying transferor the information necessary for the transferor to comply with section 864(c)(8) by the due date of the Schedule K–1 (Form 1065), *Partner's Share of Income, Deductions, Credits, etc.,* for the tax year of the partnership in which the transfer occurred. Proposed § 1.864(c)(8)–2(b).

[1] The final regulations also include certain conforming changes to regulations under sections 1445 and 1446 to reflect the rate changes made by section 13001(b)(3)(A)–(D) of the Act and the due date changes made by section 2006 of the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 (the Surface Transportation Act), Public Law 114–41 (2015). Although the changes to these regulations are applicable based on the date of publication of this document in the **Federal Register**, the same result applies before that date as of the relevant effective dates of the Act and the Surface Transportation Act.

While the final section 864(c)(8) regulations generally require a three-year lookback period for purposes of determining the foreign source portion of deemed sale gain or loss attributable to a partnership's inventory property or intangibles, the regulations also allow, in certain cases, the relevant foreign source portion of deemed sale gain or loss to be determined by reference to the source of the partnership's income occurring after the date, if any, on which a material change in circumstances occurs. § 1.864(c)(8)–1(c)(2)(ii)(E). The final regulations provide that a specified partnership must include in the statement provided to the notifying transferor information regarding whether the transferor's deemed sale EC gain or loss (as described in § 1.864(c)(8)–1(c)(2)) was determined under the material change in circumstances rule provided in § 1.864(c)(8)–1(c)(2)(ii)(E). § 1.864(c)(8)–2(b)(2)(ii).

The final regulations also revise the definition of specified partnership to remove unnecessary language on publicly traded partnerships. See § 1.864(c)(8)–1(d)(2).

III. Scope of the Withholding Obligation Under Section 1446(f)

The general approach in the proposed regulations required withholding on the transfer of a partnership interest unless an exception or adjustment to withholding applied. See proposed §§ 1.1446(f)–2(a) and 1.1446(f)–4(a). Comments suggested that proposed § 1.1446(f)–2(a) was overly broad in that it could impose a withholding obligation on any transfer of a partnership interest, regardless of whether the partnership in question has any assets in, or any other connection to, the United States, or whether a transfer of an interest in the partnership would result in tax on gain under section 864(c)(8), and so required a transferee to withhold in a number of circumstances where section 1446(f)(1)'s statutory language does not. To address this issue, the comments suggested various exceptions to withholding.

One comment requested that the final regulations provide that even if a transferee does not obtain a certification allowing an exception to withholding, the transferee should not be considered to have failed to withhold if the transferee demonstrates that the transfer did not result in any gain under section 864(c)(8). The comment also suggested that in such a case, the transferee should be excused from any penalties that would otherwise apply. In addition, the comment suggested an exception to withholding when the transferee can demonstrate that no deemed sale EC gain would be allocated to the transferor. Another comment suggested adding an exception to withholding when the transferee can demonstrate that the partnership is not engaged in a trade or business within the United States.

One comment suggested limiting the scope of withholding by allowing a transferee to rely on a certification from the partnership providing that it has not been required to file a Form 1065, *U.S. Return of Partnership Income,* for some number of past years, and it does not expect to be required to file a Form 1065 for the taxable year in which the transfer occurs. The comment suggested, however, that the partnership should not be required to provide this certification at the time of the transfer.

One comment generally requested that the final regulations expand the scope of the withholding obligation under section 1446(f). Specifically, the comment requested that the final regulations limit the number of exceptions and adjustments to withholding and, for any exception or adjustment to withholding retained in the final regulations, the comment requested that the final regulations increase the requirements necessary to qualify for such an exception or adjustment.

The final regulations retain the general rule in proposed § 1.1446(f)–2(a) that requires withholding on the transfer of a partnership interest unless an exception or adjustment to withholding applies. While the statutory language of section 1446(f)(1) imposes a withholding requirement when a portion of the gain from a transfer would be treated under section 864(c)(8) as effectively connected gain, a transferee will not know whether a transfer results in tax on gain under section 864(c)(8) without information from either the transferor or the partnership. These rules, therefore, require that the transferee presume that a transfer is subject to withholding unless it obtains a certification from the transferor establishing otherwise (or, if the partnership is the transferee because it makes a distribution, by relying on information in its books and records to make such determination). A transferee that obtains and properly relies on this certification (or, when the partnership is the transferee, its books and records) will generally not be subject to any withholding tax liability, even if the transfer results in tax on gain under section 864(c)(8). See, however, § 1.1446(f)–3(a) and section V.A. of this Summary of Comment and Explanation of Revisions regarding a partnership's obligation to withhold on distributions made to a transferee for cases in which the partnership receives a certification from the transferee that it knows, or has reason to know, is incorrect or unreliable.

However, in response to comments, the final regulations add a rule in § 1.1446(f)–5(b) that provides that any person required to withhold under section 1446(f) is not liable for failure to withhold, or any interest, penalties, or additions to tax, if it establishes to the satisfaction of the Commissioner that the transferor had no gain under section 864(c)(8) subject to tax on the transfer. Accordingly, while the general scope of the withholding obligation under § 1.1446(f)–2(a) is retained in these final regulations, the consequences for failing to comply with the obligation are modified when the transferor had no gain under section 864(c)(8) subject to tax on the transfer. As this rule applies for all purposes of section 1446(f), it also modifies the consequences for a partnership that fails to comply with its withholding obligation under § 1.1446(f)–3 or a broker that fails to comply with its withholding obligation under § 1.1446(f)–4 on the transfer of a PTP interest. The final regulations also add an exception to withholding if the partnership certifies to the transferee that it is not engaged in a trade or business within the United States. See section IV.A.3.ii of this Summary of Comments and Explanation of Revisions. The same exception is added for a publicly traded partnership that is not engaged in a trade or business within the United States. See section VI.B.2 of this Summary of Comments and Explanation of Revisions.

IV. Withholding on the Transfer of a Non-PTP Interest

In general, section 1446(f)(1) provides that a transferee of a partnership interest must withhold a tax equal to 10 percent of the amount realized on any disposition that results in effectively connected gain under section 864(c)(8). Proposed § 1.1446(f)–2(a) implemented this rule by providing that a transferee is required to withhold under section 1446(f)(1) a tax equal to 10 percent of the amount realized on any transfer of a partnership interest (other than a PTP interest) unless an exception to withholding, or an adjustment to the amount to withhold, applies under proposed § 1.1446(f)–2(b) or (c), respectively. Proposed § 1.1446(f)–2(d)(1) provided rules for reporting and paying the amount of any tax withheld and proposed § 1.1446(f)–2(e) provided rules regarding the effect of withholding on a transferor. For a discussion of the

rules that apply to a transfer of a PTP interest, see section VI of this Summary of Comments and Explanations of Revisions.

A. Exceptions to Withholding

Proposed § 1.1446(f)–2(b)(2) through (7) provided six exceptions to withholding by a transferee under section 1446(f)(1). The applicability of these exceptions was determined in one of three ways: Self-certification by the transferor (that is, the transferee relies on a certification received from the transferor); certification by the partnership (for purposes of the exception to withholding provided in proposed § 1.1446(f)–2(b)(4)(i)); or reliance on the books and records of the partnership (for cases in which a partnership is a transferee because it makes a distribution). These final regulations modify certain exceptions to withholding in response to comments received.

1. Non-Foreign Status Exception

Proposed § 1.1446(f)–2(b)(2) provided for an exception to withholding if the transferor of an interest in a partnership provides a certification of non-foreign status to the transferee (the Non-foreign Status Exception). One comment requested that the final regulations expand the Non-foreign Status Exception to match similar rules provided in §§ 1.1445–2(b) and 1.1446–1(c)(3) that allow for reliance upon means other than a certification or statement to ascertain the non-foreign status of the transferor.

The final regulations do not adopt this recommendation. While the provisions cited in the comment generally allow for reliance on means other than a certification or statement to ascertain non-foreign status, those provisions provide that the transferee or partnership remains liable under section 1461 if the determination of non-foreign status is incorrect. See §§ 1.1445–2(b)(1) (last sentence) and 1.1446–1(c)(3). As described in section III of this Summary of Comments and Explanation of Revisions, § 1.1446(f)–5(b) provides similar flexibility in that it would allow a transferee that did not rely on a certification of non-foreign status to show that the transferor had no gain under section 864(c)(8) subject to tax on the transfer because the transferor is not a foreign person; in such a case, no interest, penalties, or additions to tax will apply under the rules of these final regulations.

The comment also made the same recommendation regarding the Non-Foreign Status Exception provided in proposed § 1.1446(f)–4(b)(2) as it applied to transfers of PTP interests. The final regulations do not adopt this recommendation for the reasons described in the preceding paragraph.

2. No Realized Gain Exception

i. In General

Proposed § 1.1446(f)–2(b)(3) provided an exception to withholding if the transferee relies on a certification from the transferor that states that the transfer of the partnership interest would not result in any realized gain, including ordinary income arising from the application of section 751 and § 1.751–1 (the No Gain Exception). One comment suggested that a transferor realizing an overall loss on a transfer should be eligible for the No Gain Exception, even if the transferor realizes ordinary income under section 751 and § 1.751–1. The final regulations do not adopt this comment because the comment is inconsistent with the basic computation of outside gain and outside loss provided in § 1.864(c)(8)–1(b)(2). As explained in Section I.B of the Explanation of Provisions in the preamble to the proposed section 864(c)(8) regulations, the amount of gain or loss determined under section 741 (before application of section 751) is not a limitation on the amount of gain or loss characterized as effectively connected with the conduct of a trade or business within the United States. 83 FR 66648; see also §§ 1.751–1(a) and 1.864(c)(8)–1(i) (Example 3). Thus, because a transferor can realize ordinary income under section 751 that is characterized as effectively connected with the conduct of a trade or business within the United States under section 864(c)(8) even if the transferor realizes an overall loss with respect to the partnership interest, it would be inappropriate for the No Gain Exception to apply merely because the transferor does not realize an overall gain with respect to the transfer of the partnership interest.

ii. Ordinary Income Arising From the Deemed Sale of Section 751 Property

A comment explained that many transferors would be unable to use the No Gain Exception, even if they would otherwise qualify, because transferors need information from the partnership regarding the partnership's unrealized receivables or inventory items (section 751 property) and the relevant deemed sale computations associated with that property. While the proposed regulations require a partnership to provide the information necessary to make these computations on Form 8308, *Report of a Sale or Exchange of Certain Partnership Interests,* proposed § 1.6050K–1(c) did not accelerate the date on which the partnership must provide Form 8308 to the transferor.[2] Thus, the comment suggested that a transferor may not have the information necessary at the time of transfer to use the No Gain Exception. To address this issue, the comment requested certain regulatory safe harbors that would allow a transferor to use the No Gain Exception at the time of the deemed sale, including a rule that would allow a transferor to make reasonable assumptions regarding the presence and value of section 751 property based on information at hand (for example, information used by the partnership in preparing a recent Form 8308).

These final regulations modify the No Gain Exception to address the concerns raised in the comment, but do not adopt the solution suggested in the comment. Specifically, § 1.1446(f)–2(b)(3)(ii) provides that a transferor may rely on a certification from the partnership stating that, as of the determination date (as determined under the rules of § 1.1446(f)–1(c)(4)), the transfer of the partnership interest would not result in any ordinary income arising from the application of section 751 and § 1.751–1. This certification, in turn, is attached to, and forms part of, the general certification provided by the transferor to the transferee as part of the No Gain Exception. By adopting this approach, instead of the one suggested by the comment, the underlying issues raised in the comment are addressed in a manner consistent with the rest of the exceptions to withholding provided in § 1.1446(f)–2(b), which generally allow determinations regarding the applicability of an exception to be made as of the determination date. This approach allows a partnership that holds section 751 property to provide the same information to transferors that use the same determination date; therefore, this approach provides an administrable, clear solution that taxpayers can consistently apply, while also taking into account the unique nature of section 751 property.

3. 10-Percent EC Gain Exception

i. In General

Proposed § 1.1446(f)–2(b)(4) provided an exception to withholding if the transferee relies on a certification from the partnership stating that if the

[2] Under § 1.6050K–1(c), the partnership must provide Form 8308 to the transferor by January 31 of the calendar year following the calendar year in which the relevant exchange occurred or, if later, 30 days after the partnership is notified of the exchange.

partnership sold all of its assets at fair market value on the determination date, the amount of net effectively connected gain resulting from the deemed sale would be less than 10 percent of the total net gain from the deemed sale (the EC Gain Exception). The EC Gain Exception also applied to a partnership that is a transferee because it makes a distribution, in which case the partnership can rely on its books and records as of the determination date to determine if the EC Gain Exception applies. One comment suggested that the EC Gain Exception should refer to the transferor's distributive share of net effectively connected gain and should take into account, when applicable, the transferor's eligibility for benefits under an income tax treaty, rather than the aggregate amount of net effectively connected gain that would be realized by the partnership upon the deemed sale described in section 864(c)(8) and proposed § 1.864(c)(8)–1. With respect to treaty benefits, however, the comment acknowledged that the maximum tax liability certification provided in § 1.1446(f)–2(c)(4) could provide the same result.

The final regulations adopt this comment in part. Specifically, § 1.1446(f)–2(b)(4)(i)(A)(*2*) provides, in relevant part, that a transferee may rely on a certification from the partnership that states that if the partnership sold all of its assets at fair market value on the determination date in the manner described in § 1.864(c)(8)–1(c), the transferor's distributive share of net effectively connected gain from the partnership would be either zero or less than 10 percent of the transferor's distributive share of the total net gain from the partnership. Accordingly, this modification applies to situations in which the transferor would not have a distributive share of net effectively connected gain (including by reason of having a distributive share of net effectively connected loss). This modification, therefore, generally adopts the suggestion provided in the comment to account for the transferor's distributive share of net effectively connected gain. Additionally, these final regulations retain the rules provided in proposed § 1.1446(f)–2(b)(4)(i)(A) and (B) to allow partnerships to make the relevant determination at the partnership level as of the determination date, without regard to the transferor's distributive share of net effectively connected gain. § 1.1446(f)–2(b)(4)(i)(A)(*1*). For this purpose, however, the final regulations simplify the partnership-level exception to withholding by combining proposed § 1.1446(f)–2(b)(4)(i)(A) and (B) into a single rule; this simplification is intended to be non-substantive.

These final regulations do not adopt the suggestion in the comment regarding the transferor's eligibility for benefits under an income tax treaty. With respect to treaty benefits, the Treasury Department and the IRS believe that existing exceptions and adjustments, including modifications provided in this rulemaking, adequately address that aspect of the comment. See, *e.g.,* § 1.1446(f)–2(b)(7) (exception to withholding when a treaty claim covers all of the gain from the transfer); § 1.1446(f)-2(c)(2)(iv) and section IV.B.3 of this Summary of Comments and Explanation of Revisions (modified amount realized procedures for transferors that are foreign partnerships); and § 1.1446(f)–2(c)(4) (adjustments to the amount to withhold based on the transferor's maximum tax liability).

ii. Partnership Not Engaged in a Trade or Business Within the United States

Section 864(c)(8), by its terms, applies only to a transfer of an interest in a partnership that is engaged in a trade or business within the United States (a USTB partnership). See section 864(c)(8)(A); see also § 1.864(c)(8)–1(b)(1). When a partnership holds U.S. real property interests and is also subject to section 864(c)(8) because it is engaged in a trade or business within the United States, the computations provided in § 1.864(c)(8)–1(c) take into account any U.S. real property interests held by the partnership. § 1.864(c)(8)–1(d). Alternatively, for a partnership that is not a USTB partnership (for example, the partnership's only assets consist of foreign business assets and U.S. real property interests that are not used in a trade or business within the United States, such as shares of a United States real property holding corporation), § 1.864(c)(8)–1(d) provides that the rules of section 864(c)(8) and § 1.864(c)(8)–1 do not apply to a transfer of an interest in that partnership. One comment requested that the final regulations coordinate section 1446(f)(1) withholding with the rule provided in § 1.864(c)(8)–1(d) by clarifying that, for a partnership that is not described in § 1.1445–11T(d)(1), the EC Gain Exception applies to situations in which the partnership would not have effectively connected gain as of the determination date without the application of section 897(a). The comment noted that under the proposed regulations, no exception to withholding is provided for a transfer that would not be subject to section 864(c)(8) because the partnership is not a USTB partnership.

The Treasury Department and the IRS agree that a transfer of an interest in a partnership that is not engaged in a trade or business in the United States is not subject to section 864(c)(8) and, therefore, should be excepted from withholding under section 1446(f). Accordingly, § 1.1446(f)–2(b)(4)(i)(B) provides that the transferee may rely on a certification from the partnership stating that the partnership was not engaged in a trade or business within the United States at any time during the taxable year of the partnership through the date of transfer (that is, the partnership was not a USTB partnership at any time during the period beginning on the first day of the partnership's taxable year in which the transfer occurs and ending on the close of the date of transfer). While this modification takes into account the general scenario described in the comment (that is, the partnership only holds foreign business assets and U.S. real property interests that are not part of a trade or business and thus is not a USTB partnership), this modification also applies to any situation in which a partnership whose interest is transferred is not a USTB partnership during the relevant period, regardless of whether that partnership holds U.S. real property interests. For USTB partnerships that hold U.S. real property interests, deemed sale gain attributable to U.S. real property interests continues to be treated as effectively connected gain for purposes of the 10-percent prong of the EC Gain Exception provided in § 1.1446(f)–2(b)(4)(i)(A). Finally, for partnerships that are described in § 1.1445–11T(d)(1), see § 1.1446(f)–1(d).

Similar changes are made to the EC Gain Exception as it applies to transfers of PTP interests. See section VI.B.2 of this Summary of Comments and Explanation of Revisions and § 1.1446(f)–4(b)(3).

4. 10-Percent ECI Exception

Proposed § 1.1446(f)–2(b)(5) provided an exception to withholding if the transferee relies on a certification from the transferor providing, in relevant part, that the transferor was a partner in the partnership for the immediately prior taxable year and the two preceding taxable years and the transferor's allocable share of effectively connected taxable income (determined under § 1.1446–2) (ECTI) was less than 10 percent of the transferor's total distributive share of net income received from the partnership, and less than $1 million, in each of those years. For this purpose, proposed § 1.1446(f)–

2(b)(5) provided that the transferor's allocable share of ECTI is determined by reference to Form 8805, *Foreign Partner's Information Statement of Section 1446 Withholding Tax,* unless the transferor was allocated an allocable share of loss that is effectively connected with the conduct of a trade or business within the United States, or had deductions that are properly allocated and apportioned to income effectively connected with the conduct of a trade or business within the United States, in which case it is treated as having an allocable share of ECTI for that year of zero. See proposed § 1.1446(f)–2(b)(5)(iii). As a result, the exception provided in proposed § 1.1446(f)–2(b)(5) could be used only if a transferor was allocated either a positive amount of ECTI (as reported on Form 8805) or an effectively connected loss (such that no Form 8805 was provided) in each year. Additionally, under proposed § 1.1446(f)–2(b)(5)(iv), a transferor could not provide the certification required for the exception if the transferor did not have a distributive share of net income from the partnership for each year described in proposed § 1.1446(f)–2(b)(5)(i)(A). Finally, the proposed regulations provided that a transferee may not rely on a certification provided by the transferor if the transferor was not a partner in the partnership for each year described in proposed § 1.1446(f)–2(b)(5)(i)(A).

Comments explained that in some cases partnership investments are structured to minimize the risk that a foreign partner will have effectively connected income or loss; and, for this purpose, a foreign partner in such a structure will not have an allocable share of ECTI or effectively connected loss under the partnership agreement. As a result, if that foreign partner transfers its interest in the partnership, it would not qualify for the exception to withholding provided in proposed § 1.1446(f)–2(b)(5) because it would not receive a Form 8805 nor have an effectively connected loss for each of the taxable years described in proposed § 1.1446(f)–2(b)(5)(i)(A). To address this issue, one of the comments suggested that the final regulations modify proposed § 1.1446(f)–2(b)(5) to provide relief to transferors with neither an allocable share of ECTI nor an effectively connected loss.

The same comment suggested that, for situations in which a foreign partner is allocated effectively connected items, the exception should look to allocations of gross amounts rather than net amounts in order to more accurately reflect the partnership's capacity to produce effectively connected income or gain. The comment explained that this change would serve as a more accurate proxy for the tax consequences that would occur under section 864(c)(8) by reason of the transfer. For example, a partnership may generate significant amounts of losses or deductions during the relevant period resulting in small amounts of net ECTI, but nevertheless hold assets with significant amounts of built-in gain that would be treated as effectively connected gain on a deemed sale. In that case, the transferor would be able to use the exception to withholding provided in proposed § 1.1446(f)–2(b)(5) even though the transferor may realize a significant amount of gain under section 864(c)(8) by reason of the transfer. Finally, with respect to the period during which the transferor was required to be a partner in the partnership, the comment recommended changing the period provided in proposed § 1.1446(f)–2(b)(5)(i)(A) to allow for an exception to withholding when the transferor was not a partner in the partnership for the transferor's immediately prior taxable year and the two preceding taxable years (the look-back period), provided the transferor was a partner in the partnership long enough to receive at least one Schedule K–1 (Form 1065).

In response to comments, these final regulations modify the exception to withholding under § 1.1446(f)–2(b)(5). Under the exception in these final regulations (the ECI Exception), a transferor may qualify if its distributive share of gross effectively connected income from the partnership for each taxable year within the look-back period was less than $1 million and less than 10 percent of the transferor's total distributive share of gross income from the partnership for that year, with both amounts reflected on a Schedule K–1 (Form 1065) (or other statement furnished to the partner) received from the partnership for each year. Because the ECI Exception looks to the transferor's share of effectively connected income (as reported on a Schedule K–1 or other statement furnished to the partner), rather than its allocable share of ECTI, a transferor that is not allocated any effectively connected income or loss in any relevant year can still use the exception even if it has not received a Form 8805 for that year. The ECI Exception also adopts the suggestion in the comment to look to gross amounts of income, rather than net amounts of income, for purposes of determining whether the transferor's distributive share of effectively connected income was less than 10 percent of the transferor's total distributive share of income from the partnership. As suggested by the comment, this change is intended to provide a more accurate proxy for the tax consequences that would arise under section 864(c)(8) by reason of the transfer. Consistent with this change, the rule provided in proposed § 1.1446(f)–2(b)(5)(iv) is modified to state that a transferor cannot provide the certification required for the ECI Exception if the transferor did not have a distributive share of gross income from the partnership in each of the relevant years. § 1.1446(f)–2(b)(5)(iii). Therefore, a transferor will generally be able to use the ECI Exception even if it is allocated a distributive share of net loss from the partnership for the relevant taxable year.

These final regulations do not adopt the recommendation in the comment with respect to the relevant holding period because the Treasury Department and the IRS have determined that reducing a transferor's required length of time to be a partner in a partnership for purposes of the ECI Exception would not provide an adequate indication of the amount of the transferor's effectively connected gain realized in connection with the transfer.

5. Claims for Treaty Benefits

Under the proposed regulations, a transferor may claim an exception or adjustment to withholding when it qualifies for treaty benefits with respect to a transfer of a partnership interest (including a transfer of a PTP interest). See proposed §§ 1.1446(f)–2(b)(7) and 1.1446(f)–4(b)(6). These rules required that the certification to claim treaty benefits include an applicable withholding certificate that contains the information necessary to support the claim. Comments requested clarification of the information required to be provided on Form W–8BEN, *Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals),* or Form W–8BEN–E, *Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities)* in order to claim treaty benefits for purposes of section 1446(f).

To address the comments, the IRS intends to revise the instructions to Forms W–8BEN and W–8BEN–E to describe the information required to be provided for making a treaty claim for purposes of section 1446(f), including a treaty claim made with respect to a transfer of a PTP interest. To make the rules regarding claims for treaty benefits more administrable, these final

regulations allow a transferor to use the applicable withholding certificate as the certification for making a claim for benefits under an income tax treaty.

6. Additional Comments Regarding Exceptions to Withholding

i. Disguised Sales

Proposed § 1.864(c)(8)–1(g)(5) defined a transfer for purposes of the section 864(c)(8) proposed regulations as including a transfer treated as a sale or exchange under section 707(a)(2)(B) (a disguised sale). One comment requested an exception from section 1446(f) withholding for certain transactions that occur in connection with the formation and initial funding of an investment partnership, as well as redemptions and admissions of new partners over time, that could be characterized as disguised sales of partnership interests. The comment acknowledged that addressing the substantive issue regarding what constitutes a disguised sale of a partnership interest is beyond the scope of this rulemaking. Nonetheless, the comment recommended an exception from section 1446(f) withholding for certain transactions involving the formation and funding of a partnership and redemptions and admissions of new partners over time. The final regulations do not adopt the recommendation provided in this comment. If a contributing partner is treated as acquiring a partnership interest from a foreign person for Federal income tax purposes, it is appropriate to impose a withholding obligation on the contributing partner to ensure the collection of tax on gain under section 864(c)(8). Further, as the comment noted, the issue of what constitutes a disguised sale of a partnership interest and the tax consequences flowing from that treatment are not unique to the application of these final regulations. After studying the issue, the Treasury Department and the IRS have determined that adding an exception to withholding to take certain cases into account would require a determination, at least in part, of what constitutes a disguised sale of a partnership interest in this context, and the issue is, therefore, outside the scope of this rulemaking.

ii. Withholding Foreign Partnerships and Withholding Foreign Trusts

Comments requested an exception to withholding for transferors that are withholding foreign partnerships (WPs) and withholding foreign trusts (WTs) if they assume withholding under section 1446(f). WPs and WTs are foreign partnerships and trusts that enter into agreements with the IRS to assume primary withholding and reporting responsibilities on payments subject to withholding under chapters 3 and 4 with respect to their partners, owners, or beneficiaries (as applicable). One of the comments suggested that without such a rule, partners of a WP would be subject to duplicative withholding.

The final regulations do not adopt the suggestions contained in these comments. First, a rule allowing WPs and WTs to assume withholding under section 1446(f) would create complexity and require extensive coordination with the existing provisions for withholding and reporting in the agreements that WPs and WTs have entered into with the IRS. The comments do not provide any suggestions on how to address the many issues that would arise if such a rule were adopted. Further, the comments do not indicate that such a rule would have a material impact on taxpayers that would justify the allocation of resources necessary to provide guidance to these taxpayers. Second, any concerns regarding duplicative withholding were already addressed under the proposed regulations, which allow a foreign partnership to credit any withholding under section 1446(f) against its own section 1446(a) withholding liability. See §§ 1.1446(f)–2(e)(2)(ii) and 1.1446(f)–4(e)(2)(ii).

iii. Earnout Payments

A comment noted that a transfer of a partnership interest may be subject to an earnout provision that entitles the transferor to future payments based on the achievement of specific goals. The comment requested guidance clarifying that these future payments will be subject to an exception to withholding to the extent that the original transfer qualified for an exception to withholding. Under the proposed regulations, an exception to withholding in § 1.1446(f)–2 eliminates any requirement to withhold on the amount realized from the transfer of a partnership interest. Thus, if an exception to withholding applies at the time of the transfer of a partnership interest, it will also apply to any future payments made to the transferor that are treated as an amount realized from such transfer. As a result, no change is needed in response to this comment.

B. Determining the Amount To Withhold

If an exception to withholding under proposed § 1.1446(f)–2(b) does not apply, proposed § 1.1446(f)–2(c)(1) provided that a transferee is required to withhold 10 percent of the amount realized on the transfer of the partnership interest. Proposed § 1.1446(f)–2(c) provided guidance for determining the amount to withhold and provided certain procedures that allow for adjustments to the amount to withhold that are intended to better reflect the transferor's tax liability on gain under section 864(c)(8). A transferee may use these adjustment procedures when it relies on a certification from the transferor (or, if applicable, from the partnership). The procedures for determining the amount to withhold, therefore, employ the same self-certification procedure provided in proposed § 1.1446(f)–2(b). See generally section IV.A of this Summary of Comments and Explanation of Revisions.

1. Definition of Amount Realized

Proposed § 1.1446(f)–2(c)(2)(i) provided generally that the amount realized on a transfer of a partnership interest is determined, in part, under section 752 (including §§ 1.752–1 through 1.752–7); accordingly, the amount realized includes any reduction in the transferor's share of partnership liabilities. One comment requested that the final regulations modify the amount realized definition to exclude any reduction to the transferor's share of partnership liabilities. The comment pointed to the potential liquidity concerns that could occur when the amount of liabilities assumed exceeds the cash or other property exchanged in the transfer. The Treasury Department and the IRS have determined that it is inappropriate to exclude a reduction in a transferor's share of partnership liabilities from amount realized. Further, proposed § 1.1446(f)-2(c)(3), which is retained in these final regulations, addresses the liquidity concerns raised in this comment. That provision determines the amount to withhold without regard to any decrease in the transferor's share of partnership liabilities, but only if the amount otherwise required to be withheld would exceed the amount realized (determined without regard to any decrease in the transferor's share of partnership liabilities).

2. Modified Amount Realized for Transfers by Foreign Partnerships

Proposed § 1.1446(f)–2(c)(2)(iv) provided a procedure to determine the amount realized when the transferor of a partnership interest is a foreign partnership. Specifically, when a foreign partnership transfers an interest in a partnership, proposed § 1.1446(f)–2(c)(2)(iv) provided that the transferee of the interest may rely on a certification

provided by the transferor partnership that provides a modified amount realized. The modified amount realized is determined by multiplying the amount realized on the transfer (as determined under proposed § 1.1446(f)–2(c)(2)) by the percentage of the gain from the transfer that would be allocated to presumed foreign taxable persons, which include any direct or indirect partners of the transferor partnership that have not provided a certification of non-foreign status. Proposed § 1.1446(f)–2(c)(2)(iv)(B). To make the certification, the transferor partnership must provide to the transferee a Form W–8IMY, *Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding and Reporting,* a withholding statement allocating the gain to each partner, and a certification of non-foreign status for each partner that is treated as a U.S. person. See proposed § 1.1446(f)–2(c)(2)(iv)(C). If the transferee may rely on the certification, the modified amount realized is treated as the amount realized on the transfer.

One comment recommended that the final regulations expand this approach for determining the modified amount realized on a transfer to take into account situations in which a foreign partner (direct or indirect) in the transferor partnership is eligible for treaty benefits. These final regulations adopt this recommendation. Accordingly, these final regulations modify proposed § 1.1446(f)–2(c)(2)(iv) to allow for a reduction of the amount realized when a transferor that is a foreign partnership has a direct or indirect partner that is not subject to tax on gain from a transfer pursuant to an applicable U.S. income tax treaty. Specifically, this modification provides that a treaty-eligible partner is not a presumed foreign taxable person for purposes of determining the modified amount realized under § 1.1446(f)–2(c)(2)(iv). A foreign partnership that provides a certification of modified amount realized must include, in addition to the Form W–8IMY and a withholding statement, the certification of treaty benefits (on a Form W–8BEN or Form W–8BEN–E) from each direct or indirect partner that is not a presumed foreign taxable person. § 1.1446(f)–2(c)(2)(iv)(C).

Similar changes are made to the modified amount realized procedure for transfers of PTP interests. See section VI.C.1 of this Summary of Comments and Explanation of Revisions and § 1.1446(f)–4(c)(2)(ii).

3. Certification of Maximum Tax Liability

Proposed § 1.1446(f)–2(c)(4) provided a procedure to determine the amount to withhold under section 1446(f)(1) and proposed § 1.1446(f)–2(a) that is intended to estimate the amount of tax that the transferor is required to pay on gain under section 864(c)(8). Specifically, the procedure allows a transferee to withhold based on a certification received from the transferor containing certain information relating to the transferor and the transfer, including the transferor's maximum tax liability (as determined under proposed § 1.1446(f)–2(c)(4)(ii)) on the transfer. A transferee may rely on a certification received from a transferor that is a foreign corporation, a nonresident alien individual, or a foreign partnership regarding the transferor's maximum tax liability. Proposed § 1.1446(f)–2(c)(4)(i). A transferor that is a foreign partnership is treated as a nonresident alien individual for purposes of determining the transferor's maximum tax liability. Id. A comment pointed out that this rule adopts an entity approach with respect to determining a foreign partnership's maximum tax liability that presumes the partnership is liable for tax on its full distributive share of the effectively connected items from the transfer at individual tax rates, regardless of whether any partners in the partnership are United States persons. The comment suggested that the final regulations modify this rule for determining a foreign partnership's maximum tax liability based on the look-through principles used in proposed § 1.1446(f)–2(c)(2)(iv); that is, this modification would allow a foreign partnership to be treated as a United States person to the extent that its partners provide certifications of non-foreign status or to the extent that its partners would be eligible for treaty benefits.

These final regulations do not adopt the suggestion contained in this comment. The Treasury Department and the IRS have determined that adopting this suggestion could result in significant complexity and would increase the administrative burden on a transferee that receives a certification of maximum tax liability. The approach suggested in the comment also raises potentially broader issues, including computational issues, that are outside the scope of these final regulations. Finally, the Treasury Department and the IRS have determined that the modifications to § 1.1446(f)-2(c)(2)(iv), which allows claims for treaty benefits to be taken into account for purposes of determining the modified amount realized, provide sufficient relief in many of the cases in which the concerns raised in this comment would arise. See section IV.B.2 of this Summary of Comments and Explanation of Revisions.

In response to informal comments, these final regulations modify the proposed regulations to allow transferors that are foreign trusts to use the maximum tax liability procedure in § 1.1446(f)–2(c)(4) to reduce the amount to withhold. Similar to the approach taken with respect to foreign partnerships, these rules treat the foreign trust as a nonresident alien individual for purposes of computing its maximum tax liability under § 1.1446(f)–2(c)(4).

C. Other Comments and Changes to the Proposed Regulations

1. Determining Basis

A comment asserted that it is often difficult for the transferor of a partnership interest to know its basis in the transferred interest at the time of transfer; that is, regardless of the § 1.706–4 method used, a transferor usually has to wait to receive its Schedule K–1 (Form 1065) for the taxable year of the transfer before determining its basis accurately. As a result, the comment recommended a rule that would allow transferors and transferees to calculate the basis of a transferred partnership interest (solely for purposes of section 1446(f)) by reference to reasonable assumptions that can be made with certainty at the time of the transfer.

The Treasury Department and the IRS have determined that the concern raised by the comment was already sufficiently addressed in the proposed regulations. Specifically, the determination date rules of § 1.1446(f)–1(c)(4), which appeared in the proposed regulations and are retained in the final regulations, provide substantial flexibility with respect to making certain determinations under section 1446(f)(1). For example, a transferor (other than a controlling partner) could determine its adjusted basis in the transferred partnership interest as of the first day of the partnership's taxable year in which the transfer occurs. See §§ 1.1446(f)–1(c)(4)(i)(C)(*1*) and 1.1446(f)–2(c)(4)(iii)(B). Additionally, the No Realized Gain exception provided in § 1.1446(f)–2(b)(3) similarly allows the transferor to make the relevant determinations as of the determination date.

2. Qualified Foreign Pension Funds

Section 1446(f)(5) provides that any term used in both section 1446(f) and section 1445 will have the meaning provided in section 1445. Section 1445(f)(3) defines a foreign person as any person other than (i) a United States person and (ii) except as otherwise provided by the Secretary, an entity with respect to which section 897 does not apply due to section 897(l). Section 897(l), in turn, excludes qualified foreign pension funds (QFPFs) from the application of section 897. Accordingly, QFPFs are not treated as foreign persons under section 1445.

Section 1446(f)(6) provides the Secretary of the Treasury authority to prescribe regulations that are necessary to carry out the purposes of section 1446(f). Pursuant to this authority, the proposed regulations provided a definition of foreign person that applies for purposes of the regulations under section 1446(f). Specifically, proposed § 1.1446(f)–1(b)(4) defined a foreign person as a person that is not a United States person. Proposed § 1.1446(f)–1(b)(13) defined a United States person as a person described in section 7701(a)(30). Because QFPFs are not persons described in section 7701(a)(30), they are foreign persons for purposes of §§ 1.1446(f)–1 through 1.1446(f)–5.

One comment requested that these final regulations clarify that QFPFs are foreign persons for purposes of section 1446(f). The Treasury Department and the IRS have determined that the proposed regulations provided sufficient clarity regarding the treatment of QFPFs by specifically defining the term foreign person for purposes of §§ 1.1446(f)–1 through 1.1446(f)–5. The final regulations, therefore, adopt the relevant definitions provided in the proposed regulations with respect to QFPFs.

3. Valuation of Partnership Property

One comment described a situation in which the transferor and transferee of a partnership interest value partnership assets differently than the partnership does. The comment recommended, where relevant, a clarification to the final regulations allowing for a valuation of partnership assets based on the transferor's amount realized on a per transfer basis, provided that any valuation is supported by an arm's length price on which the transferor and transferee have agreed to execute the transaction. The final regulations do not adopt this recommendation. Valuation issues are not unique to the application of these final regulations; therefore, providing an explicit valuation rule in these final regulations that would take into account the situation described in the comment goes beyond the scope of this rulemaking.

4. Credit for Amounts Withheld on Partnerships, Trusts, or Estates

The proposed regulations provided rules prescribing the manner in which a credit for an amount withheld under section 1446(f) may be claimed by a foreign individual, corporation, or partnership. The proposed regulations provided in § 1.1446–3(c)(4) that a foreign partnership that was withheld upon under section 1446(f) could credit the amount withheld against its tax liability under section 1446(a) to the extent the amount is allocable to foreign partners. The Treasury Department and the IRS intend to amend the instructions to Forms 8804, 8805, and 8813 to provide that to obtain a credit against its section 1446(a) liability, a foreign partnership withheld upon under section 1446(f) on the sale of its non-PTP interest must attach to its Form 8804, *Annual Return for Partnership Withholding Tax (Section 1446),* a stamped copy of Form 8288–A, *Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests.*

These final regulations provide guidance for foreign trusts or estates that are withheld upon under section 1446(f). Specifically, § 1.1446(f)–2(e)(2)(ii) provides that a foreign trust or estate may claim a credit for an amount withheld under section 1446(f) in accordance with § 1.1462–1. Thus, the trust or estate may claim a credit to the extent it is ultimately liable for tax on the gain under section 864(c)(8). Similar guidance is provided for foreign trusts or estates claiming credit for amounts withheld on transfers of PTP interests. See § 1.1446(f)–4(e)(2)(ii).

5. Certifications Provided by Grantor Trusts

Under proposed § 1.1446(f)–1(c)(2)(vii), a certification provided by a transferor that is a grantor or other owner of a grantor trust was required to identify the portion of the amount realized attributable to the grantor or owner. These final regulations retain this rule, but also include a mechanism for the grantor trust to provide the certification on behalf of the transferor to a transferee. Under this allowance, a foreign grantor trust may provide to the transferee a Form W–8IMY, a withholding statement that provides the percentage of the amount realized allocable to each grantor or owner of the trust, and any applicable certification for each grantor or owner. A domestic grantor trust that has a foreign grantor or other owner may provide a similar statement in lieu of Form W–8IMY. The allowance described in this paragraph may also be applied in the context of a grantor or other owner of a grantor trust transferring a PTP interest.

V. Partnership's Requirement To Withhold Under Section 1446(f)(4) on Distributions to Transferee

Section 1446(f)(4) provides that if a transferee fails to withhold any amount required to be withheld under section 1446(f)(1), the partnership must deduct and withhold from distributions to the transferee a tax in an amount equal to the amount the transferee failed to withhold (plus interest). Proposed § 1.1446(f)–3 provided rules that implement a partnership's requirement to withhold under section 1446(f)(4), including rules for determining when a partnership is required to withhold and report under section 1446(f)(4), rules for determining if an exception to withholding applies, and rules for determining the amount required to be withheld (including the computation of interest). Proposed § 1.1446(f)–3 also provided rules regarding the effect of section 1446(f)(4) withholding on the transferee and transferor, including procedures that require the partnership to make any claim (on behalf of the transferee) for credit or refund for amounts overwithheld under section 1446(f)(4).

A. Scope of Withholding Obligation Under § 1.1446(f)–3

Proposed § 1.1446(f)–3(a)(1) provided that if a transferee fails to withhold any amount required to be withheld under proposed § 1.1446(f)–2, the partnership whose interest was transferred must withhold from any distributions made to the transferee in accordance with the rules provided in proposed § 1.1446(f)–3. To determine its withholding obligation under proposed § 1.1446(f)–3, if any, a partnership may rely on information provided in a certification received from the transferee described in proposed § 1.1446(f)–2(d)(2) (a certification of withholding) unless it knows, or has reason to know, that the certification is incorrect or unreliable. Proposed § 1.1446(f)–3(a)(1). The proposed regulations, therefore, required the partnership to review any certification of withholding received from the transferee, including any underlying certification from a transferor claiming an exception or adjustment to withholding, because the partnership could have information suggesting that the certification is

incorrect or unreliable, and that information may not be available to the transferee (for example, if the information was contained in the partnership's books and records). See generally section IV.B of the Explanation of Provisions section of the preamble to the proposed regulations. The transferee must provide the certification of withholding to the partnership within 10 days after the date of the transfer and deposit any tax due under section 1446(f)(1) within 20 days after the date of the transfer. Proposed § 1.1446(f)–2(d). If a partnership does not receive, or cannot rely on, a certification of withholding, it must withhold on the entire amount of each distribution made to the transferee until it may rely on a certification of withholding to determine that it has satisfied its section 1446(f)(4) liability. Proposed § 1.1446(f)–3(c).

1. Partnership's Review of a Certification of Withholding

A comment stated that the rule in proposed § 1.1446(f)–3(a)(1) is problematic as it may require a partnership to withhold under section 1446(f)(4) on a transferee that has fully complied with its withholding obligations under section 1446(f)(1) by properly relying on a certification from the transferor to reduce or eliminate withholding. This situation could occur, for example, if the partnership receives an underlying certification that a transferee has properly relied on, and the partnership has information in its possession indicating that the information contained in the certification is incorrect or unreliable. The comment therefore asserted that this rule is inconsistent with the statute, which imposes section 1446(f)(4) withholding when a transferee fails to withhold any amount required to be withheld under section 1446(f)(1). The comment also stated that the rule in proposed § 1.1446(f)–3(a)(1) essentially holds the transferee strictly liable for any underwithholding, which is inconsistent with the approaches taken in other withholding regimes, such as those provided under sections 1441 through 1443 and section 1445. Therefore, the comment recommended that the final regulations eliminate a partnership's requirement to withhold under section 1446(f)(4) when a transferee properly relies on a certification to reduce or eliminate the withholding tax.

The Treasury Department and the IRS have determined that the approach provided in proposed § 1.1446(f)–3(a)(1) is consistent with the language and purpose of section 1446(f), and thus the approach is retained in the final regulations. Unlike the withholding regimes under sections 1441 through 1443 and 1445, section 1446(f) explicitly provides a withholding obligation on a secondary party to the transfer, the partnership. Section 1446(f)(4) states that if a transferee fails to withhold any amount required to be withheld under section 1446(f)(1), the partnership must withhold from distributions to the transferee in an amount equal to the amount the transferee failed to withhold (plus any interest). Under section 1446(f)(1), a transferee is generally required to withhold 10 percent of the amount realized on a transfer subject to section 864(c)(8). While the proposed regulations allow the amount required to be withheld under section 1446(f)(1) to be reduced when a transferee relies on a claim for an exception or adjustment to withholding, this allowance is conditioned on proper review and acceptance of the claim by the partnership. If the conditions of the proposed regulations are not met, a transferee is required to withhold at the statutory rate under section 1446(f)(1) or will be subject to withholding under section 1446(f)(4).

To limit when withholding under section 1446(f)(4) is imposed on a transferee that properly relied on a certification from a transferor, the proposed regulations provided sufficient time for a transferee to consult with the partnership regarding the accuracy of the certification. Specifically, the proposed regulations require the transferee to provide a certification of withholding to the partnership within 10 days after the transfer and to deposit any withheld tax with the IRS within 20 days of the transfer. Therefore, a transferee may choose to withhold 10 percent of the amount realized on the transfer, and depending on the outcome of its consultation with the partnership, either repay the withheld amount to the transferor or deposit it with the IRS.

The final regulations adopt these rules from the proposed regulations and add a rule to limit the instances of withholding under section 1446(f)(4) on certain transferees, and to reduce the compliance burden on such transferees. This rule allows a partnership to determine that it does not have a withholding obligation under § 1.1446(f)–3 if it already possesses a Form W–9, *Request for Taxpayer Identification Number and Certification,* for the transferor that meets the requirements provided in § 1.1446(f)–2(b)(2) to establish non-foreign status, even if the transferee does not provide a certification of withholding to the partnership under § 1.1446(f)–2(d)(2). See § 1.1446(f)–3(a)(1). Consistent with the general rules for partnerships that rely on information in their books and records, a partnership may not apply this rule when it knows, or has reason to know, that the Form W–9 that it possesses is incorrect or unreliable.

2. Partnership's Discretion To Withhold

A comment also questioned the application of proposed § 1.1446(f)–3(a)(1) if the partnership receives a certification from the transferee and the partnership does not know or have reason to believe that the certification is incorrect or unreliable. Specifically, the comment noted that proposed § 1.1446(f)–3(a) states that a partnership may rely on a certification of withholding, which suggests that reliance on the certification is permissive and not mandatory. The comment suggested that, as a result, a partnership may choose to disregard a certification received from a transferee, and thus withhold on distributions to the transferee, even if the partnership does not know, and has no reason to believe, that the information contained in the statement is incorrect or unreliable. The comment noted that the resulting burden on the transferee is exacerbated because only the partnership, rather than the transferee, can directly obtain a refund of amounts withheld on distributions to the transferee under section 1446(f)(4). The comment recommended, therefore, that the final regulations clarify that a partnership must (rather than may) rely on a certification received from a transferee if the partnership does not know or have reason to know that the information contained in the certification is incorrect or unreliable.

The final regulations do not adopt this comment. The approach taken in the proposed regulations is consistent with other withholding regimes, which allow a withholding agent discretion in determining whether to rely on documentation that supports a claim for a reduced amount of withholding or an exception to withholding. See, *e.g.,* § 1.1441–1(b)(1). This discretion is afforded to the withholding agent because it is generally the party liable for any failure to withhold under section 1461. Further, because a withholding agent is liable under section 1461 only for underwithholding, it is unclear how a withholding agent that failed to reduce (or eliminate) the amount of withholding under such a rule could be held liable. Finally, because transferees are partners in the partnership, partnerships generally

would have an incentive to review and accept valid certifications of withholding provided by transferees, rather than withhold unnecessarily on them. For these reasons, the final regulations allow the partnership to determine whether to rely on a certification of withholding for purposes of section 1446(f)(4).

These final regulations do, however, modify the proposed regulations to allow the transferee, rather than the partnership, to obtain a refund of overwithholding for amounts withheld under section 1446(f)(4). As suggested by the comment, this modification mitigates some of the effect of any overwithholding. See section V.C of this Summary of Comments and Explanation of Revisions.

B. Removal of Withholding Under Section 1446(f)(4) by Publicly Traded Partnerships

Under proposed § 1.1446(f)–4(b)(3) and (4), a broker was not required to withhold on a transfer of a PTP interest when the publicly traded partnership claims on a qualified notice that an exception applies based on either of the following statements: (i) A statement that less than 10 percent of the total gain on a deemed sale of the publicly traded partnership's assets would be effectively connected gain, or no gain would have been effectively connected gain (the 10-percent exception); or (ii) a statement that the entire amount of a distribution is a qualified current income distribution, defined as a distribution that does not exceed the net income of the publicly traded partnership since the date of the last distribution (the qualified current income exception). Under the proposed regulations, a publicly traded partnership was required to withhold under section 1446(f)(4) only if the partnership posted a qualified notice that falsely stated that one of those exceptions to withholding under section 1446(f)(1) applied to a transfer (including a transfer that is a distribution), and a broker underwithheld in reliance on the qualified notice. The requirement for a publicly traded partnership to withhold under section 1446(f)(4) was included to ensure that publicly traded partnerships exercise due diligence when representing information on a qualified notice related to either exception given that a broker may rely on the notice to apply an exception to withholding under section 1446(f)(1).

Comments suggested that publicly traded partnerships would be unlikely to claim the exceptions to withholding on a qualified notice due to the consequences of issuing a false qualified notice, and that this would result in overwithholding on transfers of PTP interests. Further, comments pointed out that it would be difficult for publicly traded partnerships to determine the amount of underwithholding by brokers relying on a false qualified notice because publicly traded partnerships generally do not have information on transfers effected through brokers. A comment noted that a false qualified notice may result in a large amount of underwithholding because a broker may rely on the qualified notice for all transfers made between the time the notice is issued and the date of the next qualified notice (which is usually provided quarterly).

A comment also noted concerns with the rule in proposed § 1.1446(f)–3(c)(1)(ii)(C), which requires publicly traded partnerships to continue withholding on distributions under section 1446(f)(4) even when the transferee no longer owns an interest in the partnership. The comment noted that this rule could negatively affect market values of PTP interests because every person acquiring a PTP interest would be subject to the risk that future distributions may be reduced or even eliminated, even if the qualified notice has not yet been declared false. The comment suggested taking the approach in the proposed regulations that applied to transfers of non-PTP interests, which would allow the partnership to stop withholding on distributions when the transferee no longer owns an interest in the partnership, unless the partnership has actual knowledge that any successor to the transferee is related to the transferee or transferor.

In addition, a comment raised a practical concern about the timing of the withholding required under proposed § 1.1446(f)–3(c)(1)(i), which requires withholding to begin on the later of the date that is 30 days after the date of transfer, or 15 days after the date on which the partnership acquires actual knowledge that the transfer has occurred. The comment noted that a publicly traded partnership would be unable to withhold until it knows that it has issued a false qualified notice, and the comment therefore requested that any withholding obligation begin after the publicly traded partnership acquires knowledge that the qualified notice is incorrect.

The comments regarding the application of section 1446(f)(4) to publicly traded partnerships also included suggestions to address the concerns raised with respect to the withholding requirement. Several comments suggested removing the requirement for a publicly traded partnership to withhold under section 1446(f)(4) entirely. One comment suggested replacing the withholding requirement for a false qualified notice with an information reporting penalty (or other quantifiable penalty). Another comment suggested instead imposing a penalty on a preparer of a qualified notice if the preparer acts in bad faith or without a requisite standard of care. Other comments requested clarification on whether a ''false'' qualified notice is limited to a willfully false notice rather than any erroneous qualified notice.

The Treasury Department and the IRS have determined that a publicly traded partnership should not be required to withhold under section 1446(f)(4). This withholding would have necessarily impacted the distributions made to a transferee (or subsequent transferee) who bears no responsibility for the underwithholding resulting from an erroneous qualified notice (unlike the case of a transfer of a non-PTP interest). Rather, as it is the partnership that determines the contents of its qualified notice, the partnership should bear the consequences resulting from its representations on the notice rather than any specific transferee. As a result, these final regulations remove the requirement in the proposed regulations that a publicly traded partnership withhold on a transferee under § 1.1446(f)–3 and add instead provisions imposing liability for underwithholding under section 1461 on the partnership that issued the qualified notice. See § 1.1446(f)–4(b)(3)(i) and (c)(2)(iii) and sections VI.B.2 and VI.C.2 of this Summary of Comments and Explanation of Revisions. By removing the requirement for the partnership to withhold under section 1446(f)(4) on any transferees, this modification also addresses the comments noting concerns that withholding on specific transferees could negatively affect the market values of PTP interests. This modification also alleviates the need to address those comments concerning when withholding under section 1446(f)(4) would begin to apply.

These final regulations do not apply information reporting penalties in lieu of imposing a section 1461 liability on a publicly traded partnership. The comment to impose an information reporting penalty in lieu of a withholding requirement was not adopted in these final regulations due to concerns that a qualified notice may not be treated as an information return or a payee statement under section 6724(d) for purposes of applying penalties under section 6721 or 6722.

With respect to the comments suggesting that a publicly traded

partnership would be unable to obtain the information necessary to determine the underwithholding resulting from a broker's reliance on a qualified notice, for this determination, the Treasury Department and the IRS note that a publicly traded partnership should be able to obtain information on transfers of PTP interests from nominees holding interests in the partnership under § 1.6031(c)–1T (generally requiring a nominee to provide certain information about persons for whom it holds interests in the partnership, including information on transfers of partnership interests).

C. Credits and Refunds for Amounts Withheld Under Section 1446(f)(4)

Proposed § 1.1446(f)–3(e)(2) provides that a transferee may not obtain a refund if the amount of tax withheld under proposed § 1.1446(f)–3 exceeds the transferee's withholding tax liability under proposed § 1.1446(f)–2; instead, only the partnership may claim a refund on behalf of the transferee for the excess amount withheld under proposed § 1.1446(f)–3. The preamble to the proposed regulations provided that the purpose of this rule is to make the refund process more administrable and requested comments on this issue.

Comments requested that the transferee be allowed to directly claim a refund for the excess amount withheld under § 1.1446(f)–3. The comments explained that it would be neither practical, nor reasonable, to expect the partnership to claim the refund on behalf of the transferee in most circumstances. Thus, if the partnership does not seek a refund on behalf of the transferee for the excess amount withheld, the transferee may have no way to obtain the overwithheld amounts from the IRS.

One comment requested clarification regarding the manner in which proposed § 1.1446(f)–3(e)(2) measures the excess of the amount of tax withheld under § 1.1446(f)–3 over the transferee's withholding tax liability under § 1.1446(f)–2. The comment suggested, for example, computing the excess amount as the difference between the sum of any withholding under §§ 1.1446(f)–2 and 1.1446(f)–3, plus any tax on gain paid by reason of § 1.864(c)(8)–1, and the total tax liability of the foreign transferor (as defined in § 1.864(c)(8)–1(g)(3)) for the year in which the transfer occurred. Alternatively, the comment suggested computing the excess amount as the difference between the sum of any withholding under §§ 1.1446(f)–2 and 1.1446(f)–3 and the tax liability of the foreign transferor under § 1.864(c)(8)–1 on the transfer.

The Treasury Department and the IRS agree with these comments and modify these final regulations to allow a transferee to directly claim and obtain a refund for the excess amount withheld under § 1.1446(f)–3. Specifically, these final regulations modify § 1.1446(f)–3, in relevant part, to provide that a transferee may obtain a refund of the excess amount if it has made payments in excess of the tax which is properly due by the transferee for the tax period. Accordingly, under these final regulations, the partnership is not permitted to claim a refund on behalf of the transferee for the excess amount withheld under § 1.1446(f)–3.

The final regulations also clarify that the excess amount withheld under § 1.1446(f)–3 is the amount of tax and interest withheld under § 1.1446(f)–3 that exceeds the transferee's withholding tax liability under § 1.1446(f)–2 and any interest owed by the transferee with respect to such liability. § 1.1446(f)–3(e)(2). This rule retains the general approach in the proposed regulations that computes the excess amount as the difference between the amount withheld under § 1.1446(f)–3 and the transferee's withholding tax liability under § 1.1446(f)–2, but clarifies that both amounts are computed by including interest, and a refund may be claimed only to the extent that the excess amount produces an overpayment. While the final regulations do not explicitly adopt either of the specific suggestions made in the comment, this approach is generally consistent with the alternative suggestion described in the comment as the final regulations also allow a transferee to establish that it has a reduced withholding tax liability under § 1.1446(f)–2 based on the amount of tax due by the foreign transferor on gain subject to § 1.864(c)(8)–1, or that tax has already been paid by the foreign transferor. See § 1.1446(f)–5(b) and section IV.A of this Summary of Comments and Explanation of Revisions. In order to coordinate a partnership's obligation to withhold with the transferee's withholding liability, these final regulations modify § 1.1446(f)–2(d)(2) to provide that a transferee's withholding tax liability under § 1.1446(f)–2 is not satisfied if a partnership knows or has reason to know that a certification relied on by the transferee to reduce or eliminate withholding is incorrect or unreliable. See section V.A.1 of this Summary of Comments and Explanation of Revisions.

D. Liability of a Related Person to the Transferee

The proposed regulations generally did not require a partnership to continue withholding under section 1446(f)(4) on distributions made after the transferee disposed of its interest. However, if the interest were transferred to a person that is related to the transferee or the transferor from which the transferee acquired its interest (that is, a subsequent transferee that bears a relationship described in sections 267(b) or 707(b)(1) with respect to the relevant party), and if the partnership had actual knowledge of the subsequent transferee's relationship to the relevant party, proposed § 1.1446(f)–3(c)(1)(ii)(C) required the partnership to withhold on distributions made to the subsequent transferee. This rule was intended to prevent a transferee (or any subsequent transferee) from avoiding withholding under section 1446(f)(4) by transferring its interest to a related person. Consistent with this intent, the final regulations clarify that a related person is treated as liable for tax under section 1461 to the same extent to which the transferee is liable under § 1.1446(f)–2. This clarification is meant to prevent the related person that is withheld upon under section 1446(f)(4) from making a claim for a credit or refund of the withheld amount. These final regulations, therefore, ensure that a credit or refund is permitted only for an amount that exceeds the amount that the transferee failed to withhold.

VI. Withholding on the Transfer of a PTP Interest by a Foreign Person

Proposed § 1.1446(f)–4(a) implemented the withholding requirement under section 1446(f) on transfers of PTP interests. Under this rule, any broker that effects a transfer of a PTP interest on behalf of a foreign partner and receives the amount realized on behalf of the transferor is generally required to withhold a tax equal to 10 percent of the amount realized. Proposed § 1.1446(f)–4(b) provided certain exceptions to this requirement, and proposed § 1.1446(f)–4(c) provided rules for determining the amount realized for purposes of withholding on a transfer of a PTP interest. Proposed revisions to § 1.1461–1 provided rules for a broker to report the amount realized and tax withheld from a transfer of a PTP interest.

A. Scope of Withholding Obligation

1. Qualified Intermediary Agreement

The preamble to the proposed regulations stated that the Treasury Department and the IRS intend to

modify the qualified intermediary agreement (QI agreement) set forth in Revenue Procedure 2017–15, 2017–3 I.R.B. 437, to allow qualified intermediaries (QIs) to assume primary withholding responsibilities on amounts realized under section 1446(f) and on distributions by publicly traded partnerships under section 1446(a). Comments requested that the revisions to the QI agreement be set forth in proposed form before the modified QI agreement is published. In response to those comments, this section VI of this Summary of Comments and Explanation of Revisions describes certain requirements specific to QIs to preview several intended revisions to the QI agreement that relate to § 1.1446(f)–4. Additionally, section VII of this Summary of Comments and Explanation of Revisions describes certain requirements included in § 1.1446–4 of these final regulations that apply to QIs that receive distributions made by publicly traded partnerships. Since the QI agreement expires at the end of the 2022 calendar year, provisions related to these final regulations applicable to QIs will be incorporated into a revised QI agreement effective for the 2023 calendar year. As the provisions of these final regulations that relate to withholding with respect to transfers of PTP interests and distributions by publicly traded partnerships apply to QIs starting January 1, 2022, the requirements for QIs related to section 1446(a) and (f) for the 2022 calendar year will be set forth in a rider to the QI agreement. See section VIII of this Summary of Comments and Explanation of Revisions for a discussion of the applicability dates of these final regulations. A QI will not be required to include in a periodic review for the 2022 calendar year any review procedures with respect to the QI's compliance with sections 1446(a) and (f); therefore, the rider will not include any review procedures related to those sections, nor will the rider include any new certifications or information for purposes of Appendix I of the QI agreement for a QI with a certification period ending December 31, 2022.

2. Transfers of PTP Interests That Are Cleared and Settled at a Clearing Organization

The proposed regulations generally defined a broker as any person that, in the ordinary course of business, stands ready to effect sales made by others, and that, in connection with a transfer of a PTP interest, receives all or a portion of the amount realized on behalf of the transferor. Proposed § 1.1446(f)–1(b)(1). The proposed regulations provided that the term broker includes a clearing organization that effects the transfer of a PTP interest on behalf of the transferor. Id. In addition, the proposed regulations generally provided that a broker that pays the amount realized to a foreign broker is required to withhold unless the foreign broker is a QI that assumes primary withholding responsibility or is a U.S. branch treated as a U.S. person. Proposed § 1.1446(f)–4(a).

The Treasury Department and the IRS received comments requesting various exclusions and special rules for brokers effecting trades that are cleared and settled at a clearing organization. One comment requested that U.S. clearing organizations be excluded from the definition of broker in § 1.1446(f)–1(b)(1) in connection with their roles in the clearance and settlement of sales of PTP interests. The comment noted that U.S. clearing organizations perform a critical role in ensuring the functioning of the U.S. capital markets, and that imposing withholding requirements on U.S. clearing organizations may be disruptive to the market for trading PTP interests.

The comment also explained that within U.S. clearing organizations, trades of securities (including PTP interests) are frequently processed through a netting system, whereby each security and related money settlement obligation is netted to one net security and payment position per broker, with the clearing organization as the central counterparty. The netting system creates efficiencies that ensure the prompt clearance and settlement of securities transactions and increases liquidity in the market. The comment noted that this netting process is critical to orderly and efficient trading in the capital markets, and that withholding under section 1446(f) on a gross basis may cause netting to be impacted with respect to the clearance and settlement of PTP interests. The comment also noted that the Treasury Department and the IRS have historically recognized this issue by creating exceptions or special rules for clearing organizations in similar contexts. See §§ 1.1473–1(a)(3)(i)(C) and 1.6045–1(b), Example 2(vii).

The comment further explained that a U.S. clearing organization may also process bilateral transactions between members of the clearing organization for which the cash and securities exchanged are not netted by the clearing organization as described in the preceding paragraph. These transactions may include, among others, the transfer of cash and securities between a seller's broker and custodian in order to settle a trade. For example, a member broker effecting a sale of a PTP interest for a seller may make a payment of the gross proceeds to the custodian for the seller when the seller engages a broker that is not its custodian to effect the sale of the PTP interest through a clearing organization. The comment requested that withholding on such transactions be the responsibility of the member making the gross payment and not the clearing organization. The comment stated that the members of a U.S. clearing organization are in the better position to withhold on such transactions because they possess the information about the transaction necessary to determine whether withholding is required, whereas the role of the clearing organization in such cases is generally limited to transferring securities and cash based on instructions provided by the members.

Another comment requested a special rule for so-called ''delivery versus payment'' transactions. The comment noted that regulations under section 6045 (which require reporting by brokers of gross proceeds from sales of securities by U.S. nonexempt recipients) provide that in the case of a sale of securities through a ''cash on delivery'' or ''delivery versus payment'' account (or other similar account or transaction), only the broker that receives the gross proceeds from the sale against delivery of the securities sold is required to report the sale. See § 1.6045–1(c)(3)(iv). The comment requested that in the case of a ''delivery versus payment'' transaction, for purposes of section 1446(f), only the custodian for the seller should report and withhold on the sale, and not the broker paying the gross proceeds to the custodian. The comment noted that without such a rule for section 1446(f), certain brokers that are not currently documenting and reporting payments of gross proceeds for purposes of section 6045 would be required to create systems to document and, if necessary, withhold on and report payments to a custodian holding a PTP interest on behalf of a transferor and receiving the amount realized for purposes of section 1446(f).

The comment also noted that because brokers are not currently required to obtain documentation on custodians to which they make payments in connection with ''delivery versus payment'' transactions, a custodian may not be willing to provide documentation to the broker or accept less than the entire amount of gross proceeds from the sale, causing the trade to ''fail'' (in other words, the trade would not be settled with respect to the transferor holding the PTP interest through the

custodian). However, the comment acknowledged that if the withholding responsibility is only on the custodian, there is a risk that a custodian would be a nonqualified intermediary (NQI) and would not document or withhold on the transferor under section 1446(f). The comment suggested that this risk could be mitigated by requiring a clearing organization to withhold on these sales, and noted that U.S. clearing organizations already collect documentation on their members that are custodians for purposes of meeting other withholding requirements.

These final regulations retain the rule in the proposed regulations that a broker includes a clearing organization. However, the final regulations provide that a broker that is a U.S. clearing organization is not required to withhold on an amount realized on trades of PTP interests that are netted and that have a U.S. clearing organization as the central counterparty. The Treasury Department and the IRS have determined a U.S. clearing organization should not be required to withhold on such transactions under section 1446(f) at this time. The Treasury Department and the IRS understand that withholding by a U.S. clearing organization on a gross basis on such trades may be disruptive to the efficiency and liquidity of the trading of PTP interests in the capital markets. The Treasury Department and the IRS also understand that there are no NQI direct clearing members that participate directly in the net settlement system at a U.S. clearing organization at the present time. Therefore, there is no risk of underwithholding due to this exception based on current market practice. Further, the Treasury Department and the IRS understand that it is highly unlikely that a NQI would become such a member in the future because of restrictions in U.S. securities and banking laws on foreign banks and brokers, as well as the practical barriers to becoming a direct clearing member at a U.S. clearing organization. After carefully weighing the burdens and benefits of the possible approaches, the Treasury Department and the IRS have determined that the risk of any possible market disruption outweighs any benefit of imposing a withholding requirement on a U.S. clearing organization in these final regulations at the present time on trades settled through a net settlement system at the U.S. clearing organization.

However, in order to ensure that withholding on sales of PTP interests that have undergone a netting process at a U.S. clearing organization is satisfied by the member brokers and that there are no NQI direct clearing members participating in the net settlement system with respect to PTP interests, a U.S. clearing organization is required in these final regulations to report such sales (on a non-netted basis) for each direct clearing member on Form 1042–S, *Foreign Person's U.S. Source Income Subject to Withholding* (unless an exception applies). If this reporting on Form 1042–S indicates that an NQI is a direct clearing member of a U.S. clearing organization, the Treasury Department and the IRS will issue proposed guidance that would revise these final regulations to require withholding by the U.S. clearing organization on such NQIs.

With respect to transfers of cash and securities on a gross basis by a U.S. clearing organization at the instruction of its members in order to settle a trade of a PTP interest, these final regulations do not require withholding and reporting by the U.S. clearing organization. However, the Treasury Department and the IRS decline to adopt an exclusion from withholding and reporting with respect to brokers (other than U.S. clearing organizations) for ''delivery versus payment'' transactions. Therefore, under these final regulations, a broker paying an amount realized to a foreign custodian is required to withhold and report on the amount realized (unless an exception applies). This determination follows from concerns with cases in which brokers may pay amounts realized to custodians that are NQIs. To address the concerns raised in the comments about the difficulty of obtaining documentation on custodians in order to determine whether withholding or reporting applies, these final regulations permit a U.S. clearing organization to provide documentation on a member custodian to a member broker paying an amount realized to such custodian, subject to the notification and opt-out requirements described in the final regulations, and a broker may rely on such documentation. See § 1.1446(f)–4(a)(4). The Treasury Department and the IRS understand that it is possible for brokers to create a mechanism for imposing withholding on amounts realized paid to custodians that are NQIs (and thus avoiding failed trades).

3. Documentation of Non-Foreign Status of Broker

The proposed regulations provided that a broker must treat another broker as a foreign person unless it obtains documentation (including a certification of non-foreign status) establishing that the other broker is a U.S. person. See proposed § 1.1446(f)–4(a)(2)(iv).

One comment requested that the presumption rules under § 1.1441–1(b)(3)(iii) that apply to a payment subject to withholding under sections 1441 and 1442 also apply for purposes of section 1446(f) when a broker does not obtain documentation on another broker. In certain cases, this change would allow a broker to treat another broker, including a custodian, to which it pays an amount realized as a non-foreign person even when it does not obtain the documentation of non-foreign status required under the proposed regulations. This suggestion is not adopted in these final regulations. The presumption rules in § 1.1441–1(b)(3)(iii) are generally aimed at withholding agents that have an ongoing relationship with the payee and make periodic payments to the payee and, therefore, are likely to have some information on the payee in the withholding agent's account files or in documentation associated with a payment. Furthermore, many withholding agents that are required to withhold under sections 1441 and 1442 are generally subject to anti-money laundering/know your customer (AML/KYC) obligations that require the collection of customer information on account opening. Therefore, in most instances where the presumption rules in § 1.1441–1(b)(3)(iii) apply, the presumption would be foreign status. Those rules would not be appropriate in a transactional context where a broker may not have an ongoing relationship with another broker to which it pays an amount realized. The application of such rules to brokers required to withhold on sales of PTP interests under section 1446(f) in those cases would generally result in a presumption of U.S. status, which would disincentivize brokers from collecting tax documentation on another broker to which it pays an amount realized. Further, the Treasury Department and the IRS understand that there are a limited number of custodians for which a broker would need to obtain documentation. Accordingly, documenting a broker as a U.S. person would generally be a one-time event because a Form W–9 generally has indefinite validity (absent a change in circumstances).

However, in order to provide additional flexibility in cases in which a broker may have an existing relationship with another broker, these final regulations permit a broker to rely on documentation that it already possesses from the payee broker (rather than requiring new documentation for each transaction when the same payee

broker is used). Additionally, these final regulations provide a further allowance for a broker to rely on documentation required for transfers of PTP interests that is collected by a clearing organization. See section VI.A.2 of this Summary of Comments and Explanation of Revisions.

These final regulations also include a technical correction to the definition of foreign person to account for certain QIs that are not foreign entities. The term foreign person is defined in these final regulations to include QI branches of U.S. financial institutions. See § 1.1446(f)–1(b)(4). This definition is consistent with the definition of foreign person for purposes of sections 1441 through 1443, 1461, and the regulations under those sections. See § 1.1441–1(c)(2)(i).

4. QIs Assuming Section 1446(f) Withholding Responsibility

Under proposed § 1.1446(f)–4, a broker was not required to withhold on an amount realized paid to another broker that is a QI that represents on its withholding certificate (as described in § 1.1441–1(e)(3)(ii)) its assumption of primary withholding responsibility for chapter 3 withholding. With respect to a distribution made by a publicly traded partnership, the proposed regulations provided a similar allowance for a QI to assume primary withholding responsibility under section 1446(a) by acting as a nominee for the distribution. See proposed § 1.1446–4(b)(3).

The QI agreement generally permits a QI to assume primary withholding responsibilities on an account-by-account basis rather than on all payments made by a withholding agent to a QI. Comments requested generally similar flexibility for QIs assuming withholding responsibilities under sections 1446(a) and 1446(f), noting that the proposed regulations do not clearly state whether a QI would need to assume section 1446 withholding responsibilities as part of its overall withholding responsibilities. One comment noted the different system-related considerations in withholding on sale proceeds as opposed to withholding on payments of periodic income. To better match systems capabilities of withholding agents and QIs and provide for a more efficient withholding process, comments therefore requested that the regulations be clarified to permit a QI to assume primary withholding responsibilities under section 1446(a) and (f) regardless of whether the QI assumes primary withholding responsibilities for other payments subject to withholding under chapters 3 and 4. A comment requested that a QI be permitted to assume withholding responsibility under section 1446(a) but not section 1446(f), and vice versa. Another comment requested that a QI be permitted to assume withholding responsibility under section 1446(f) resulting from a sale of a PTP interest independent of whether the QI assumes primary withholding responsibility under section 1446(f) on distributions made by the publicly traded partnership.

The Treasury Department and the IRS agree that QIs should be permitted appropriate flexibility to make appropriate arrangements to assume, or not assume, certain withholding responsibilities. These final regulations allow a QI to assume primary withholding responsibility under section 1446(f) on a payment-by-payment basis. For example, a QI may assume primary withholding responsibility under section 1446(f) for a sale of a PTP interest but not a distribution, and vice versa. Further, a QI is permitted to assume (or not assume) primary withholding responsibility under section 1446(f) on a sale of a PTP interest regardless of whether the QI assumes primary withholding responsibilities under sections 1441 and 1442. However, under these final regulations a QI that assumes withholding responsibilities on any portion of a distribution from a publicly traded partnership will be required to assume withholding responsibilities for the entire distribution (in other words, a QI must either assume withholding responsibilities on the distribution for purposes of chapter 3 (including section 1446(a) and (f)) and chapter 4, or not assume withholding responsibilities for any of those purposes). See §§ 1.1446(f)–4(a)(8) and 1.1446–4(b)(3). This requirement will make withholding and reporting on distributions with respect to PTP interests more efficient because one party will perform the withholding and reporting on a distribution. The Treasury Department and the IRS intend for the revised QI agreement to incorporate the requirements for a QI that assumes primary withholding responsibility under section 1446(a) or (f).

Similar changes to those described above for QIs are included in these final regulations with respect to payments of amounts realized made to U.S. branches that agree to act as U.S. persons under section 1446(a) or (f). Additionally, these final regulations clarify in § 1.1446(f)–4(a)(2)(i)(B) that the requirements for a U.S. branch withholding certificate under § 1.1441–1(e)(3)(v) apply without regard to the requirement that the certificate include a representation that the income is not effectively connected with the conduct of a trade or business within the United States.

5. QIs Not Assuming Section 1446 Withholding Responsibility

Under the current QI agreement, a QI is not required to assume primary withholding responsibilities under chapters 3 and 4. In such cases, a QI provides withholding rate pool information on its account holders that are foreign persons (rather than specific information about each such account holder) to the withholding agent sufficient for the withholding agent to determine the amounts to withhold. The proposed regulations permitted an exception to withholding on an amount realized paid to a QI only when the QI assumes primary withholding responsibility, but provided no special rules for when a QI does not assume withholding responsibility under section 1446(f). Comments requested that a QI be permitted to not assume primary withholding responsibility under section 1446(f) if it provides to the broker paying an amount realized a withholding statement that allocates the amount realized to account holders of the QI selling their PTP interests in withholding rate pools, similar to the allowance for a QI to pass up withholding rate pools for purposes of section 1441. See § 1.1441–1(b)(2)(vii)(C) and (e)(5)(v)(C). In addition, for accounts not designated by a QI as accounts for which it acts under the QI agreement, a comment requested that the final regulations also permit a QI not assuming primary withholding responsibility under section 1446(f) to represent its status as a QI and provide to the broker a withholding statement allocating the amount realized to each account holder of the QI selling its PTP interest in the same transaction, along with specific account holder documentation, sufficient for the broker to determine the amount to withhold. This allowance would avoid any additional withholding that might apply were the QI instead required to represent its status as an NQI in those cases, as described in section VI.A.6 of this Summary of Comments and Explanation of Revisions, and would relieve a QI from filing a Form 1042–S in such a case. Comments also requested that a QI be permitted to report on Form 1042–S on a pooled basis (rather than to specific recipients) for section 1446(f) purposes to the same extent permitted for other payments covered by the QI agreement.

In response to these comments, the final regulations provide that a broker

may determine the amount to withhold under section 1446(f) on an amount realized paid to a QI that does not assume primary withholding responsibility under section 1446(f) based on aggregate information (in other words, in withholding rate pools) about the account holders of the QI that are transferring PTP interests. See § 1.1446(f)–4(a)(7). Under these final regulations, a broker may rely on a QI's allocation of an amount realized to a pool of foreign transferors subject to 10-percent withholding, a pool of foreign transferors that are excepted from withholding under § 1.1446(f)–4(b), and, to the extent permitted under chapter 4, U.S. transferors included in a chapter 4 withholding rate pool of U.S. payees. This allowance provides parity with sections 1441 and 1442 with respect to a QI's requirements for its withholding statements (and associated documentation) and will provide QIs and brokers making payments of amounts realized to QIs greater flexibility in meeting their section 1446(f) requirements. Additionally, under these final regulations a broker may also rely on specific payee information provided by a QI with respect to foreign transferors (rather than pooled information), thereby permitting the broker to withhold based on this information rather than treating the QI as an NQI in such a case (as would generally be the case for other amounts subject to withholding under chapter 3). See § 1.1446(f)–4(a)(7)(iii). A broker may also withhold as described in the preceding sentence for purposes of section 1446(a) under these final regulations in order to coordinate the rules applicable to QIs under both sections 1446(a) and (f). See § 1.1446–4(e) and section VII.C of this Summary of Comments and Explanation of Revisions. These final regulations also provide that in cases where a QI passes up specific payee information for a partner receiving a distribution or an amount realized, the nominee or broker shall treat the partner (that is, the QI's account holder) as the recipient for purposes of reporting on Form 1042–S. See § 1.1461–1(c)(1)(ii)(A)(*8*).

The revised QI agreement incorporates the allowances described in the preceding paragraph, including an allowance relieving a QI from filing a Form 1042–S to the extent that it has provided specific payee information to a broker that has issued a Form 1042–S to one or more account holders of the QI (although such a case will be within the scope of a QI's activities under the QI agreement). In addition, as requested by comments, the revised QI agreement will permit a QI to report on Form 1042–S on a pooled basis (rather than to specific recipients) for amounts subject to withholding under section 1446(a) or (f) to the same extent generally permitted for other payments to foreign account holders under the QI agreement. To ensure that account holders that are foreign partners will have the information necessary to satisfy their own U.S. income tax reporting requirements, the requirements of § 1.6031(c)–1T will be incorporated into the QI agreement. See §§ 1.6012–1(b)(1), 1.6012–2(g)(1), and 1.6031(a)–1. Since foreign partners are required to file U.S. income tax returns to report their effectively connected income and may request Forms 1042–S from QIs to support amounts withheld that are reported on their returns, these partners are able to obtain refunds of taxes overwithheld under section 1446(f) when making their required filings. Therefore, the revised QI agreement will not allow a QI to use the collective refund procedures for amounts withheld under section 1446(a) or (f) with respect to its account holders that are foreign partners.

6. Withholding Under Section 1446(f) on Payments to NQIs

As discussed in section VI.A.5 of this Summary of Comments and Explanation of Revisions, these final regulations permit a broker to determine its withholding obligation under section 1446(f) by relying on certain account holder information provided by a QI that does not assume primary withholding responsibility. One comment requested a similar allowance that would permit a broker to rely on a certification from an NQI for calculating the broker's withholding under section 1446(f) in a case in which the NQI provides specific partner information to the broker (thus avoiding withholding on the full amount paid to the NQI in certain cases). The comment noted that requiring withholding on amounts realized allocable to U.S. partners that are NQI account holders would result in excessive withholding. Another comment noted that the requested allowance would relieve an NQI from reporting on Form 1042–S as its broker would have the information to report the amount realized that is allocated to each foreign partner in the publicly traded partnership. See § 1.1461–1(c)(1)(ii)(A)(*8*) (requiring reporting of amounts realized paid to foreign partners of publicly traded partnerships).

Even though overwithholding could occur in certain cases absent the requested change, the Treasury Department and the IRS have determined that a broker should not be relieved of withholding at the full amount under section 1446(f) on amounts realized that are paid to NQIs (except when the NQI maintains a U.S. branch that assumes the withholding). This determination reflects the view that in general NQIs are not required to account to the IRS with respect to their compliance with the withholding and reporting requirements of section 1446(f). As in the proposed regulations, therefore, a broker will be required to withhold at the full 10-percent rate on an amount realized paid to an NQI when no exception to withholding applies under these final regulations. However, a partner that is an account holder of an NQI that is subject to withholding under section 1446(f) will be entitled to claim a credit under section 33 for the amount withheld when the partner is provided a Form 1042–S supporting the claim from the NQI (or as otherwise provided in IRS forms or instructions). See § 1.1446(f)–4(e)(2).

7. Broker's Determination of Prior Broker Withholding Under Section 1446(f)

Under proposed § 1.1446(f)–4(a)(2)(iii), a broker is not required to withhold on an amount realized from the sale of a PTP interest when it knows that the withholding obligation has been satisfied by another broker. A comment requested a specific documentation rule (such as a certification from the paying broker) to provide more certainty to the receiving broker that the withholding requirement has been satisfied with respect to the payment.

The regulations under section 1441 provide a standard different than that included in the proposed regulations for when a withholding agent may treat a payment as already subjected to withholding (thus avoiding duplicative withholding). That rule provides that an NQI receiving a payment from a withholding agent is not required to withhold when the NQI has provided a Form W–8IMY, withholding statement, and attached documentation to the withholding agent and does not know or have reason to know that another withholding agent failed to withhold the correct amount. See § 1.1441–1(b)(6). In the case of a QI receiving the payment, however, § 1.1441–1(b)(6) provides that a QI determines its withholding requirement in accordance with the QI agreement. To address the concern raised in the comment regarding the difficulty for a broker to show that withholding was applied by another broker, these final regulations amend

that requirement by incorporating a standard generally similar to that in § 1.1441–1(b)(6). See § 1.1446(f)–4(a)(4). Therefore, a broker acting as an intermediary for an amount realized is not required to withhold when it receives the amount from another broker unless it knows, or has reason to know, that the paying broker did not withhold on the full amount required (or, in the case of a QI receiving the amount realized, as required in accordance with the QI agreement).

8. Withholding Date for Sales of PTP Interests

A comment requested that the date for withholding with respect to a sale of a PTP interest should be the settlement date (as opposed to the trade date), consistent with the rule in § 31.3406(a)–4(b)(1) for when backup withholding under section 3406 is required on certain payments of amounts reportable under section 6045. In response to this comment, these final regulations include a cross-reference to § 31.3406(a)–4(b)(1) to clarify the date of withholding under section 1446(f) for a transfer of a PTP interest other than a distribution.

B. Exceptions to Withholding

Proposed § 1.1446(f)–4(b) provided exceptions to the withholding requirement that applies to a broker paying an amount realized from the transfer of a PTP interest, including exceptions that apply to distributions by publicly traded partnerships and exceptions dependent on certifications obtained from transferors. These final regulations modify certain of these exceptions and add an exception for certain transferors (the ECI exception). These final regulations also remove the exception to withholding for a qualified current income distribution in proposed § 1.1446(f)–4(b)(4), and replace that exception with a provision for determining the amount realized in the case of a distribution by a publicly traded partnership such that withholding is required only to the extent a distribution is not attributable to net income. A QI will be permitted to apply these same exceptions to withholding under the revised QI agreement.

1. ECI Exception

Comments requested an exception to withholding if a valid Form W–8ECI, *Certificate of Foreign Person's Claim that Income is Effectively Connected with the Conduct of Trade or Business in the United States,* is provided under certain new conditions. The comments explained that certain foreign persons not eligible for the section 864(b) trading safe harbor, such as dealers in securities, buy and sell PTP interests as part of their trade or business in the United States, such that gain or loss on the transfer of the PTP interests would be effectively connected with the conduct of a trade or business within the United States without regard to section 864(c)(8). The comments requested a limited exception for non-U.S. persons that provide a Form W–8ECI and specify on the form that the gain from the sale, exchange, or other disposition of the PTP interest is effectively connected with the conduct of a trade or business within the United States without regard to the application of section 864(c)(8).

The Treasury Department and the IRS have determined that it is appropriate to provide relief from withholding for transferors that certify on a Form W–8ECI that the transferor is a dealer in securities (as defined in section 475(c)(1)) and that any gain from the transfer of a PTP interest is effectively connected with the conduct of a trade or business within the United States without regard to section 864(c)(8). The final regulations add this exception in § 1.1446(f)–4(b)(6).

2. 10-Percent Exception

The proposed regulations provided that a broker may rely on a qualified notice stating that the exception to withholding described in proposed § 1.1446(f)–4(b)(3) (the 10-percent exception) applies. The proposed regulations required that this exception apply as of the PTP designated date for a transfer of a PTP interest. The PTP designated date was defined as the date for a deemed sale determination that is designated by a publicly traded partnership in a qualified notice, provided that the date is not earlier than 92 days before the date that the publicly traded partnership posts the qualified notice. In addition, the proposed regulations limited reliance on a qualified notice depending on the date of posting. Specifically, a broker may in general only rely on the most recent qualified notice that is posted by the publicly traded partnership within the 92-day period ending on the date of the transfer.

One comment requested that, for purposes of the exception, a broker be permitted to rely on the qualified notice for 183 days from the date of posting by the publicly traded partnership instead of the 92-day period provided in the proposed regulations. This comment noted that qualified notices issued with respect to distributions that are made late in the year complicate the withholding and reporting process.

As noted in the preamble to the proposed regulations, the 92-day period was provided to limit the availability of the 10-percent exception to situations in which a publicly traded partnership has designated a deemed sale date occurring within the most recent calendar quarter given that publicly traded partnerships are in a position to determine the value of their assets quarterly. The proposed regulations limit reliance on a qualified notice to a notice posted within the 92-day period ending on the date of transfer in order to ensure that the broker is using the most recent information available. Therefore, these final regulations retain the 92-day period for purposes of the 10-percent exception.

A comment stated that the 10-percent exception should only account for the publicly traded partnership's effectively connected gain under section 864(c)(8), without taking into account any effectively connected gain under section 897. According to the comment, this would ensure that the transfer of an interest in a partnership that is not engaged in a trade or business within the United States, but that holds U.S. real property interests, is not subject to withholding under section 1446(f). This comment is not adopted because it is appropriate to account for effectively connected gain under section 897 when applying the 10-percent exception. However, to address the concern raised in the comment, these final regulations add an exception to withholding similar to the one described in section IV.A.3.ii of this Summary of Comments and Explanation of Revisions that applies when a non-publicly traded partnership certifies that it is not engaged in a trade or business within the United States (including when the partnership is not engaged in a trade or business within the United States and only holds U.S. real property interests that are not part of a trade or business). A publicly traded partnership states that this exception applies by providing on a qualified notice that it is not engaged in a trade or business within the United States.

Finally, these final regulations add a provision for certain cases in which a publicly traded partnership is liable under section 1461 for underwithholding by a broker on a transfer when the partnership issues a qualified notice that incorrectly states the applicability of the 10-percent exception. However, this liability applies only when the publicly traded partnership fails to make a reasonable estimate of the amounts required for

determining the applicability of the 10-percent exception. See § 1.1446(f)–4(b)(3)(i); see also section V.B of this Summary of Comments and Explanation of Revisions.

C. Determining the Amount To Withhold

If an exception to withholding under proposed § 1.1446(f)–4(b) does not apply, proposed § 1.1446(f)–4(c) provided rules for a broker to determine the amount realized for purposes of computing the amount to withhold on the transfer of a PTP interest. Proposed § 1.1446(f)–4(c) included a general rule for determining the amount realized based on the amount of gross proceeds paid on the transfer (as defined in § 1.6045–1(d)(5)) and a procedure for modifying the amount realized when the transferor is a foreign partnership that has domestic partners.

1. Modified Amount Realized for Transfers by Foreign Partnerships

Proposed § 1.1446(f)–4(c)(2) provided, in the event of a transfer of a PTP interest by a foreign partnership, a procedure that allows a broker to reduce the amount realized on the transfer to the extent the amount realized is allocable to partners that are U.S. persons. A foreign partnership may claim this modified amount realized by providing a Form W–8IMY, a withholding statement allocating the percentage of gain from the transfer allocable to each direct or indirect partner that is a U.S. person or a presumed foreign person, and a certification of non-foreign status for each partner that is a U.S. person. As described in section IV.B.2 of this Summary of Comments and Explanation of Revisions, these final regulations expand the analogous procedure under § 1.1446(f)–2(c)(2)(iv) that applies to transfers of non-PTP interests to take into account situations in which a foreign partner (direct or indirect) in the transferor partnership is eligible for treaty benefits. In response to a comment, the same modification is made in these final regulations for transfers of PTP interests.

Another comment requested an allowance for the transferor partnership to provide to the broker the aggregate percentage of gain allocable to its partners that are U.S. persons as opposed to the requirement to include on the withholding statement the percentage of gain allocable to each partner that is a U.S. person. The comment reflects a concern that a broker using the procedure under the proposed regulations may be considered to have actual knowledge of the extent to which proceeds from the transfer are paid to each partner that is a U.S. person, thereby resulting in a requirement for the broker to report these gross proceeds under section 6045. See §§ 1.6045–1(g)(1)(i) and 1.6049–5(d)(3)(i).

The Treasury Department and the IRS have determined that any additional reporting under section 6045 that results from this requirement is an appropriate consequence of the rule. Additionally, this rule provides information useful to the IRS. See, however, §§ 1.6049–4(c)(4) and 1.6045–1(g)(1)(iv) (providing coordination of chapter 61 reporting with reporting by certain foreign financial institutions under chapter 4).

Under the revised QI agreement, a QI will be permitted to adjust an amount realized in accordance with the procedures described in this section VI.C.1 of this Summary of Comments and Explanation of Revisions with respect to any direct account holder of the QI that is a foreign partnership or a direct account holder of another QI that is a foreign partnership to which the first-mentioned QI pays the amount realized.

2. Determining Amount Realized With Respect to Distributions

Under the proposed regulations, in the event of a distribution by a publicly traded partnership that is treated as a transfer for purposes of section 1446(f), the entire amount of a distribution was treated as the amount realized. Proposed § 1.1446(f)–4(c)(2). In general, under section 731(a), a partner recognizes gain on a distribution from a partnership to the extent that any money distributed exceeds the partner's basis in its interest in the partnership. Under section 705(a)(1), a partner's basis in its interest is increased by its distributive share of income for the taxable year. Proposed § 1.1446(f)–4(b)(4) provided an exception to a broker's requirement to withhold on a distribution by a publicly traded partnership if the entire amount of the distribution is designated on the publicly traded partnership's qualified notice (as defined in § 1.1446–4(b)(4)) as a qualified current income distribution. The proposed regulations defined a qualified current income distribution as a distribution that does not exceed the net income that the publicly traded partnership earned since the record date of the publicly traded partnership's last distribution. This exception was intended to eliminate withholding under section 1446(f)(1) on a distribution by a publicly traded partnership when the partner would not likely recognize gain from the distribution under section 731(a) due to the basis increase under section 705(a)(1) for partnership income allocable to a partner.

Comments suggested various alternatives to the qualified current income distribution exception. Two comments requested that withholding under section 1446(f) not apply to any distributions by a publicly traded partnership. One of those comments asserted that any unrealized effectively connected gain attributable to assets of the publicly traded partnership would eventually be taxed through withholding under either section 1446(a) when the publicly traded partnership disposes of those assets or section 1446(f) when the partner sells its PTP interest. Certain comments suggested modifying the requirements for the exception. One comment suggested that, for purposes of applying the exception, a broker should be permitted to treat a distribution as made out of current net income unless the qualified notice states otherwise. This comment noted that publicly traded partnerships may not publish qualified notices designating the distribution as a qualified current income distribution due to concerns about liability under proposed § 1.1446(f)–3(b)(2)(ii) if the qualified notice is false. Another comment suggested modifying the qualified current income distribution exception so that withholding under section 1446(f)(1) would not apply to the extent that cumulative distributions by a publicly traded partnership do not exceed its cumulative net income earned over time.

Other comments focused on alternatives for coordinating withholding under section 1446(f) on distributions by publicly traded partnerships with withholding under other sections of the Code, noting that a distribution by a publicly traded partnership would be subject to withholding under section 1446(f) as well as withholding under sections 1441, 1442, 1443, and 1446(a) (to the extent applicable) when the qualified current income distribution exception would not apply. For example, a comment suggested reducing the tax liability under section 1446(a) by amounts withheld under section 1446(f) dollar-for-dollar, or exempting distributions from withholding under section 1446(f) to the extent those distributions are subject to withholding under section 1446(a) (or vice versa). Another comment requested more broadly that withholding under section 1446(f) not apply to a distribution made by a publicly traded partnership when withholding under section 1441, 1442, 1443, or 1446(a) applies to the payment.

Section 1446(f)(1) requires withholding if any portion of the gain on a disposition of an interest in a partnership would be treated under section 864(c)(8) as effectively connected gain. Section 1446(f) ensures that tax is collected on gain under section 864(c)(8). The Treasury Department and IRS have determined that eliminating withholding entirely on distributions by publicly traded partnerships would undermine the purpose of section 1446(f) in certain cases. For example, there may not be a subsequent sale of the PTP interest subject to withholding under section 1446(f), particularly if the distribution is in redemption of the PTP interest. Alternatively, the value of a publicly traded partnership's assets (or the amount of unrealized effectively connected gain) may change between the date of a distribution and either the date on which the partnership sells the assets or the date on which the partner sells its PTP interest.

The Treasury Department and the IRS do not agree with the comments requesting an offset against section 1446(f) withholding for amounts withheld under section 1446(a). Section 1446(a) withholding applies to effectively connected taxable income earned by the partnership that is allocated and distributed to its partners. In contrast, section 1446(f) withholding applies to ensure the collection of tax on the built-in gain of the partnership's assets under section 864(c)(8). Thus, each withholding regime applies to a separate item of taxable income.

For these reasons, the final regulations continue to require withholding under section 1446(f) on a distribution made with respect to a PTP interest. However, because the exception for a qualified current income distribution provided relief only when a publicly traded partnership made a distribution entirely out of current net income, these final regulations replace this exception with a procedure in § 1.1446(f)–4(c)(2)(iii) for adjusting the amount realized to the amount of a distribution in excess of cumulative net income. Thus, if a portion of a distribution made by a publicly traded partnership is attributable to an amount in excess of cumulative net income, a broker is required to withhold only on this portion for purposes of section 1446(f), rather than on the entire amount of the distribution. Also, in response to a comment, this rule looks to the amount in excess of the cumulative net income, rather than the current net income (as was required under the proposed regulations). The cumulative net income is the net income earned by the partnership since the formation of the partnership that has not been previously distributed by the partnership. As a result of this change, these final regulations remove the general rule included in the proposed regulations that defined the amount realized from a PTP distribution as the amount of cash and the fair market value of property distributed or to be distributed.

Under the final regulations, the publicly traded partnership identifies the portion of a distribution attributable to an amount in excess of cumulative net income on a qualified notice. If a broker properly withholds based on the qualified notice (applying the rules of § 1.1446–4(d)(1) to the distribution), the broker is not liable for any underwithholding on any amount attributable to an amount in excess of cumulative net income. Instead, if a publicly traded partnership issues a qualified notice that causes a broker to underwithhold with respect to an amount in excess of cumulative net income, the partnership is liable under section 1461 for any underwithholding on such amount.

D. Form 1042–S Reporting Under Section 1446(f)

The proposed regulations included requirements for reporting with respect to transfers of PTP interests on Form 1042–S. As part of these requirements, a broker is generally required to report on Form 1042–S a payment of an amount realized from the transfer of a PTP interest made to a foreign transferor or broker.

One comment requested clarification that reporting on Form 1042–S is performed on an aggregate basis (that is, a broker reports on a single Form 1042–S all transfers of PTP interests with respect to a customer for a calendar year). The proposed regulations added to § 1.1461–1(c)(1)(i) the general requirement that a broker report on Form 1042–S amounts realized as determined under section 1446(f). Section 1.1461–1(c)(1)(i) generally provides that a Form 1042–S shall be prepared for each recipient of an amount subject to reporting and for each single type of income payment, in such manner as the form and accompanying instructions prescribe. The IRS intends to amend the instructions to Form 1042–S to clarify that aggregate reporting is used with respect to amounts realized by a transferor on transfers of PTP interests.

As described in section VI.A.6 of this Summary of Comments and Explanation of Revisions, these final regulations require a broker to withhold on an amount realized paid to an NQI effecting a transfer of a PTP interest for an account holder. A comment requested that the regulations clarify how a broker reports the payment to the NQI, and suggested that the broker report the amount as paid to an unknown account holder, with the NQI reported as an intermediary for the amount (rather than as the recipient). The Treasury Department and the IRS agree with the manner of reporting noted in this comment, which is already generally reflected in § 1.1461–1(c)(1)(ii)(B)(*1*) and (c)(4)(ii)(A) (addressing payments to persons that are not recipients, including NQIs) and § 1.1461–1(c)(1)(ii)(B)(*5*) (excluding as a recipient a broker withheld upon under § 1.1446(f)–4(a)(2)(i)). In response to this comment, the IRS also intends to amend the instructions to Form 1042–S to indicate the reporting that applies in this case.

A comment requested clarification that a foreign partnership subject to withholding under § 1.1446(f)–4 may use the Form 1042–S that it receives from the broker to substantiate the foreign partnership's credit of such withholding against its tax liability under section 1446(a). In response to this comment, the Treasury Department and the IRS intend to amend the instructions to Forms 8804, 8805 and 8813 to provide that a foreign partnership withheld upon under section 1446(f) on the transfer of a PTP interest must attach Form 1042–S in order to credit such amount against its liability under section 1446(a).

As discussed in section VI.A.2 of this Summary of Comments and Explanation of Revisions, under these final regulations a U.S. clearing organization will be required to report on Form 1042–S the non-netted amounts realized by a foreign broker with respect to sales of PTP interests that are cleared and settled on a net basis through the clearing organization.

Finally, under § 1.1461–1(a)(1), a withholding agent that withholds tax pursuant to chapter 3 is required to deposit the tax as provided in § 1.6302–2(a). Consistent with the proposed regulations, these final regulations amend § 1.1461–1(a)(1) to incorporate the requirement to deposit tax withheld under section 1446(f). These final regulations include a conforming change to § 1.6302–2(a)(1)(i) to provide that the requirement to deposit tax under § 1.6302–2 applies to a broker or publicly traded partnership for purposes of section 1446(f), and to a nominee or publicly traded partnership for purposes of section 1446(a).

E. Synthetic Interests

A comment requested clarification that the proposed regulations apply only to physical interests in publicly traded partnerships and not synthetic interests. A subsequent comment submitted by the same commenter suggested that the final regulations clarify this point by explicitly defining the term ''interest'' as ''an interest as a partner in the partnership.'' The question of when a contract or other financial instrument denominated as a synthetic interest in a partnership interest may be treated as ownership of a partnership interest is beyond the scope of these regulations.

VII. Amendments to Existing Section 1446 Regulations Relating to Distributions by Publicly Traded Partnerships

A. Method of Providing a Qualified Notice

The proposed regulations contained changes to the existing qualified notice rules and rules for nominees that apply to distributions of effectively connected income, gain, or loss made by publicly traded partnerships to foreign partners. Proposed § 1.1446–4(b)(4) revised the method for a publicly traded partnership to provide a qualified notice to a nominee by requiring that the notice be posted in a readily accessible format in an area of the primary public website of the publicly traded partnership that is dedicated to this purpose. Two comments requested that a requirement be added to require the publicly traded partnership to furnish a copy of the qualified notice to the publicly traded partnership's registered holders that are nominees. PTP interests are generally immobilized at a central depository and registered in the name of the depository's nominee. The comments state that furnishing the qualified notice to the publicly traded partnership's registered holders that are nominees would facilitate the dissemination of information provided on the qualified notice to relevant market participants. Another comment noted the burden on brokers to find qualified notices posted on publicly traded partnerships' websites and suggested requiring all qualified notices to be posted on a central public website.

The Treasury Department and the IRS have determined that the delivery requirements for qualified notices should be aimed at ensuring that all relevant market participants receive the information necessary to comply with their withholding and reporting obligations. Therefore, these final regulations include a requirement for a publicly traded partnership to provide a qualified notice to any registered holder that is a nominee for a distribution. Because the requirements provided will generally ensure that brokers receive the information necessary to meet their withholding obligations under § 1.1446(f)–4, these final regulations do not adopt the comment to require publicly traded partnerships to post their qualified notices to a central website.

B. Default Withholding Rule

The proposed regulations also added a default withholding rule (the default withholding rule) for cases in which a qualified notice fails to provide sufficient detail for a nominee to determine the amounts subject to withholding on a publicly traded partnership distribution (a deficient qualified notice). Under this rule, to the extent that a deficient qualified notice fails to specify the type of income from which a distribution is made, the nominee must withhold at the highest rate specified in section 11(b) or 881 for a partner that is a foreign corporation, or the highest rate specified in section 1 or 871 for a foreign partner that is not a corporation. See proposed § 1.1446–4(d). One comment requested that a broker be permitted to adjust the rate of withholding under the default withholding rule by considering the status of a partner for purposes of taking into account a lower treaty rate.

The Treasury Department and the IRS have concluded that a nominee applying the default withholding rule should withhold based on the statutory withholding rates determined under the proposed regulations, without regard to any lower rate that might apply under an applicable income tax treaty. Determinations by nominees of lower rates that might otherwise apply under a treaty would depend on information from publicly traded partnerships about the characterization of the income attributable to the distribution. Because this information would not be provided to the nominee on a qualified notice, these final regulations clarify that a lower treaty rate is not considered for purposes of determining the amount to withhold under the default withholding rule.

The comment also requested that the final regulations clarify that a nominee is required to apply the default withholding rule to a distribution for which no qualified notice is issued. Proposed § 1.1446–4(d) modified the existing rule to provide that a nominee is a withholding agent for the entire distribution that it receives from a publicly traded partnership (rather than only to the extent of the amount specified on a qualified notice). These final regulations add language to clarify that a nominee must apply the default withholding rule when a publicly traded partnership fails to issue a qualified notice for a distribution under § 1.1446–4(b)(4) of these final regulations.

The default withholding rule in the proposed regulations did not address a case in which a nominee has no information about the status of a partner, including whether the partner is a corporation for determining the withholding rate on effectively connected income paid to the partner. As a result, these final regulations add that if a nominee cannot determine the status of a partner as a corporation, for purposes of the default withholding rule the nominee is required to use the higher of the following rates: (1) The rate of withholding applicable to a foreign person that is a corporation, and (2) the rate of withholding applicable to a foreign person that is not a corporation.

C. Modifications Related to QIs

The proposed regulations expanded the definition of a nominee to include a QI that assumes primary withholding responsibility for a distribution and a U.S. branch of a foreign person that agrees to be treated as a U.S. person for withholding on a distribution from a publicly traded partnership. To address cases in which a distribution by a publicly traded partnership is paid through multiple nominees that might each be required to withhold under proposed § 1.1446–4(d), these final regulations add an exception to withholding for a nominee paying the distribution to a QI or U.S. branch that is also a nominee for the distribution.

Under the QI agreement, a QI may choose not to assume primary withholding responsibilities and in certain of those cases may provide withholding rate pools, rather than specific payee documentation, to the withholding agent that makes a payment to the QI. Because the QI agreement applies only to amounts subject to withholding under chapter 3 (defined as sections 1441 through 1443), chapter 4 (sections 1471 through 1474), or section 3406, the IRS intends to update the QI agreement to extend this treatment to amounts subject to withholding under section 1446(a) to the same extent generally permitted for payments received by QIs on behalf of their foreign account holders under the QI agreement. To coordinate with the intended updates to the QI agreement, these final regulations allow a publicly traded partnership or nominee paying a

distribution under section 1446(a) to a QI that does not assume primary withholding responsibilities to rely on an allocation of the distribution to an applicable withholding rate pool provided by the QI by specifying the withholding rate pools permitted for withholding under section 1446(a).

In addition, these final regulations allow a broker to withhold under section 1446(a) based on specific payee documentation provided by a QI. See § 1.1446–4(e) and section VI.A.5 of this Summary of Comments and Explanations of Revisions. Additionally, as discussed in section VI.A.4 of this Summary of Comments and Explanations of Revisions, these final regulations require a QI or U.S. branch that acts as a nominee under section 1446(a) for a distribution made by a publicly traded partnership to assume all other required withholding responsibilities with respect to the distribution. These provisions (as applicable to QIs) will be incorporated into the revised QI agreement.

VIII. Applicability Dates

The proposed regulations generally provided that the regulations would apply 60 days after final regulations are issued. Comments requested additional time before withholding on transfers of PTP interests is required, noting that the rules in the proposed regulations would require brokers to update systems, processes, and procedures. The comments generally requested an extension of the applicability date to 18 months following the finalization of all guidance with respect to this requirement. Another comment requested that the same extension apply to QIs, noting the time required for QIs to review the regulations and anticipated revisions to the QI agreement, and to implement the necessary updates to their systems and procedures.

The provisions in these final regulations relating to transfers of PTP interests apply to transfers that occur on or after January 1, 2022. See §§ 1.1446(f)–4(f), 1.1461–1(i), 1.1461–2(d), and 1.1464–1(c). Similarly, § 1.6302–2(g) applies to tax required to be withheld on or after January 1, 2022 with respect to section 1446(f). The provisions included in these final regulations that are applicable to QIs will apply beginning January 1, 2022. See section VI.A.1 of this Summary of Comments and Explanations of Revisions. The Treasury Department and the IRS have determined that this applicability date should provide sufficient time for taxpayers to prepare to implement the regulations relating to transfers of PTP interests. Additionally, certain allowances in the final regulations, such as the allowances for brokers to rely on documentation from clearing organizations in certain cases and documentation already in the broker's possession, should reduce the time needed for brokers to update their systems. See section VI.A.3 of this Summary of Comments and Explanation of Revisions.

Other provisions in the final regulations that require systems adjustments by publicly traded partnerships, such as the procedures for qualified notices, are similarly applicable on January 1, 2022. Specifically, the requirements with respect to publicly traded partnership distributions under § 1.1446–4 of these final regulations apply to distributions made on or after January 1, 2022. See § 1.1446–7. In addition, the requirements with respect to distributions that are attributable to dispositions of U.S. real property interests under § 1.1445–8(f) apply to distributions made on or after January 1, 2022. See § 1.1445–8(j).

Further, in order to provide partnerships with time to implement withholding under section 1446(f)(4), § 1.1446(f)–3 applies to transfers that occur on or after January 1, 2022. See § 1.1446(f)–3(f).

As contemplated in the proposed regulations, § 1.864(c)(8)–2(a) applies to transfers that occur on or after November 30, 2020, §§ 1.864(c)(8)–2(b) and (c) and 1.6050K–1(c)(2) and (3) apply to returns filed on or after November 30, 2020, and § 1.864(c)(8)–2(d) applies beginning on November 30, 2020. See §§ 1.864(c)(8)–2(e) and 1.6050K–1(h). Sections 1.1445–2(b)(2)(v) and 1.1445–5(b)(3)(iv) apply to the use of Forms W–9 for certifications of non-foreign status provided on or after May 7, 2019, except that a taxpayer may choose to apply those provisions with respect to certifications provided before that date. See §§ 1.1445–2(e) and 1.1445–5(h).

The conforming changes in §§ 1.1445–5 and 1.1445–8 resulting from the rate changes made by the Act apply to distributions on or after November 30, 2020. The conforming changes in §§ 1.1446–3 and 1.1446–4 resulting from the rate changes made by the Act and the change to the due date of Form 8804 made by the Surface Transportation Act apply to partnership taxable years beginning on or after November 30, 2020. Although the applicability date of the changes to the regulations described in this paragraph is based on the date of publication of this document in the **Federal Register**, the same results apply before that date as of the relevant effective dates of the Act and the Surface Transportation Act.

The remaining provisions in these final regulations are generally applicable to transfers that occur on or after January 29, 2021, as contemplated in the proposed regulations. See §§ 1.1446(f)–1(e), 1.1446(f)–2(f), 1.1446(f)–5(d), 1.1461–3, and 1.1463–1(a).

Effect on Other Documents

Notice 2018–08 (2018–7 I.R.B. 352) is obsolete as of January 1, 2022. Notice 2018–29 (2018–16 I.R.B. 495), other than section 11, is obsolete as of January 29, 2021. Section 11 of Notice 2018–29 is obsolete as of January 1, 2022. Accordingly, the withholding requirements for transfers of PTP interests and withholding under section 1446(f)(4) remain suspended for transfers occurring before January 1, 2022.

Statement of Availability of IRS Documents

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

Special Analyses

I. Regulatory Planning and Review

These regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations.

II. Paperwork Reduction Act

The collections of information in these final regulations are in § 1.864(c)(8)–2 regarding reporting for transactions described in section 864(c)(8) and § 1.864(c)(8)–1; §§ 1.1446(f)–1 through 1.1446(f)–4 regarding the withholding, reporting, and paying of tax under section 1446(f) following the transfer of an interest described in section 864(c)(8) and § 1.864(c)(8)–1; and § 1.6050K–1(c) regarding reporting of section 751(a) exchanges. Section II.A of this Special Analyses describes the changes made in these final regulations to the collections of information in the proposed regulations that will be conducted using IRS forms. Section II.B of this Special Analyses describes the changes made in

these final regulations to the collections of information in the proposed regulations that will not be conducted using IRS forms.

A. Collections of Information Conducted Using IRS Forms

These final regulations include an exception from withholding for amounts realized paid to certain foreign banks and securities dealers. § 1.1446(f)–4(b)(6). The collection of information in § 1.1446(f)–4(b)(6) is provided by the transferor by submitting a certification as part of Form W–8ECI, *Certificate of Foreign Person's Claim that Income is Effectively Connected with the Conduct of Trade or Business in the United States,* to the broker and is optional. The information will be used by the broker to determine whether an exception to withholding applies if the gain from the transfer of a PTP interest is effectively connected with the conduct of a trade or business within the United States without regard to section 864(c)(8).

The Treasury Department and the IRS intend that the information collection requirement described in this section II.A will be set forth on Form W–8ECI. As a result, for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* (PRA), the reporting burden associated with the collection of information in this form will be reflected in the PRA submission associated with the form. The current status of the PRA submission for Form W–8ECI is provided in the Current Status of PRA Submissions table.

CURRENT STATUS OF PRA SUBMISSIONS

	Type of filer	OMB No(s).	Status
Form W–8ECI	Business (NEW Model)	1545–0123	Approved 01/30/2019 until 01/30/21.
	https://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=1545-0123#.		
	All other filers (Legacy system)	1545–1621	Approved 12/19/2018 until 12/31/2021.
	Link: *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201708-1545-002.*		

B. Collections of Information Not Included on IRS Forms

These final regulations contain collections of information that are not on existing or new IRS forms, and include minor modifications to the collections of information in the proposed regulations relating to certain certifications that may be provided to obtain an exception to withholding or an adjustment to the amount to withhold. See § 1.1446(f)–2(b)(4) and (5) and (c)(2). See sections IV.A.3, VI.A.4, and IV.B.2 of the Summary of Comments and Explanation of Revisions for explanations of the changes to these certifications.

Section II.B of the Special Analyses of the proposed regulations provided estimates of the cost of certain collections of information contained in the proposed regulations. A comment suggested that the cost of collections of information for a broker was too high. However, the comment misinterpreted the data provided in section II.B of the Special Analyses of the proposed regulations. The estimated total annual monetized cost provided in section II.B of the Special Analyses of the proposed regulations was the estimated cost of all collections of information not on existing or new IRS forms for all respondents (generally transferors of partnership interests), not the estimated cost of compliance for a broker.

The collections of information contained in these final regulations have been reviewed and approved by the Office of Management and Budget in accordance with the PRA under control number 1545–2292.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

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.

III. Regulatory Flexibility Act

It is hereby certified that these final regulations will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act (5 U.S.C. chapter 6).

The final regulations affect (i) foreign persons that recognize gain or loss from the sale or exchange of an interest in a partnership that is engaged in a trade or business within the United States (who are not subject to the Regulatory Flexibility Act), (ii) U.S. persons that are transferors providing Forms W–9 to transferees to certify that they are not foreign persons, (iii) persons who acquire interests in partnerships engaged in a trade or business within the United States, (iv) partnerships that, directly or indirectly, have foreign persons as partners, and (v) brokers that effect transfers of interests in publicly traded partnerships.

The Treasury Department and the IRS do not have data readily available to assess the number of small entities potentially affected by the final regulations. However, entities potentially affected by these final regulations are generally not small entities, because of the resources and investment necessary to acquire a partnership interest from a foreign person or, in the case of a partnership, to, directly or indirectly, have foreign persons as partners. Therefore, the Treasury Department and the IRS have determined that there will not be a substantial number of domestic small entities affected by the final regulations. Consequently, the Treasury Department and the IRS certify that the final regulations will not have a significant economic impact on a substantial number of small entities.

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

IV. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated

annually for inflation. This rule does not include any Federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of that threshold.

V. Executive Order 13132: Federalism

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

Drafting Information

The principal authors of these regulations are Chadwick Rowland, Subin Seth, Ronald M. Gootzeit, and Charles Rioux, Office of the Associate Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

For the reasons set out in the preamble, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by:
■ 1. Adding a sectional authority for § 1.864(c)(8)–2 in numerical order.
■ 2. Revising the sectional authorities for §§ 1.1445–5 and 1.1445–8.
■ 3. Adding sectional authorities for §§ 1.1446–3, 1.1446–4, and 1.1446(f)–1 through 1.1446(f)–5 in numerical order.
■ 4. Revising the sectional authority for § 1.6050K–1.

The additions and revisions read in part as follows:

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

Section 1.864(c)(8)–2 also issued under 26 U.S.C. 864(c)(8)(E), 6001 and 6031(b).

* * * * *

Section 1.1445–5 also issued under 26 U.S.C. 1445(e)(7).

Section 1.1445–8 also issued under 26 U.S.C. 1445(e)(7).

Section 1.1446–3 also issued under 26 U.S.C. 1446(g).

Section 1.1446–4 also issued under 26 U.S.C. 1446(g).

Section 1.1446(f)–1 also issued under 26 U.S.C. 1446(f)(6) and 1446(g).

Section 1.1446(f)–2 also issued under 26 U.S.C. 1446(f)(6) and 1446(g).

Section 1.1446(f)–3 also issued under 26 U.S.C. 1446(f)(6) and 1446(g).

Section 1.1446(f)–4 also issued under 26 U.S.C. 1446(f)(6) and 1446(g).

Section 1.1446(f)–5 also issued under 26 U.S.C. 1446(f)(6) and 1446(g).

* * * * *

Section 1.6050K–1 also issued under 26 U.S.C. 6050K(a).

* * * * *

■ **Par. 2.** Section 1.864(c)(8)–2 is added to read as follows:

§ 1.864(c)(8)–2 Notification and reporting requirements.

(a) *Notification by foreign transferor*—(1) *In general.* Except as provided in paragraph (a)(2) of this section, a notifying transferor that transfers an interest in a specified partnership must notify the partnership of the transfer in writing within 30 days after the transfer. The notification must include—

(i) The names and addresses of the notifying transferor and the transferee or transferees;

(ii) The U.S. taxpayer identification number (TIN) of the notifying transferor and, if known, of the transferee or transferees; and

(iii) The date of the transfer.

(2) *Exceptions*—(i) *Certain interests in publicly traded partnerships.* Paragraph (a)(1) of this section does not apply to a notifying transferor that transfers an interest in a publicly traded partnership if the interest is publicly traded on an established securities market or is readily tradable on a secondary market (or the substantial equivalent thereof).

(ii) *Certain distributions.* Paragraph (a)(1) of this section does not apply to a notifying transferor that is treated as transferring an interest in a specified partnership because it received a distribution from that specified partnership.

(3) *Section 6050K.* The notification described in paragraph (a)(1) of this section may be combined with or provided at the same time as the notification described in § 1.6050K–1(d), provided that it satisfies the requirements of both sections.

(4) *Other guidance.* The notification described in paragraph (a)(1) of this section must also include any information prescribed by the Commissioner in forms or instructions or in publications or guidance published in the Internal Revenue Bulletin (see §§ 601.601(d)(2) and 601.602 of this chapter).

(b) *Reporting by specified partnerships with notifying transferor*—(1) *In general*—(i) *Requirement to provide statement.* A specified partnership must provide to a notifying transferor the statement described in paragraph (b)(2) of this section if—

(A) The partnership receives the notice described in paragraph (a) of this section, or otherwise has actual knowledge that there has been a transfer of an interest in the partnership by a notifying transferor; and

(B) At the time of the transfer, the notifying transferor would have had a distributive share of deemed sale EC gain or deemed sale EC loss within the meaning of § 1.864(c)(8)–1(c).

(ii) *Distributions.* For purposes of paragraph (b)(1)(i)(B) of this section, a specified partnership that is a transferee because it makes a distribution is treated as having actual knowledge of that transfer.

(2) *Contents of statement.* The statement required to be furnished by the specified partnership under paragraph (b)(1) of this section must include—

(i) The items described in § 1.864(c)(8)–1(c)(3)(ii) (foreign transferor's aggregate deemed sale EC items, which includes items derived from lower-tier partnerships);

(ii) Whether the items described in paragraph (b)(2)(i) of this section were determined (in whole or in part) under § 1.864(c)(8)–1(c)(2)(ii)(E) (material change in circumstances rule for determining deemed sale EC gain or deemed sale EC loss from a deemed sale of the partnership's inventory property or intangibles); and

(iii) Any other information as may be prescribed by the Commissioner in forms, instructions, publications, or guidance published in the Internal Revenue Bulletin (see §§ 601.601(d)(2) and 601.602 of this chapter).

(3) *Time for furnishing statement.* The specified partnership must furnish the required information on or before the due date (with extensions) for issuing Schedule K–1 (Form 1065), *Partner's Share of Income, Deductions, Credits, etc.,* or other statement required to be furnished under § 1.6031(b)–1T, to the notifying transferor for the year of the transfer. *See* § 1.6031(b)–1T(b).

(4) *Manner of furnishing statement.* The statement required to be furnished under paragraph (b)(1) of this section must be provided on Schedule K–1 (Form 1065), *Partner's Share of Income, Deductions, Credits, etc.,* or other statement required to be furnished under § 1.6031(b)–1T.

(5) *Partnership notifying transferor.* For purposes of this paragraph (b), a

specified partnership must treat a notifying transferor that is a partnership as a nonresident alien individual.

(c) *Statement may be provided to agent.* A specified partnership may provide a statement required under paragraph (b)(2) of this section to a person other than the notifying transferor if the person is described in § 1.6031(b)–1T(c).

(d) *Definitions.* The following definitions apply for purposes of this section.

(1) *Notifying transferor.* The term *notifying transferor* means any foreign person, any domestic partnership that has a foreign person as a direct partner, and any domestic partnership that has actual knowledge that a foreign person indirectly holds, through one or more partnerships, an interest in the domestic partnership.

(2) *Specified partnership.* The term *specified partnership* means a partnership that is engaged in a trade or business within the United States or that owns (directly or indirectly) an interest in a partnership that is engaged in a trade or business within the United States.

(3) *Transfer.* The term *transfer* has the meaning provided in § 1.864(c)(8)–1(g)(5).

(e) *Applicability dates.* Paragraph (a) of this section applies to transfers that occur on or after November 30, 2020. Paragraphs (b) and (c) of this section apply to returns filed on or after November 30, 2020. Paragraph (d) of this section applies beginning on November 30, 2020.

■ **Par. 3.** Section 1.1445–2 is amended by adding paragraph (b)(2)(v) and a sentence to the end of paragraph (e) to read as follows:

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

* * * * *

(b) * * *

(2) * * *

(v) *Form W–9.* For purposes of paragraph (b)(2)(i) of this section, a certification of non-foreign status includes a valid Form W–9, *Request for Taxpayer Identification Number and Certification,* or its successor, submitted to the transferee by the transferor.

* * * * *

(e) * * * Paragraph (b)(2)(v) of this section applies to certifications provided on or after May 7, 2019, except that a taxpayer may choose to apply paragraph (b)(2)(v) of this section with respect to certifications provided before May 7, 2019.

■ **Par. 4.** Section 1.1445–5 is amended by:

■ 1. Adding paragraph (b)(3)(iv).

■ 2. In each paragraph listed in the first column in the table, removing the language in the second column and adding in its place the language in the third column as set forth below:

Paragraph	Remove	Add
(c)(1)(ii) first sentence	A partnership must withhold a tax equal to 35 percent (or the highest rate specified in section 1445(e)(1)).	A partnership must withhold a tax equal to the rate specified in section 1445(e)(1) multiplied by the amount.
(c)(1)(iii)(A) third sentence	The fiduciary must withhold 35 percent (or the highest rate specified in section 1445(e)(1)).	The fiduciary must withhold a tax equal to the rate specified in section 1445(e)(1) multiplied by the amount.
(c)(1)(iv)	The trustee or equivalent fiduciary of a trust that is subject to the provisions of subpart E of part 1 of subchapter J (sections 671 through 679) must withhold a tax equal to 35 percent (or the highest rate specified in section 1445(e)(1)).	The trustee or equivalent fiduciary of a trust that is subject to the provisions of subpart E of part 1 of subchapter J (sections 671 through 679) must withhold a tax equal to the rate specified in section 1445(e)(1) multiplied by the amount.
(c)(3)(ii)	A partnership or trust electing to withhold under this § 1.1445–5(c)(3) shall withhold from each distribution to a foreign person an amount equal to 35 percent (or the highest rate specified in section 1445(e)(1)).	A partnership or trust electing to withhold under this paragraph (c)(3) shall withhold from each distribution to a foreign person an amount equal to the rate specified in section 1445(e)(1) multiplied by.
(d)(1) first sentence	A foreign corporation that distributes a U.S. real property interest must deduct and withhold a tax equal to 35 percent (or the rate specified in section 1445(e)(2)).	A foreign corporation that distributes a U.S. real property interest must deduct and withhold a tax equal to the rate specified in section 1445(e)(2) multiplied by.

■ 3. Adding a sentence to the end of paragraph (c)(1)(iii)(B) introductory text.

■ 4. Adding two sentences to the end of paragraph (h).

The additions read as follows:

§ 1.1445–5 Special rules concerning distributions and other transactions by corporations, partnerships, trusts, and estates.

* * * * *

(b) * * *

(3) * * *

(iv) *Form W–9.* For purposes of paragraph (b)(3)(i) of this section, a certification of non-foreign status includes a valid Form W–9, *Request for Taxpayer Identification Number and Certification,* or its successor, submitted to the transferee by the transferor.

* * * * *

(c) * * *

(1) * * *

(iii) * * *

(B) * * * In 1994, the relevant rate of withholding (that is, the rate specified in section 1445(e)(1)) was 35%.

* * * * *

(h) * * * Paragraph (b)(3)(iv) of this section applies to certifications provided on or after May 7, 2019, except that a taxpayer may choose to apply paragraph (b)(3)(iv) of this section with respect to certifications provided before May 7, 2019. Paragraphs (c) and (d) of this section apply to distributions on or after November 30, 2020.

■ **Par. 5.** Section 1.1445–8 is amended by revising paragraphs (c)(2)(i) and (f) and adding paragraph (j) to read as follows:

§ 1.1445–8 Special rules regarding publicly traded partnerships, publicly traded trusts and real estate investment trusts (REITs).

* * * * *

(c) * * *

(2) * * *

(i) *In general.* The amount to be withheld with respect to a distribution by a REIT, under this section shall be equal to the highest rate specified in section 1445(e)(1) multiplied by the amount described in paragraph (c)(2)(ii) of this section.

* * * * *

(f) *Qualified notice.* A qualified notice for purposes of paragraph (b)(3)(iv) of this section is a notice provided in the manner described in § 1.1446–4(b)(4) by a partnership, trust, or REIT regarding a distribution that is attributable to the disposition of a United States real

property interest. In the case of a REIT, a qualified notice is only a notice of a distribution, all or any portion of which the REIT actually designates, or characterizes in accordance with paragraph (c)(2)(ii)(C) of this section, as a capital gain dividend in the manner described in § 1.1446–4(b)(4), with respect to each share or certificate of beneficial interest. A deemed designation under paragraph (c)(2)(ii)(A) of this section may not be the subject of a qualified notice under this paragraph (f). A person described in paragraph (b)(3) of this section is treated as receiving a qualified notice when the notice is provided in accordance with § 1.1446–4(b)(4).

* * * * *

(j) *Applicability dates.* Paragraph (c)(2)(i) of this section applies to distributions on or after November 30, 2020. Paragraph (f) of this section applies to distributions made on or after January 1, 2022. For distributions made before January 1, 2022, see § 1.1445–8(f) as contained in 26 CFR part 1, revised as of April 1, 2020.

■ **Par. 6.** Section 1.1446–0 is amended by:

■ 1. Adding an entry for § 1.1446–3(c)(4).

■ 2. Revising the entry § 1.1446–4(d).

■ 3. Adding entries for § 1.1446–4(d)(1) and (2).

■ 4. Revising the entry § 1.1446–7.

The additions and revisions read as follows:

§ 1.1446–0 Table of contents.

* * * * *

§ 1.1446–3 Time and manner of calculating and paying over the 1446 tax.

* * * * *

(c) * * *

(4) Coordination with section 1446(f).

* * * * *

§ 1.1446–4 Publicly traded partnerships.

* * * * *

(d) Rules for nominees required to withhold tax under section 1446.

(1) In general.

(2) Exception to nominee's withholding.

* * * * *

§ 1.1446–7 Applicability dates.

■ **Par. 7.** Section 1.1446–3 is amended:

■ 1. In the first sentence of paragraph (a)(2)(i), by removing ''section 11(b)(1)'' and adding in its place ''section 11(b)''.

■ 2. By adding paragraph (c)(4).

■ 3. In paragraph (d)(2)(vi), by designating *Examples 1* through *3* as paragraphs (d)(2)(vi)(A) through (C), respectively.

■ 4. In each newly designated paragraph listed in the first column in the table, by removing the language in the second column and adding in its place the language in the third column as set forth below:

Paragraph	Remove	Add
(d)(2)(vi)(A) tenth, twelth, and thirteenth sentences.	$35	$37.
(d)(2)(vi)(B) first sentence	*Example 1*	paragraph (d)(2)(vi)(A) of this section (*Example 1*).
(d)(2)(vi)(C) first sentence	*Example 1*	paragraph (d)(2)(vi)(A) of this section (*Example 1*).
(d)(2)(vi)(C) fifth sentence	$35	$37.

■ 5. In newly designated paragraph (d)(2)(vi)(A), by revising the eighth sentence.

■ 6. In newly designated paragraph (d)(2)(vi)(B), by revising the third and fourth sentences.

■ 7. In newly designated paragraph (d)(2)(vi)(C), by revising the sixth sentence.

■ 8. In paragraph (e)(4), by designating *Examples 1* through *3* as paragraphs (e)(4)(i) through (iii), respectively.

■ 9. In newly designated paragraphs (e)(4)(i) through (iii), by further redesignating the paragraphs in the first column in this table as the paragraphs in the second column as set forth below:

Old paragraphs	New paragraphs
(e)(4)(i)(i) through (viii)	(e)(4)(i)(A) through (H)
(e)(4)(ii)(i) through (v)	(e)(4)(ii)(A) through (E)
(e)(4)(iii)(i) through (v)	(e)(4)(iii)(A) through (E)

■ 10. In each newly redesignated paragraph listed in the first column in this table, by removing the language in the second column and adding in its place the language in the third column as set forth below:

Paragraph	Remove	Add
(e)(4)(i)(B) second sentence	$8.75 (.25 × ($100 × .35))	$9.25 (.25 × ($100 × .37))
(e)(4)(i)(B) fifth sentence	$35	$37
(e)(4)(i)(E) third sentence	$8.75	$9.25
(e)(4)(i)(F) first sentence	$35	$37
(e)(4)(i)(G) second sentence	$35	$37
(e)(4)(ii) introductory text	*Example 1*	paragraph (e)(4)(i)(A) of this section (*Example 1*)
(e)(4)(iii) introductory text	*Example 2*	paragraph (e)(4)(ii) introductory text of this section (*Example 2*)
(e)(4)(iii) introductory text	April	March
(e)(4)(iii)(A)	April	March
(e)(4)(iii)(B) first sentence	*Example 1* and *Example 2*	paragraphs (e)(4)(i) and (ii) of this section (*Examples 1* and *2*), respectively
(e)(4)(iii)(B) second sentence	April	March
(e)(4)(iii)(C) first and second sentences	April	March
(e)(4)(iii)(D) first through third sentences	April	March
(e)(4)(iii)(D) first sentence	$35	$37

■ 11. By removing paragraph (g).

The addition reads as follows:

§ 1.1446–3 Time and manner of calculating and paying over the 1446 tax.

* * * * *

(c) * * *

(4) *Coordination with section 1446(f).* A partnership that is directly or indirectly subject to withholding under section 1446(f)(1) during its taxable year may credit the amount withheld under section 1446(f)(1) against its section 1446 tax liability for that taxable year only to the extent the amount is allocable to foreign partners.

(d) * * *

(2) * * *

(vi) * * *

(A) * * * PRS pays installments of 1446 tax based upon its estimates and timely pays a total of $37 of 1446 tax over the course of the partnership's taxable year ($100 ECTI × .37). * * *

(B) * * * Pursuant to paragraph (d)(2)(iii) of this section, FT may claim a $14.8 credit under section 33 for the 1446 tax PRS paid ($40/$100 multiplied by $37). NRA is required to include the $60 of the ECTI in gross income under section 652 (as ECTI) and may claim a $22.2 credit under section 33 for the 1446 tax PRS paid ($37 less $14.8 or $60/$100 multiplied by $37).

(C) * * * NRA is required to include $100 of the ECTI in gross income under section 662 (as ECTI) and may claim a $37 credit under section 33 for the 1446 tax paid by PRS ($37 less $0).

* * * * *

■ **Par. 8.** Section 1.1446–4 is amended by:

■ 1. Revising paragraphs (b)(3) and (4).

■ 2. Removing the second sentence of paragraph (c).

■ 3. Revising paragraphs (d) and (e).

■ 4. Adding a sentence after the fourth sentence and revising the last five sentences of paragraph (f)(1).

■ 5. Revising paragraph (f)(3).

The revisions and addition read as follows:

§ 1.1446–4 Publicly traded partnerships.

* * * * *

(b) * * *

(3) *Nominee.* For purposes of this section, the term nominee means a person that holds an interest in a publicly traded partnership on behalf of a foreign person and that is either a U.S. person, a qualified intermediary (as defined in § 1.1441–1(e)(5)(ii)) that assumes primary withholding responsibility for the distribution, or a U.S. branch of a foreign person that agrees to be treated as a U.S. person (as described in § 1.1441–1(b)(2)(iv)) with respect to the distribution. For purposes of this paragraph (b)(3), a U.S. branch or a qualified intermediary is a nominee only if it assumes primary withholding responsibility for the distribution for all purposes of chapters 3 and 4 of subtitle A of the Code.

(4) *Qualified notice.* For purposes of this section, a qualified notice is a notice from a publicly traded partnership that states the amount of a distribution that is attributable to each type of income described in paragraphs (f)(3)(i) through (v) of this section. A qualified notice may also include the information described in § 1.1446(f)–4(b)(3) (relating to the 10-percent exception to withholding under section 1446(f)(1)) and the information described in § 1.1446(f)–4(c)(2)(iii) (relating to an adjustment to the amount realized for withholding under section 1446(f)(1)). The notice must be posted in a readily accessible format in an area of the primary public website of the publicly traded partnership that is dedicated to this purpose, and a copy of the notice must be delivered to any registered holder that is a nominee. A qualified notice must be posted and delivered to the registered holder by the date required for providing notice with respect to distributions described in 17 CFR 240.10b–17(b)(1) or (3) issued pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a) and contain the information described therein as it would relate to the distribution. The publicly traded partnership must keep the notice accessible to the public for ten years on its primary public website or the primary public website of any successor organization. No specific format is required unless otherwise prescribed by the Commissioner in forms or instructions or in publications or guidance published in the Internal Revenue Bulletin (see §§ 601.601(d)(2) and 601.602 of this chapter). See paragraph (d) of this section regarding when a nominee is considered to have received a qualified notice.

* * * * *

(d) *Rules for nominees required to withhold tax under section 1446*—(1) *In general.* A nominee that receives a distribution from a publicly traded partnership (or another nominee) that is to be paid to (or for the account of) any foreign person is treated as a withholding agent under this section. A nominee that fails to withhold pursuant to this section is subject to liability under section 1461, as well as applicable penalties and interest, as if the nominee were the partnership responsible for withholding. A nominee that receives a qualified notice that meets the requirements in paragraph (b)(4) of this section must withhold based on the amounts specified on the qualified notice. A nominee is treated as receiving a qualified notice on the date that the notice is posted to the publicly traded partnership's website or is received by the nominee in accordance with paragraph (b)(4) of this section. If a nominee properly withholds based on the amounts specified on a qualified notice, the nominee is not liable for any underwithholding on amounts that are effectively connected income, gain, or loss. Rather, the publicly traded partnership that issued the qualified notice is liable under section 1461 for underwithholding on such amounts. If a nominee does not receive a qualified notice that meets the requirements in paragraph (b)(4) of this section, or to the extent the qualified notice does not specify an amount, the nominee must withhold on the full amount of the distribution with respect to—

(i) A foreign partner that is a corporation, at the greater of the highest rate of tax specified in section 11(b) or 881 (without regard to any reduction in the rate of tax permitted under an applicable income tax treaty);

(ii) A foreign partner that is not a corporation, at the greater of the highest rate of tax specified in section 1 or 871 (without regard to any reduction in the rate of tax permitted under an applicable income tax treaty); or

(iii) A foreign partner whose classification cannot be determined, at the higher of the rate determined under paragraph (d)(1)(i) or (ii) of this section.

(2) *Exception to nominee's withholding.* A nominee is not required to withhold under paragraph (d)(1) of this section to the extent that it makes a payment of a distribution to a qualified intermediary or U.S. branch that is also a nominee for the distribution under paragraph (b)(3) of this section. For purposes of the preceding sentence, a nominee may treat a qualified intermediary or U.S. branch as a nominee for a distribution based on, respectively, a valid qualified intermediary withholding certificate described in § 1.1441–1(e)(3)(ii) or a valid U.S. branch withholding certificate described in § 1.1446(f)–4(a)(2)(ii)(B) on which the qualified intermediary or U.S. branch represents that it assumes primary withholding responsibility with respect to the distribution.

(e) *Determining foreign status of partners.* Except as provided in this paragraph (e), the rules of § 1.1446–1 shall apply in determining whether a partner of a publicly traded partnership is a foreign partner for purposes of the 1446 tax. A partnership or nominee

obligated to withhold under this section shall be entitled to rely on any of the forms acceptable under § 1.1446–1 that it receives from persons on whose behalf it holds interests in the partnership to the same extent a partnership is entitled to rely on such forms under those rules. If a partnership or nominee pays a distribution to an entity that provides a valid qualified intermediary withholding certificate described in § 1.1441–1(e)(3)(ii) indicating that the entity does not assume primary withholding responsibility for the distribution, for withholding under this section the partnership or nominee may instead rely on a withholding statement that allocates the distribution to—

(1) A chapter 3 withholding rate pool (as described in § 1.1441–1(e)(5)(v)(C)) consisting of account holders that are foreign persons subject to withholding at the highest rate of tax specified in section 1;

(2) A chapter 3 withholding rate pool (as described in § 1.1441–1(e)(5)(v)(C)) consisting of account holders that are foreign persons subject to withholding at the highest rate of tax specified in section 11(b);

(3) A chapter 3 withholding rate pool (as described in § 1.1441–1(e)(5)(v)(C)) consisting of account holders that are foreign persons not subject to withholding; or

(4) Each account holder for which a form acceptable under § 1.1446–1 is provided.

(f) * * *

(1) * * * LTP makes a distribution subject to section 1446 of $100 to UTP during its taxable year beginning January 1, 2020, and withholds 37 percent (the highest rate in section 1) ($37) of that distribution under section 1446. UTP receives a net distribution of $63 which it immediately redistributes to its partners. UTP has a liability to pay 37 percent of the total actual and deemed distribution it makes to its foreign partners as a section 1446 withholding tax. UTP may credit the $37 withheld by LTP against this liability as if it were paid by UTP. See §§ 1.1462–1(b) and 1.1446–5(b)(1). When UTP distributes the $63 it actually receives from LTP to its partners, UTP is treated for purposes of section 1446 as if it made a distribution of $100 to its partners ($63 actual distribution and $37 deemed distribution). UTP's partners (U.S. and foreign) may claim a credit against their U.S. income tax liability for their allocable share of the $37 of 1446 tax paid on their behalf.

* * * * *

(3) *Ordering rule relating to distributions.* Distributions from publicly traded partnerships are deemed to be paid out of the following types of income in the order indicated—

(i) Amounts attributable to income described in section 1441 or 1442 that are not effectively connected with the conduct of a trade or business in the United States and are subject to withholding under § 1.1441–2(a);

(ii) Amounts attributable to income described in section 1441 or 1442 that are not effectively connected with the conduct of a trade or business in the United States and are not subject to withholding under § 1.1441–2(a);

(iii) Amounts attributable to income effectively connected with the conduct of a trade or business in the United States that are not subject to withholding under §§ 1.1446–1 through 1.1446–6;

(iv) Amounts subject to withholding under §§ 1.1446–1 through 1.1446–6; and

(v) Amounts not listed in paragraphs (f)(3)(i) through (iv) of this section.

* * * * *

■ **Par. 9.** Section 1.1446–6 is amended by adding a sentence after the first sentence of paragraph (e)(1) to read as follows:

§ 1.1446–6 Special rules to reduce a partnership's 1446 tax with respect to a foreign partner's allocable share of effectively connected taxable income.

* * * * *

(e) * * *

(1) * * * In 2008, the relevant rate of withholding for foreign partners that were not corporations (that is, the highest rate in section 1 as specified in § 1.1446–3(a)(2)(i)) was 35%, and the due date for filing Form 8804 for domestic calendar year partnerships (that is, the date specified in § 1.1446–3(d)(1)(iii)) was April 15. * * *

* * * * *

■ **Par. 10.** Section 1.1446–7 is amended by revising the section heading and adding six sentences at the end of the paragraph to read as follows:

§ 1.1446–7 Applicability dates.

* * * Section 1.1446–3 generally applies to returns filed on or after January 30, 2020 and § 1.1446–3T (as contained in 26 CFR part 1, revised as of April 1, 2019) generally applies to returns filed before January 30, 2020. The addition of § 1.1446–3(c)(4) applies to transfers of partnership interests that occur on or after January 29, 2021, except that a taxpayer may choose to apply § 1.1446–3(c)(4) to transfers of partnership interests that occur on or after January 1, 2018. Sections 1.1446–3(a)(2)(i), (d)(2)(vi), and (e)(4) and 1.1446–4(f)(1) apply to partnership taxable years beginning on or after November 30, 2020. For partnership taxable years beginning before November 30, 2020, see those sections as in effect and contained in 26 CFR part 1, revised as of April 1, 2020. Section 1.1446–4(b)(3) and (4), (c), (d), (e), and (f)(3) apply to distributions made on or after January 1, 2022. For distributions made before January 1, 2022, see §§ 1.1446–4(b)(3) and (4), (c), (d), (e), and (f)(3), as contained in 26 CFR part 1, revised as of April 1, 2020.

■ **Par. 11.** Sections 1.1446(f)–1 through 1.1446(f)–5 are added to read as follows:

§ 1.1446(f)–1 General rules.

(a) *Overview.* This section and §§ 1.1446(f)–2 through 1.1446(f)–5 provide rules for withholding, reporting, and paying tax under section 1446(f) upon the sale, exchange, or other disposition of certain interests in partnerships. This section provides definitions and general rules that apply for purposes of section 1446(f). Section 1.1446(f)–2 provides withholding rules for the transfer of a non-publicly traded partnership interest under section 1446(f)(1). Section 1.1446(f)–3 provides rules that apply when a partnership is required to withhold under section 1446(f)(4) on distributions made to the transferee in an amount equal to the amount that the transferee failed to withhold plus interest. Section 1.1446(f)–4 provides special rules for the sale, exchange, or disposition of publicly traded partnership interests, for which the withholding obligation under section 1446(f)(1) is generally imposed on certain brokers that act on behalf of the transferor. Section 1.1446(f)–5 provides rules that address the liability for failure to withhold under section 1446(f) and rules regarding the liability of a transferor's or transferee's agent.

(b) *Definitions.* This paragraph (b) provides definitions that apply for purposes of this section and §§ 1.1446(f)–2 through 1.1446(f)–5.

(1) The term *broker* means any person, foreign or domestic, that, in the ordinary course of a trade or business during the calendar year, stands ready to effect sales made by others, and that, in connection with a transfer of a PTP interest, receives all or a portion of the amount realized on behalf of the transferor. The term broker includes a clearing organization (as defined in § 1.1471–1(b)(21)). In the case of a U.S. clearing organization clearing or settling sales of PTP interests, however, see § 1.1446(f)–4(a)(3) for an exception from the requirement to withhold on a sale of a PTP interest. The term broker does not

include an escrow agent that does not effect sales other than transactions that are incidental to the purpose of escrow (such as sales to collect on collateral).

(2) The term *controlling partner* means a partner that, together with any person that bears a relationship described in section 267(b) or 707(b)(1) to the partner, owns directly or indirectly a 50 percent or greater interest in the capital, profits, deductions, or losses of the partnership at any time within the 12 months before the determination date (see paragraph (c)(4) of this section).

(3) The term *effect* has the meaning provided in § 1.6045–1(a)(10).

(4) The term *foreign person* means a person that is not a United States person, including a QI branch of a U.S. financial institution (as defined in § 1.1471–1(b)(109)).

(5) The term *PTP interest* means an interest in a publicly traded partnership if the interest is publicly traded on an established securities market or is readily tradable on a secondary market (or the substantial equivalent thereof).

(6) The term *publicly traded partnership* has the same meaning as in section 7704 and §§ 1.7704–1 through 1.7704–4 but does not include a publicly traded partnership treated as a corporation under that section.

(7) The term *TIN* means the tax identifying number assigned to a person under section 6109.

(8) The term *transfer* means a sale, exchange, or other disposition, and includes a distribution from a partnership to a partner, as well as a transfer treated as a sale or exchange under section 707(a)(2)(B).

(9) The term *transferee* means any person, foreign or domestic, that acquires a partnership interest through a transfer, and includes a partnership that makes a distribution.

(10) Except as otherwise provided in this paragraph, the term *transferor* means any person, foreign or domestic, that transfers a partnership interest. In the case of a trust, to the extent all or a portion of the income of the trust is treated as owned by the grantor or another person under sections 671 through 679 (such trust, a grantor trust), the term transferor means the grantor or such other person.

(11) The term *transferor's agent* or *transferee's agent* means any person who represents the transferor or transferee (respectively) in any negotiation with another person relating to the transaction or in settling the transaction. A person will not be treated as a transferor's agent or a transferee's agent solely because it performs one or more of the activities described in § 1.1445–4(f)(3) (relating to activities of settlement officers and clerical personnel).

(12) The term *United States person* or *U.S. person* means a person described in section 7701(a)(30).

(c) *General rules of applicability*—(1) *In general.* This paragraph (c) provides general rules that apply for purposes of this section and §§ 1.1446(f)–2 through 1.1446(f)–5.

(2) *Certifications*—(i) *In general.* This paragraph (c)(2) provides rules that are applicable to certifications described in this section and §§ 1.1446(f)–2 through 1.1446(f)–5, except as otherwise provided therein, or as may be prescribed by the Commissioner in forms or instructions or in publications or guidance published in the Internal Revenue Bulletin (see §§ 601.601(d)(2) and 601.602 of this chapter). A certification must provide the name and address of the person providing it. A certification must also be signed under penalties of perjury and, if the certification is provided by the transferor, must include a TIN if the transferor has, or is required to have, a TIN. A transferee (or other person required to withhold) may not rely on a certification if it knows that a transferor has, or is required to have, a TIN, and that TIN has not been provided with the certification. A certification includes any documents associated with the certification, such as statements from the partnership, IRS forms, withholding certificates, withholding statements, certifications, or other documentation. Documents associated with the certification form an integral part of the certification, and the penalties of perjury statement provided on the certification also applies to the associated documents. A certification (other than the certification described in § 1.1446(f)–2(d)(2)) may not be relied upon if it is obtained earlier than 30 days before the transfer or any time after the transfer.

(ii) *Penalties of perjury.* A certification signed under penalties of perjury must provide the following: ''Under penalties of perjury, I declare that I have examined the information on this document, and to the best of my knowledge and belief, it is true, correct, and complete.''

(iii) *Authority to sign certifications on behalf of a business entity.* A certification provided by a business entity must be signed by an individual who is an officer, director, general partner, or managing member of the entity, or other individual that has authority to sign for the entity under local law.

(iv) *Electronic submission.* A certification may be sent electronically, including as text in an email, an image embedded in an email, or a Portable Document Format (.pdf) attached to an email. An electronic certification, however, may not be relied upon if the person receiving the submission knows that the certification was transmitted by a person not authorized to do so by the person required to execute the certification.

(v) *Retention period.* Any person that relies on a certification pursuant to this section and §§ 1.1446(f)–2 through 1.1446(f)–5 must retain the certification (including any documentation) for as long as it may be relevant to the determination of its withholding obligation under section 1446(f) or its withholding tax liability under section 1461.

(vi) *Submission to IRS.* The recipient of a certification is not required to mail a copy to the IRS, except as provided in § 1.1446(f)–2(b)(7) and (c)(4)(vi) (involving certifications relating to an income tax treaty), or as may be prescribed by the Commissioner in forms or instructions or in publications or guidance published in the Internal Revenue Bulletin (see §§ 601.601(d)(2) and 601.602 of this chapter).

(vii) *Grantor trusts.* A certification provided by a transferor that is a grantor or other owner of a grantor trust must identify the portion of the amount realized that is attributable to the grantor or other owner. A certification provided by a foreign grantor trust on behalf of a transferor that is a grantor or owner must also include a Form W–8IMY, *Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding and Reporting*), (or similar statement for a domestic grantor trust with a foreign grantor or owner), that includes a withholding statement that provides the percentage of the amount realized allocable to each grantor or owner of the trust, and any applicable certification for each grantor or owner. In the case of a certification so provided, a grantor or owner of the trust is treated as having provided the certification to the transferee (or broker).

(3) *Books and records.* A partnership that relies on its books and records pursuant to this section and §§ 1.1446(f)–2 through 1.1446(f)–5 (including for purposes of providing a certification or other statement) must identify in its books and records the date on which the transfer occurred, the information on which the partnership relied, and the provisions of this section and §§ 1.1446(f)–2 through 1.1446(f)–5

supporting an exception from, or adjustment to, the partnership's obligation to withhold. The identification required by this paragraph (c)(3) must be made no later than 30 days after the date of the transfer. The partnership must retain the identified information in its books and records for the longer of five calendar years following the close of the last calendar year in which it relied on the information or for as long as it may be relevant to the determination of its withholding obligation under section 1446(f) or its withholding tax liability under section 1461.

(4) *Determination date*—(i) *In general.* This paragraph (c)(4) provides rules for the determination date. The same determination date must be used for all purposes with respect to a transfer. Any statement, certification, or books and records with regard to a transfer must state the determination date. The determination date of a transfer must be one of the following—

(A) The date of the transfer;

(B) Any date that is no more than 60 days before the date of the transfer; or

(C) The date that is the later of—

(*1*) The first day of the partnership's taxable year in which the transfer occurs, as determined under section 706; or

(*2*) The date, before the date of the transfer, of the most recent event described in § 1.704–1(b)(2)(iv)(*f*)(*5*) or (b)(2)(iv)(*s*)(*1*) (revaluation event), irrespective of whether the capital accounts of the partners are adjusted in accordance with § 1.704–1(b)(2)(iv)(*f*).

(ii) *Controlling partner.* The determination date for a transferor that is a controlling partner is determined without regard to paragraph (c)(4)(i)(C) of this section.

(5) *IRS forms and instructions.* Any reference to an IRS form includes its successor form. Any form must be filed in the manner prescribed by the Commissioner in forms or instructions or in publications or guidance published in the Internal Revenue Bulletin (see §§ 601.601(d)(2) and 601.602 of this chapter).

(d) *Coordination with section 1445.* A transferee that is otherwise required to withhold under section 1445(e)(5) or § 1.1445–11T(d)(1) with respect to the amount realized, as well as under section 1446(f)(1), will be subject to the payment and reporting requirements of section 1445 only, and not section 1446(f)(1), with respect to that amount. However, if the transferor has applied for a withholding certificate under the last sentence of § 1.1445–11T(d)(1), the transferee must withhold the greater of the amounts required under section 1445(e)(5) or 1446(f)(1). A transferee that has complied with the withholding requirements under either section 1445(e)(5) or 1446(f)(1), as applicable under this paragraph (d), will be deemed to satisfy the withholding requirement.

(e) *Applicability date.* This section applies to transfers that occur on or after January 29, 2021.

§ 1.1446(f)–2 Withholding on the transfer of a non-publicly traded partnership interest.

(a) *Transferee's obligation to withhold.* Except as otherwise provided in this section, a transferee is required to withhold under section 1446(f)(1) a tax equal to 10 percent of the amount realized on any transfer of a partnership interest. This section does not apply to a transfer of a PTP interest that is effected through one or more brokers, including a distribution made with respect to a PTP interest held in an account with a broker. For rules regarding those transfers, see § 1.1446(f)–4.

(b) *Exceptions to withholding*—(1) *In general.* A transferee is not required to withhold under this section if it properly relies on a certification or its books and records as described in this paragraph (b). A transferee may not rely on a certification if it has actual knowledge that the certification is incorrect or unreliable. A partnership that is a transferee because it makes a distribution may not rely on its books and records if it knows, or has reason to know, that the information is incorrect or unreliable.

(2) *Certification of non-foreign status by transferor.* A transferee may rely on a certification of non-foreign status from the transferor that states that the transferor is not a foreign person, states the transferor's name, TIN, and address, and is signed under penalties of perjury. For purposes of this paragraph (b)(2), a certification of non-foreign status includes a valid Form W–9, *Request for Taxpayer Identification Number and Certification.* For purposes of this paragraph (b)(2), a transferee may rely on a valid Form W–9 from the transferor that it already possesses if the form meets the requirements of this paragraph (b)(2).

(3) *No realized gain by transferor*—(i) *In general.* A transferee (other than a partnership that is a transferee because it makes a distribution) may rely on a certification from the transferor that states that the transfer of the partnership interest would not result in any realized gain (including ordinary income arising from the application of section 751 and § 1.751–1) to the transferor as of the determination date (see § 1.1446(f)–1(c)(4)). See paragraph (b)(6) of this section for rules that apply when the transferor realizes gain but is not required to recognize the gain under a provision of the Internal Revenue Code.

(ii) *No section 751 income.* For purposes of paragraph (b)(3)(i) of this section, a transferor may rely on a certification from the partnership stating that the transfer of the partnership interest would not result in any ordinary income arising from the application of section 751 and § 1.751–1 to the transferor as of the determination date. The certification from the partnership must be attached to, and forms part of, the certification of no realized gain that the transferor provides to the transferee.

(iii) *Partnership distributions.* A partnership that is a transferee because it makes a distribution may rely on its books and records, or on a certification from the transferor, to determine that the distribution would not result in any realized gain to the transferor as of the determination date.

(4) *Less than 10 percent effectively connected gain*—(i) *In general.* A transferee (other than a partnership that is a transferee because it makes a distribution) may rely on a certification from the partnership that states that—

(A) If the partnership sold all of its assets at fair market value as of the determination date in the manner described in § 1.864(c)(8)–1(c), either—

(*1*) The partnership would have no gain that would have been effectively connected with the conduct of a trade or business within the United States, or, if the partnership would have a net amount of such gain, the amount of the partnership's net gain that would have been effectively connected with the conduct of a trade or business within the United States would be less than 10 percent of the total net gain; or

(*2*) The transferor would not have a distributive share of net gain from the partnership that would have been effectively connected with the conduct of a trade or business in the United States, or, if the transferor would have a distributive share of such gain from the partnership, the transferor's distributive share of net gain from the partnership that would have been effectively connected with the conduct of a trade or business within the United States would be less than 10 percent of the transferor's distributive share of the total net gain from the partnership; or

(B) The partnership was not engaged in a trade or business within the United States at any time during the taxable year of the partnership through the date of transfer.

(ii) *Partnership distributions.* A partnership that is a transferee because it makes a distribution may rely on its books and records to determine that paragraph (b)(4)(i)(A) of this section is satisfied as of the determination date or paragraph (b)(4)(i)(B) of this section is satisfied for the taxable year of the partnership through the date of transfer.

(5) *Less than 10 percent effectively connected income*—(i) *In general.* A transferee (other than a partnership that is a transferee because it makes a distribution) may rely on a certification from the transferor that states that—

(A) The transferor was a partner in the partnership throughout the look-back period described in paragraph (b)(5)(ii) of this section;

(B) The transferor's distributive share of gross effectively connected income from the partnership, as reported on a Schedule K–1 (Form 1065), *Partner's Share of Income, Deductions, Credits, etc.,* or other statement required to be furnished under § 1.6031(b)–1T, including any gross effectively connected income included in the distributive share of a partner that bears a relationship to the transferor described in section 267(b) or 707(b)(1), was less than $1 million for each of the taxable years within the look-back period described in paragraph (b)(5)(ii) of this section;

(C) The transferor's distributive share of gross effectively connected income from the partnership, as reported on a Schedule K–1 (Form 1065), or other statement required to be furnished under § 1.6031(b)–1T, for each of the taxable years within the look-back period described in paragraph (b)(5)(ii) of this section, was less than 10 percent of the transferor's total distributive share of gross income from the partnership for that year as determined under subchapter K of the Internal Revenue Code (as provided on a Schedule K–1 (Form 1065) or other statement required to be furnished under § 1.6031(b)–1T); and

(D) The transferor's distributive share of income or gain from the partnership that is effectively connected with the conduct of a trade or business within the United States or deductions or losses properly allocated and apportioned to that income in each of the taxable years within the look-back period described in paragraph (b)(5)(ii) of this section has been reported on a Federal income tax return (either filed by the transferor or, in the case of transferor that is a partnership, filed by its direct or indirect nonresident alien individual or foreign corporate partners) on or before the due date (including extensions), and all amounts due with respect to the reported amounts have been timely paid to the IRS, provided that the return was required to be filed when the transferor furnishes the certification (taking into account any extensions of time to file).

(ii) *Look-back period*—(A) *In general.* The transferor's look-back period is the transferor's immediately prior taxable year and the two preceding taxable years.

(B) *Immediately prior taxable year.* The transferor's immediately prior taxable year is the transferor's most recent taxable year—

(*1*) With or within which a taxable year of the partnership ended; and

(*2*) For which a Schedule K–1 (Form 1065) was due (including extensions) or furnished (if earlier) before the transfer.

(C) *Limitation.* A transferee may not rely on a certification that is provided before the transferor's receipt of the Schedule K–1 (Form 1065) described in paragraph (b)(5)(ii)(B) of this section.

(iii) *No distributive share of gross income.* A transferor that did not have a distributive share of gross income in any year described in paragraph (b)(5)(ii)(A) of this section cannot provide the certification described in this paragraph (b)(5).

(iv) *Partnership distributions.* A partnership that is a transferee by reason of making a distribution may rely on its books and records to determine that the requirements in paragraphs (b)(5)(i)(A) through (C) of this section have been satisfied (subject to the rules in paragraphs (b)(5)(ii) and (iii) of this section). The partnership must also obtain a representation from the transferor stating that the requirement in paragraph (b)(5)(i)(D) of this section has been satisfied.

(6) *Certification of nonrecognition by transferor*—(i) *In general.* A transferee may rely on a certification from the transferor that states that by reason of the operation of a nonrecognition provision of the Internal Revenue Code the transferor is not required to recognize any gain or loss with respect to the transfer. The certification must briefly describe the transfer and provide the relevant law and facts relating to the certification.

(ii) *Partial nonrecognition.* Paragraph (b)(6)(i) of this section does not apply if only a portion of the gain realized on the transfer is subject to a nonrecognition provision. However, see paragraph (c)(4)(v) of this section for rules applicable to a transferor's claim for partial nonrecognition.

(7) *Income tax treaties*—(i) *In general.* A transferee may rely on a certification from the transferor that states that the transferor is not subject to tax on any gain from the transfer pursuant to an income tax treaty in effect between the United States and a foreign country if the requirements of this paragraph (b)(7) are met. The transferor makes the certification on a withholding certificate (on a Form W–8BEN, *Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals),* or Form W–8BEN–E, *Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities)*) that meets the requirements for validity under § 1.1446–1(c)(2)(iv) (or an applicable substitute form that meets the requirements under § 1.1446–1(c)(5)) and that contains the information necessary to support the claim for treaty benefits. A transferee may rely on a certification of treaty benefits only if, within 30 days after the date of the transfer, the transferee mails a copy of the certification to the Internal Revenue Service, at the address provided in § 1.1445–1(g)(10), together with a cover letter providing the name, TIN, and address of the transferee and the partnership in which an interest was transferred.

(ii) *Treaty claim for less than all of the gain.* Paragraph (b)(7)(i) of this section does not apply if treaty benefits apply to only a portion of the gain from the transfer. However, see paragraph (c)(4)(vi) of this section for rules applicable to situations in which treaty benefits apply to only a portion of the gain.

(iii) *Exclusive means to claim an exception from withholding based on treaty benefits.* A transferor claiming treaty benefits with respect to all of the gain from the transfer must use the exception in this paragraph (b)(7) and not any other exception or determination procedure in paragraphs (b) and (c) of this section to claim an exception to withholding by reason of a claim of treaty benefits.

(c) *Determining the amount to withhold*—(1) *In general.* A transferee that is required to withhold under this section must withhold 10 percent of the amount realized on the transfer of the partnership interest, except as otherwise provided in this paragraph (c). Any procedures in this paragraph (c) apply solely for purposes of determining the amount to withhold under section 1446(f)(1) and this section. A transferee may not rely on a certification if it has actual knowledge that the certification is incorrect or unreliable. A partnership that is a transferee because it makes a distribution may not rely on its books and records if it knows, or has reason to know, that the information is incorrect or unreliable.

(2) *Amount realized*—(i) *In general.* The amount realized on the transfer of the partnership interest is determined under section 1001 (including §§ 1.1001–1 through 1.1001–5) and section 752 (including §§ 1.752–1 through 1.752–7). Thus, the amount realized includes the amount of cash paid (or to be paid), the fair market value of other property transferred (or to be transferred), the amount of any liabilities assumed by the transferee or to which the partnership interest is subject, and the reduction in the transferor's share of partnership liabilities. In the case of a distribution, the amount realized is the sum of the amount of cash distributed (or to be distributed), the fair market value of property distributed (or to be distributed), and the reduction in the transferor's share of partnership liabilities.

(ii) *Alternative procedures for transferee to determine share of partnership liabilities*—(A) *In general.* A transferee (other than a partnership that is a transferee because it makes a distribution), as an alternative to determining the share of partnership liabilities under paragraph (c)(2)(i) of this section, may use the procedures of this paragraph (c)(2)(ii) to determine the extent to which a reduction in partnership liabilities is included in the amount realized.

(B) *Certification of liabilities by transferor.* Except as otherwise provided in this section, a transferee may rely on a certification from a transferor, other than a controlling partner, that provides the amount of the transferor's share of partnership liabilities reported on the most recent Schedule K–1 (Form 1065) issued by the partnership. If the transferor's actual share of liabilities at the time of the transfer differs from the amount reported on that Schedule K–1 (Form 1065), the certification will not be treated as incorrect or unreliable if the transferor also certifies that it does not have actual knowledge of any events occurring after receiving the Schedule K–1 (Form 1065) and before the date of the transfer that would cause the amount of the transferor's share of partnership liabilities at the time of the transfer to differ by more than 25 percent from the amount shown on the Schedule K–1 (Form 1065). A transferee may not rely on a certification if the last day of the partnership taxable year for which the Schedule K–1 (Form 1065) was provided was more than 22 months before the date of the transfer.

(C) *Certification of liabilities by partnership.* A transferee may rely on a certification from a partnership that provides the amount of the transferor's share of partnership liabilities on the determination date. If the transferor's actual share of liabilities at the time of the transfer differs from the amount on the certification, the certification will not be treated as incorrect or unreliable if the partnership also certifies that it does not have actual knowledge of any events occurring after the determination date and before the date on which the partnership provides the certification to the transferee that would cause the amount of the transferor's share of partnership liabilities at the time of the transfer to differ by more than 25 percent from the amount shown on the certification by the partnership for the determination date.

(iii) *Partnership's determination of partnership liabilities for distributions.* A partnership that is a transferee because it makes a distribution may rely on its books and records to determine the extent to which the transferor's share of partnership liabilities on the determination date are included in the amount realized. The information in the books and records will not be treated as incorrect or unreliable unless the partnership has actual knowledge, on or before the date of the distribution, of any events occurring after the determination date that would cause the amount of the transferor's share of partnership liabilities at the time of the transfer to differ by more than 25 percent from the amount determined by the partnership as of the determination date.

(iv) *Certification by a foreign partnership of modified amount realized*—(A) *In general.* When a transferor is a foreign partnership, a transferee may use the procedures of this paragraph (c)(2)(iv) to determine the amount realized. For purposes of this paragraph (c)(2)(iv)(A), the transferee may treat the modified amount realized as the amount realized to the extent that it may rely on a certification from the transferor providing the modified amount realized.

(B) *Determining modified amount realized.* The modified amount realized is determined by multiplying the amount realized (as determined under this paragraph (c)(2), without regard to this paragraph (c)(2)(iv)) by the aggregate percentage computed as of the determination date. The aggregate percentage is the percentage of the gain (if any) arising from the transfer that would be allocated to presumed foreign taxable persons. For purposes of this paragraph (c)(2)(iv)(B), a presumed foreign taxable person is any direct or indirect partner of the transferor that has not provided either a certification of non-foreign status that meets the requirements of paragraph (b)(2) of this section or a certification of treaty benefits that states that the partner is not subject to tax on any gain from the transfer pursuant to an income tax treaty in effect between the United States and a foreign country. A valid certification of treaty benefits must meet the requirements of paragraph (b)(7) of this section (as applied to the partner claiming treaty benefits), including the requirement that the transferee mail a copy of the certification to the IRS within the time prescribed. For purposes of this paragraph (c)(2)(iv), an indirect partner is a person that owns an interest in the transferor indirectly through one or more foreign partnerships.

(C) *Certification.* The certification is made by providing a withholding certificate (on Form W–8IMY, *Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding and Reporting*) that includes a withholding statement that provides the percentage of gain allocable to each direct or indirect partner and that provides whether each such person is a United States person, a foreign partner eligible for treaty benefits, or a presumed foreign taxable person. The certification must also include the certification of non-foreign status or the certification of treaty benefits from each direct or indirect partner that is not a presumed foreign taxable person.

(3) *Lack of money or property or lack of knowledge regarding liabilities.* The amount to withhold equals the amount realized determined without regard to any decrease in the transferor's share of partnership liabilities if—

(i) The amount otherwise required to be withheld under this paragraph (c) would exceed the amount realized determined without regard to the decrease in the transferor's share of partnership liabilities; or

(ii) The transferee is unable to determine the amount realized because it does not have actual knowledge of the transferor's share of partnership liabilities (and has not received or cannot rely on a certification described in paragraph (c)(2)(ii)(B) or (C) of this section).

(4) *Certification of maximum tax liability*—(i) *In general.* A transferee may use the procedures of this paragraph (c)(4) for determining the amount to withhold for purposes of section 1446(f)(1) and paragraph (a) of this section. A transferee (other than a partnership that is a transferee because it makes a distribution) may rely on a certification from a transferor that is a

foreign corporation, a nonresident alien individual, a foreign partnership, or a foreign trust regarding the transferor's maximum tax liability as described in paragraph (c)(4)(ii) of this section. A partnership that is a transferee because it makes a distribution may instead rely on its books and records to determine the transferor's maximum tax liability if the books and records includes the information required by paragraphs (c)(4)(iii) and (iv) of this section. A transferor that is a foreign partnership or a foreign trust is treated as a nonresident alien individual for purposes of determining the transferor's maximum tax liability.

(ii) *Maximum tax liability.* For purposes of this paragraph (c)(4), the term *maximum tax liability* means the amount of the transferor's effectively connected gain (as determined under paragraph (c)(4)(iii)(E) of this section) multiplied by the applicable percentage, as defined in § 1.1446–3(a)(2).

(iii) *Required information.* The certification must include—

(A) A statement that the transferor is either a nonresident alien individual, a foreign corporation, a foreign partnership, or a foreign trust;

(B) The transferor's adjusted basis in the transferred interest on the determination date;

(C) The transferor's amount realized (determined in accordance with paragraph (c)(2) of this section) on the determination date;

(D) Whether the transferor remains a partner immediately after the transfer;

(E) The amount of outside ordinary gain and outside capital gain that would be recognized and treated as effectively connected gain under § 1.864(c)(8)–1(b) on the determination date (effectively connected gain);

(F) The transferor's maximum tax liability on the determination date;

(G) A representation from the transferor that the transferor determined the amounts described in paragraph (c)(4)(iii)(E) of this section based on the statement described in paragraph (c)(4)(iv) of this section, if applicable; and

(H) A representation from the transferor that it has provided the transferee with a copy of the statement described in paragraph (c)(4)(iv) of this section.

(iv) *Partnership statement.* A transferor may make the representation in paragraph (c)(4)(iii)(G) of this section only if the partnership provides to the transferor a statement (that meets the requirements for a certification under the general rules for applicability in § 1.1446(f)–1(c)) that includes—

(A) The partnership's name, address, and TIN; and

(B) The transferor's aggregate deemed sale EC ordinary gain, within the meaning of § 1.864(c)(8)–1(c)(3)(ii)(A) (if any) and the transferor's aggregate deemed sale EC capital gain, within the meaning of § 1.864(c)(8)–1(c)(3)(ii)(B) (if any), in each case, on the determination date.

(v) *Partial nonrecognition.* If a nonrecognition provision applies to only a portion of the gain realized on the transfer, a certification described in paragraph (c)(4)(i) may be relied upon only if the certification also includes the information required in paragraph (b)(6) of this section (substituting ''a portion of the gain or loss'' for ''any gain or loss'' in paragraph (b)(6)(i) of this section).

(vi) *Income tax treaties.* If only a portion of the gain on the transfer is not subject to tax pursuant to an income tax treaty in effect between the United States and a foreign country, a certification described in paragraph (c)(4)(i) of this section may be relied upon only if the requirements of paragraph (b)(7)(i) of this section have been met, including the requirement to obtain the applicable withholding certificate indicating that the gain from the transfer is not subject to tax pursuant to an income tax treaty (substituting ''a portion of the gain'' for ''any gain'' in paragraph (b)(7)(i) of this section), and the requirement to mail a copy of the withholding certificate to the IRS.

(d) *Reporting and paying withheld amounts*—(1) *In general.* A transferee required to withhold under this section must report and pay any tax withheld by the 20th day after the date of the transfer using Forms 8288, *U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests,* and 8288–A, *Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests,* in accordance with the instructions to those forms. The IRS will stamp Form 8288–A to show receipt and mail a stamped copy to the transferor (at the address reported on the form). See paragraph (e)(2) of this section for the procedures for the transferor to claim a credit for amounts withheld. Forms 8288 and 8288–A must include the TINs of both the transferor and the transferee. If any required TIN is not provided, the transferee must still report and pay any tax withheld on Form 8288.

(2) *Certification of withholding to partnership for purposes of section 1446(f)(4).* A transferee (other than a partnership that is a transferee because it makes a distribution) must certify to the partnership the extent to which it has satisfied its obligation to withhold under this section no later than 10 days after the transfer. The certification must either include a copy of Form 8288–A that the transferee files with respect to the transfer, or state the amount realized and the amount withheld on the transfer. The certification must also include any certifications that the transferee relied on to apply an exception to withholding under paragraph (b) of this section or to determine the amount to withhold under paragraph (c) of this section. A transferee that relied on a certification to apply an exception or adjustment to withholding remains liable under this section when the partnership knows, or has reason to know, that the certification is incorrect or unreliable. See § 1.1446(f)–3 for rules regarding a partnership's obligation to withhold on distributions to a transferee when this certification establishes only partial satisfaction of the required amount, is not provided, or cannot be relied upon.

(e) *Effect of withholding on transferor*—(1) *In general.* The withholding of tax by a transferee under this section does not relieve a foreign person from filing a U.S. tax return with respect to the transfer. See §§ 1.6012–1(b)(1), 1.6012–2(g)(1), and 1.6031(a)–1. Further, the withholding of tax by a transferee does not relieve a nonresident alien individual or foreign corporation subject to tax on gain by reason of section 864(c)(8) from paying any tax due with the return that has not been fully satisfied through withholding.

(2) *Manner of obtaining credit*—(i) *Individuals or corporations.* Except as provided in paragraph (e)(3) of this section, an individual or corporation may claim a credit under section 33 for the amount withheld under this section by attaching to its applicable return the stamped copy of Form 8288–A provided to it under paragraph (d)(1) of this section.

(ii) *Partnerships, trusts, or estates.* For a rule allowing a foreign partnership that is a transferor to claim a credit for the amount withheld under this section against its tax liability under section 1446(a), see § 1.1446–3(c)(4). For the rule providing the extent to which a foreign trust or estate may claim a credit for an amount withheld under this section, see § 1.1462–1. Except as provided in paragraph (e)(3) of this section, a foreign partnership, trust, or estate claiming a credit for an amount withheld must attach to its applicable return the stamped copy of Form 8288–A provided to it under paragraph (d)(1) of this section. A foreign trust or estate must also provide any other information required in forms or instructions to any

beneficiary or owner that is liable for tax on any of the gain under section 864(c)(8).

(3) *Failure to receive Form 8288–A.* If a stamped copy of Form 8288–A has not been provided to the transferor by the IRS, the transferor may establish the amount of tax withheld by the transferee by attaching to its return substantial evidence of the amount. The transferor must attach to its return a statement that includes all of the information otherwise required to be provided on Form 8288–A.

(f) *Applicability date.* This section applies to transfers that occur on or after January 29, 2021.

§ 1.1446(f)–3 Partnership's requirement to withhold under section 1446(f)(4) on distributions to transferee.

(a) *Partnership's obligation to withhold amounts not withheld by the transferee*—(1) *In general.* If a transferee fails to withhold any amount required to be withheld under § 1.1446(f)–2, the partnership in which the interest was transferred must withhold from any distributions with respect to the transferred interest pursuant to this section. To determine its withholding obligation under this paragraph (a)(1), a partnership may rely on a certification received from the transferee described in § 1.1446(f)–2(d)(2) unless it knows, or has reason to know, that the certification is incorrect or unreliable. A partnership that already possesses a certification of non-foreign status (including a Form W–9) for the transferor that meets the requirements provided in § 1.1446(f)–2(b)(2) may instead rely on this certification to determine that it has no withholding obligation under this paragraph (a)(1) unless it knows, or has reason to know, that the certification is incorrect or unreliable. A partnership that receives a certification described in § 1.1446(f)–2(d)(2) that is inconsistent with the information on the certification of non-foreign status in its possession is treated as having actual knowledge, or reason to know, that the certification of non-foreign status is incorrect or unreliable.

(2) *Notification by IRS.* A partnership that receives notification from the IRS that a transferee has provided incorrect information regarding the amount realized or amount withheld on the certification described in § 1.1446(f)–2(d)(2), or has failed to pay the IRS the amount reported as withheld on the certification, must withhold the amount prescribed in the notification on distributions with respect to the transferred interest made on or after the date that is 15 days after it receives the notification. The IRS will not issue a notification on the basis that the amount realized on the certification described in § 1.446(f)–2(d)(2) is incorrect if it determines that the transferee properly relied on a certification that included the incorrect information to compute the amount realized pursuant to § 1.1446(f)–2(c)(2).

(3) *Subsequent transferees.* A partnership is not required to withhold under paragraph (a)(1) or (2) of this section on distributions that are made after the date on which the transferee disposes of the transferred interest, unless the partnership has actual knowledge that any person that acquires the transferee's interest in the partnership is a related person, *i.e.,* a person that bears a relationship described in section 267(b) or 707(b)(1) with respect to the transferee or the transferor from which the transferee acquired the interest. A related person that acquires the transferee's interest is treated as liable for tax under section 1461 to the same extent that the transferee is liable for its failure to withhold under § 1.1446(f)–2.

(b) *Exceptions to withholding*—(1) *Withholding has been satisfied by transferee.* A partnership is not required to withhold under paragraph (a)(1) of this section if it relies on a certification described in § 1.1446(f)–2(d)(2) received from the transferee (within the time prescribed in § 1.1446(f)–2(d)(2)) that states that an exception to withholding described in § 1.1446(f)–2(b) applies or that the transferee withheld the full amount required to be withheld (taking into account any adjustments under § 1.1446(f)–2(c)) under § 1.1446(f)–2.

(2) *PTP interests.* A partnership is not required to withhold under this section on distributions made with respect to a PTP interest.

(3) *Distributing partnerships.* A partnership that is a transferee because it makes a distribution is not required to withhold under this section.

(c) *Withholding rules*—(1) *Timing of withholding*—(i) *In general.* A partnership required to withhold under paragraph (a)(1) of this section must withhold on distributions made with respect to a transferred interest beginning on the later of—

(A) The date that is 30 days after the date of transfer; or

(B) The date that is 15 days after the date on which the partnership acquires actual knowledge that the transfer has occurred.

(ii) *Satisfaction of withholding obligation.* A partnership is treated as satisfying its withholding obligation under paragraph (a)(1) of this section and may stop withholding on distributions with respect to a transferred interest on the earlier of—

(A) The date on which the partnership completes withholding and paying the amount required to be withheld under paragraph (c)(2) of this section; or

(B) The date on which the partnership receives and may rely on a certification from the transferee described in § 1.1446(f)–2(d)(2) (without regard to whether the certification is received by the time prescribed in § 1.1446(f)–2(d)(2)) that claims an exception to withholding under § 1.1446(f)–2(b).

(2) *Amount to withhold*—(i) *In general.* A partnership required to withhold under paragraph (a)(1) of this section must withhold the full amount of each distribution made with respect to the transferred interest until it has withheld—

(A) A tax of 10 percent of the amount realized (determined solely under § 1.1446(f)–2(c)(2)(i)) on the transfer, reduced by any amount withheld by the transferee; plus

(B) Any interest computed under paragraph (c)(2)(ii) of this section.

(ii) *Computation of interest.* The amount of interest required to be withheld under paragraph (a)(1) of this section is the amount of interest that would be required to be paid under section 6601 and § 301.6601–1 of this chapter if the amount that should have been withheld by the transferee was considered an underpayment of tax. For purposes of this paragraph (c)(2)(ii), interest is payable between the date that is 20 days after the date of the transfer and the date on which the tax due under paragraph (a)(1) of this section is paid to the IRS.

(iii) *Certifications required.* For purposes of paragraph (c)(2)(i)(A) of this section, a partnership must determine the amount realized on the transfer and any amount withheld by the transferee based on a certification from the transferee described in § 1.1446(f)–2(d)(2), without regard to whether the certification is received by the time prescribed in § 1.1446(f)–2(d)(2). A partnership that does not receive or cannot rely on a certification from the transferee described in § 1.1446(f)–2(d)(2) must withhold tax equal to the full amount of each distribution made with respect to a transferred interest until it receives a certification that it can rely on.

(3) *Coordination with other withholding provisions.* Any amount required to be withheld on a distribution under any other provision of the Internal Revenue Code is not also required to be withheld under section 1446(f)(4) or this section.

(d) *Reporting and paying withheld amounts.* The partnership must report and pay the tax withheld using Forms 8288, *U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests,* and 8288–C, *Statement of Withholding Under Section 1446(f)(4) for Withholding on Dispositions by Foreign Persons of Partnership Interests,* as provided in forms, instructions, or other guidance.

(e) *Effect of withholding on transferor and transferee*—(1) *Transferor.* The withholding of tax by a partnership under this section does not relieve a foreign person from filing a U.S. income tax return with respect to the transfer. See §§ 1.6012–1(b)(1), 1.6012–2(g)(1), and 1.6031(a)–1. Further, the withholding of tax by a partnership does not relieve a nonresident alien individual or foreign corporation subject to tax on gain by reason of section 864(c)(8) from paying any tax due with the return that has not been fully satisfied through withholding. An individual or corporation is not allowed a credit under section 33 for amounts withheld on distributions to the transferee under this section. See, however, §§ 1.1446(f)–5(a) and 1.1463–1(a), which generally provide that tax will not be recollected if paid by another person.

(2) *Transferee.* A transferee is treated as satisfying its withholding tax liability under § 1.1446(f)–2 to the extent that a partnership withholds tax (which does not include interest) under this section. Interest computed under paragraph (c)(2)(ii) of this section that is withheld by the partnership from the transferee is treated as interest paid by the transferee with respect to its withholding tax liability under § 1.1446(f)–2. An excess amount under this section is the amount of tax and interest withheld under this section that exceeds the transferee's withholding tax liability under § 1.1446(f)–2 plus any interest owed by the transferee with respect to such liability. A transferee may claim a refund for the excess amount if payments have been made in excess of the tax which is properly due by the transferee for the tax period.

(f) *Applicability date.* This section applies to transfers that occur on or after January 1, 2022.

§ 1.1446(f)–4 Withholding on the transfer of a publicly traded partnership interest.

(a) *Obligation to withhold on a transfer of a PTP interest*—(1) *In general.* If a transfer of a PTP interest is effected through one or more brokers (as defined in § 1.1446(f)–1(b)(1)), the transferee is not required to withhold under section 1446(f)(1) and § 1.1446(f)–2. Rather, any broker required to withhold under paragraph (a)(2) of this section must withhold a tax equal to 10 percent of the amount realized (as defined in paragraph (c)(2) of this section) on the transfer of a PTP interest, except as otherwise provided in this section. For cases in which a publicly traded partnership is liable for withholding under this section, see paragraphs (b)(3)(i) and (c)(2)(iii) of this section.

(2) *Broker's requirement to withhold*—(i) *In general.* Except as otherwise provided in this section, a broker is required to withhold under this section if it pays an amount realized to another broker that it is required to treat as a foreign person, or if a broker pays an amount realized to a foreign transferor that is its customer.

(ii) *Payments to foreign brokers.* A broker that pays an amount realized from the transfer of a PTP interest to another broker that it is required to treat as a foreign person must withhold under this section unless the first-mentioned broker obtains documentation on which it may rely establishing that the second-mentioned broker is described in paragraph (a)(2)(ii)(A) or (B) of this section. A broker must treat any broker to which it pays an amount realized from the transfer of a PTP interest as a foreign person unless it obtains, or already possesses, documentation (including a certification of non-foreign status) on which it may rely that establishes that the other broker is a U.S. person. A broker may rely on documentation described in this paragraph (a)(2)(ii), or in paragraph (a)(2)(ii)(A) or (B) of this section, unless it has actual knowledge that the documentation is unreliable or incorrect.

(A) A broker is described in this paragraph (a)(2)(ii)(A) if it is a qualified intermediary (as defined in § 1.1441–1(e)(5)(ii)) that provides a valid qualified intermediary withholding certificate (as described in § 1.1441–1(e)(3)(ii)) that states that it assumes primary withholding responsibility for the payment.

(B) A broker is described in this paragraph (a)(2)(ii)(B) if it is a U.S. branch of a foreign person (as described in § 1.1441–1(b)(2)(iv)) that provides a valid U.S. branch withholding certificate (as described in § 1.1441–1(e)(3)(v), but without regard to the requirement in § 1.1441–1(e)(3)(v) that the certificate state that the amount is not effectively connected with a trade or business within the United States) that states that the U.S. branch agrees to be treated as a U.S. person with respect to the payment.

(iii) *Payments to foreign transferors that are customers of the broker.* A broker that pays an amount realized to a foreign transferor that is its customer (as defined in § 1.6045–1(a)(2)) from the transfer of a PTP interest is required to withhold under this section unless an exception under paragraph (b) of this section applies.

(3) *Exception from certain withholding by U.S. clearing organizations.* A broker that is a U.S. clearing organization clearing or settling a sale of a PTP interest is not required to withhold on the amount realized from the sale. However, see § 1.1461–1(c)(2)(i)(R)(*2*) for the requirement that a U.S. clearing organization acting as a central counterparty report on Form 1042–S sales of PTP interests that it clears and settles on a net basis.

(4) *Exception when withholding already satisfied.* A broker that receives from another broker an amount realized from the transfer of a PTP interest is required to withhold under this section unless the other broker has withheld the full amount required. A broker that receives from another broker an amount realized from the transfer of a PTP interest may treat the withholding as having been satisfied on the full amount required unless it knows or has reason to know that the withholding obligation has not already been satisfied. A broker that is a qualified intermediary determines its withholding requirement for purposes of this paragraph (a)(4) in accordance with its qualified intermediary agreement.

(5) *Documentation obtained from another person to determine a broker's status.* A U.S. clearing organization may act as an agent for a broker receiving an amount realized from another broker that is a member of the clearing organization for purposes of furnishing valid documentation described in paragraph (a)(2) of this section of the first-mentioned broker's status to such other broker, provided the clearing organization notifies the first-mentioned broker and such broker has the ability to opt out. A broker that obtains documentation from a clearing organization under this paragraph (a)(5) for a broker to which the first-mentioned broker is paying an amount realized may rely on such documentation unless it has actual knowledge that the documentation is incorrect or unreliable.

(6) *Date of withholding with respect to a transfer other than a distribution.* For a transfer of a PTP interest that is not a distribution, a broker is required to apply the principles of § 31.3406(a)–4(b)(1) of this chapter to determine the

date on which to withhold under this section.

(7) *Payments to qualified intermediaries not assuming primary withholding responsibility.* With respect to the transfer of a PTP interest, if a broker pays the amount realized to a foreign person that the broker may treat as a qualified intermediary (as defined in § 1.1441–1(e)(5)(ii)) that does not assume primary withholding responsibility for the payment based on a valid qualified intermediary withholding certificate described in § 1.1441–1(e)(3)(ii) upon which the broker may rely under paragraph (a)(2) of this section, the broker may withhold as provided in this paragraph (a)(7). Under this paragraph (a)(7), a broker may withhold under this section by reference to the amount of the payment that the broker can reliably determine, based on the withholding statement provided with the withholding certificate, is allocable to—

(i) Foreign transferors included in a chapter 3 withholding rate pool (as described in § 1.1441–1(e)(5)(v)(C)) that are subject to a 10 percent rate of withholding on the payment of the amount realized;

(ii) Foreign transferors included in a chapter 3 withholding rate pool (as described in § 1.1441–1(e)(5)(v)(C)) that qualify for an exception from withholding on the payment of the amount realized under paragraph (b) of this section;

(iii) Each foreign transferor for which a form acceptable under § 1.1446–1 is provided; or

(iv) U.S. transferors, based on a valid Form W–9 provided for each such transferor to the extent that the transferor is not included in a chapter 4 withholding rate pool of U.S. payees (as described in § 1.1441–1(e)(5)(v)(C), to the extent permitted for purposes of chapter 4 of the Internal Revenue Code).

(8) *Qualified intermediary or U.S. branch withholding requirement.* A broker that is a qualified intermediary (as defined in § 1.1441–1(e)(5)(ii)) or U.S. branch must assume primary withholding responsibility under this section for a distribution from a publicly traded partnership for which the qualified intermediary or U.S. branch acts as a nominee for purposes of section 1446(a). See § 1.1446–4(b)(3).

(b) *Exceptions to withholding*—(1) *In general.* A broker is not required to withhold under this section if it properly relies on a certification described in paragraph (b)(2), (5), or (6) of this section, a qualified notice described in paragraph (b)(3) of this section, or if the exception described in paragraph (b)(4) of this section applies. A broker may not rely on a certification described in this paragraph (b) if it has actual knowledge that the certification is incorrect or unreliable.

(2) *Certification of non-foreign status.* A broker may rely on a certification of non-foreign status that it obtains from the transferor. A certification of non-foreign status under this section means a Form W–9, *Request for Taxpayer Identification Number and Certification,* or valid substitute form, that meets the requirements of § 1.1441–1(d)(2). For purposes of this paragraph (b)(2), a broker may rely on a valid form that it already possesses from the transferor. A broker may instead rely on certification from a second broker (as defined in § 1.6045–1(a)(1)) that acts as an agent for the transferor when the second broker does not receive the amount realized from the transfer of the PTP interest. This certification must state that the second broker has collected a valid certification of non-foreign status (within the meaning of this paragraph (b)(2)) from the transferor, and it must include the transferor's TIN and status as a foreign or U.S. person.

(3) *Less than 10 percent effectively connected gain by partnership*—(i) *In general.* A broker may rely on a qualified notice described in paragraph (b)(3)(iii) of this section that states that the 10-percent exception applies, as determined under paragraph (b)(3)(ii) of this section. In a case in which a broker properly relies on a qualified notice under paragraph (b)(1) of this section that results in underwithholding on a transfer of a PTP interest, the publicly traded partnership that issued the notice is solely liable for the underwithheld tax under section 1461. A publicly traded partnership's liability referenced in the preceding sentence, however, applies only when the publicly traded partnership fails to make a reasonable estimate of the amounts required for determining the applicability of the 10-percent exception.

(ii) *10-percent exception*—(A) *In general.* The 10-percent exception applies to a transfer if, on the PTP designated date described in paragraph (b)(3)(ii)(B) of this section—

(*1*) If the publicly traded partnership sold all of its assets at fair market value in the manner described in § 1.864(c)(8)–1(c), either—

(*i*) The amount of net gain that would have been effectively connected with the conduct of a trade or business within the United States would be less than 10 percent of the total net gain; or

(*ii*) No gain would have been effectively connected with the conduct of a trade or business in the United States; or

(*2*) The partnership was not engaged in a trade or business within the United States at any time during the taxable year of the partnership through the PTP designated date.

(B) *PTP designated date.* The PTP designated date for a transfer is any date for a deemed sale determination that is designated by the publicly traded partnership in a qualified notice described in paragraph (b)(3)(iii) of this section, provided that the PTP designated date occurs on or after the date that is 92 days before the date on which the publicly traded partnership posted the qualified notice naming the PTP designated date.

(iii) *Qualified notice*—(A) *In general.* Except as provided in paragraphs (b)(3)(iii)(B) and (C) of this section, a qualified notice described in this paragraph (b)(3)(iii) is the most recent qualified notice (within the meaning of § 1.1446–4(b)(4)) posted by the publicly traded partnership.

(B) *Qualified notice posting date requirement.* A qualified notice is described in this paragraph (b)(3)(iii) only if the publicly traded partnership has posted it within the 92-day period ending on the date of the transfer. For a transfer that is a distribution by the publicly traded partnership, the qualified notice is described in paragraph (b)(3)(iii) of this section only if the qualified notice is posted with respect to the distribution.

(C) *Recent posting of qualified notice.* If the most recent qualified notice posted by the publicly traded partnership was posted during the 10-day period ending on the date of the transfer, a broker may instead rely on the immediately preceding qualified notice (within the meaning of § 1.1446–4(b)(4)) posted by the publicly traded partnership, provided that it satisfies the condition described in paragraph (b)(3)(iii)(B) of this section.

(4) *Amount subject to withholding under section 3406.* A broker is not required to withhold under this section if the amount realized from the transfer of the PTP interest is subject to withholding under § 31.3406(b)(3)–2 of this chapter.

(5) *Income tax treaties.* A broker may rely on a certification from the transferor that states that the transferor is not subject to tax on any gain from the transfer pursuant to an income tax treaty in effect between the United States and a foreign country if the requirements of this paragraph (b)(5) are met. The transferor makes the certification on a withholding certificate (on a Form W–8BEN, *Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting*

(Individuals), or Form W–8BEN–E, *Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities)*) that meets the requirements for validity under § 1.1446–1(c)(2)(iv) (or an applicable substitute form that meets the requirements under § 1.1446–1(c)(5)) and that contains the information necessary to support the claim for treaty benefits. For purposes of this paragraph (b)(5), a broker may rely on a withholding certificate that it already possesses from the transferor that meets the requirements of this paragraph (b)(5) unless it has actual knowledge that the information is incorrect or unreliable. The exception in this paragraph (b)(5) does not apply if treaty benefits apply to only a portion of the gain from the transfer.

(6) *Foreign dealers that provide Form W–8ECI.* A broker may rely on a certification provided by a transferor that certifies that it is a dealer in securities (as defined in section 475(c)(1)) and that any gain from the transfer of the PTP interest is effectively connected with the conduct of a trade or business within the United States without regard to the provisions of section 864(c)(8). The certification described in the preceding sentence is made on a Form W–8ECI, *Certificate of Foreign Person's Claim That Income Is Effectively Connected With the Conduct of a Trade or Business in the United States,* that meets the requirements for validity under § 1.1446–1(c)(2)(iv) (or an applicable substitute form that meets the requirements under § 1.1446–1(c)(5)) and that contains any other information required in the instructions to the form. A broker may rely on a withholding certificate that it already possesses from the transferor that meets the requirements of this paragraph (b)(6) unless it has actual knowledge that the information is incorrect or unreliable.

(c) *Determining the amount to withhold*—(1) *In general.* A broker that is required to withhold under this section must withhold 10 percent of the amount realized on the transfer of the PTP interest, except as provided in this paragraph (c). Any procedures in this paragraph (c) apply solely for purposes of determining the amount to withhold under section 1446(f)(1) and this section. A broker may not rely on a certification described in this paragraph (c) if it has actual knowledge that the certification is incorrect or unreliable.

(2) *Amount realized*—(i) *In general.* Solely for purposes of this section, the amount realized is the amount of gross proceeds (as defined in § 1.6045–1(d)(5)) paid or credited upon the transfer to the customer or other broker (as applicable), or, in the case of a distribution, the amount determined under paragraph (c)(2)(iii) of this section.

(ii) *Certification by a foreign partnership of modified amount realized*—(A) *In general.* When a transferor is a foreign partnership, a broker may use the procedures of this paragraph (c)(2)(ii) to determine the amount realized. For purposes of this paragraph (c)(2)(ii)(A), the broker may treat the modified amount realized as the amount realized to the extent it may rely on a certification from the transferor providing the modified amount realized.

(B) *Determining modified amount realized.* The modified amount realized is determined by multiplying the amount realized (as determined under this paragraph (c)(2), without regard to this paragraph (c)(2)(ii)) by the aggregate percentage computed as of the determination date (see § 1.1446(f)–1(c)(4)). The aggregate percentage is the percentage of the gain (if any) arising from the transfer that would be allocated to presumed foreign taxable persons. For purposes of this paragraph (c)(2)(ii)(B), a presumed foreign taxable person is any direct or indirect partner of the transferor that has not provided either a certification of non-foreign status that meets the requirements of paragraph (b)(2) of this section or a certification of treaty benefits that states that the partner is not subject to tax on any gain from the transfer pursuant to an income tax treaty in effect between the United States and a foreign country. A valid certification of treaty benefits must meet the requirements of paragraph (b)(5) of this section (as applied to the partner claiming treaty benefits). For purposes of this paragraph (c)(2)(ii), an indirect partner is a person that owns an interest in the transferor indirectly through one or more foreign partnerships.

(C) *Certification.* The certification is made by providing a withholding certificate (on Form W–8IMY, *Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding and Reporting*) that includes a withholding statement that provides the percentage of gain allocable to each direct or indirect partner and that provides whether each such person is a United States person, a foreign partner eligible for treaty benefits, or a presumed foreign taxable person. The certification must also include the certification of non-foreign status or the certification of treaty benefits from each direct or indirect partner that is not a presumed foreign taxable person. For purposes of this paragraph (c)(2)(ii), a broker may rely on a withholding certificate and withholding statement that it already possesses from the partnership unless it has actual knowledge that the information is incorrect or unreliable.

(iii) *Determination of amount realized on a distribution.* The amount realized on a distribution from a publicly traded partnership is the amount of the distribution reduced by the portion of the distribution that is attributable to the cumulative net income of the partnership. The cumulative net income is the net income earned by the publicly traded partnership since its formation that has not been previously distributed by the partnership. A publicly traded partnership identifies such excess portion of the distribution as an amount in excess of cumulative net income on a qualified notice (within the meaning of § 1.1446–4(b)(4)) posted with respect to the distribution. If a broker properly withholds based on the qualified notice (applying the rules of § 1.1446–4(d)(1) to the distribution), the broker is not liable for any underwithholding on any amount attributable to an amount in excess of cumulative net income. Rather, the publicly traded partnership that issued the qualified notice is solely liable for the underwithheld tax under section 1461 on such amount that results from a broker's reliance on the notice.

(d) *Reporting and paying withheld amounts.* A broker that is required to withhold under this section must pay the withheld tax pursuant to the deposit rules in § 1.6302–2. For rules regarding reporting on Forms 1042, *Annual Withholding Tax Return for U.S. Source Income of Foreign Persons,* and 1042–S, *Foreign Person's U.S. Source Income Subject to Withholding,* that apply to a broker that withholds under this section, see § 1.1461–1(b) and (c). For rules regarding when an amount realized on the transfer of a PTP interest is reportable on a Form 1042–S (including in certain cases in which withholding is not required), see § 1.1461–1(c)(2)(i)(Q) and (R). A broker that pays the amount realized to a foreign partnership must issue a Form 1042–S directly to the partnership rather than issuing a form to each of the partners of the partnership. *See* § 1.1461–1(c)(1)(ii)(A)(*8*) (treating the foreign partnership as a recipient for reporting purposes). A broker making a payment to a U.S. branch treated as a U.S. person must not treat the branch as a U.S. person for purposes of reporting the payment made to the branch. Therefore, a payment to that U.S. branch must be reported on Form 1042–S. *See* § 1.1461–1(c). A Form 1042–S issued

directly to the transferor must include the TIN of the transferor unless the broker does not know the TIN at the time of issuance.

(e) *Effect of withholding on transferor*—(1) *In general.* The withholding of tax under this section does not relieve a foreign person from filing a U.S. tax return with respect to the transfer. *See* §§ 1.6012–1(b)(1), 1.6012–2(g)(1), and 1.6031(a)–1. Further, the withholding of tax by a broker does not relieve a nonresident alien individual or foreign corporation subject to tax on gain by reason of section 864(c)(8) from paying any tax due with the return that has not been fully satisfied through withholding.

(2) *Manner of obtaining credit*—(i) *Individuals and corporations.* An individual or corporation may claim a credit under section 33 for the amount withheld under this section by attaching to its applicable return a copy of a Form 1042–S that includes its TIN (or as otherwise provided in IRS forms or instructions).

(ii) *Partnerships, trusts, or estates.* For a rule allowing a foreign partnership that is a transferor to claim a credit for the amount withheld under this section against its obligation to withhold under section 1446(a), see § 1.1446–3(c)(4). For the rule providing the extent to which a foreign trust or estate may claim a credit for an amount withheld under this section, see § 1.1462–1. A foreign partnership, trust, or estate claiming a credit for an amount withheld must attach to its applicable return the Form 1042–S provided to it under paragraph (d) of this section (or as otherwise provided in IRS forms or instructions). A foreign trust or estate must also provide any information required in forms or instructions to any beneficiary or owner that is liable for tax on any of the gain under section 864(c)(8).

(f) *Applicability date.* This section applies to transfers that occur on or after January 1, 2022.

§ 1.1446(f)–5 Liability for failure to withhold.

(a) *Liability for failure to withhold.* Every person required to withhold and pay tax under section 1446(f), but that fails to do so, is liable for the tax under section 1461, plus any applicable interest, penalties, or additions to tax. A partnership that failed to withhold and pay tax under § 1.1446(f)–3 is liable only for the amount of tax that it failed to collect (but not any interest computed on that amount under § 1.1446(f)–3(c)(2)(ii)), plus any interest, penalties, or additions to tax with regard to the partnership's failure to withhold.

(b) *Tax liability otherwise satisfied.* Under section 1463, if the tax required to be withheld under section 1446(f) is paid by another person required to withhold under section 1446(f), or by the nonresident alien individual or foreign corporation subject to tax on gain resulting from section 864(c)(8), the tax will not be recollected. The person required to withhold must establish proof of payment by another person required to withhold or by the nonresident alien individual or foreign corporation subject to the tax on gain resulting from section 864(c)(8). The person required to withhold may show that a reduced rate of withholding was appropriate by establishing the amount of tax due by the foreign transferor (as defined in § 1.864(c)(8)–1(g)(3)) on gain resulting from section 864(c)(8). The person required to withhold under section 1446(f) is not relieved from liability for any interest, penalties, or additions to tax that would otherwise apply. However, if the person required to withhold establishes to the satisfaction of the Commissioner that no gain on the transfer is treated as effectively connected with the conduct of a trade or business within the United States under section 864(c)(8), no interest, penalties, or additions to tax will apply.

(c) *Liability of agents*—(1) *Duty to provide notice of false certification.* A transferee's or transferor's agent (other than a broker required to withhold under § 1.1446(f)–4) must provide notice to a transferee (or other person required to withhold) if that person is furnished with a certification described in §§ 1.1446(f)–1 through 1.1446(f)–4 that the agent knows is false. A person required to withhold may not rely on a certification if it receives the notice described in this paragraph (c)(1).

(2) *Procedural requirements.* Any agent who is required to provide notice under paragraph (c)(1) of this section must do so in writing (including by electronic submission) as soon as possible after learning of the false certification. If the agent first learns of the false certification before the date of transfer, notice must be given by the third day following that discovery but no later than the date of transfer (before the transferee's payment of consideration). If an agent first learns of a false certification after the date of transfer, notice must be given by the third day following that discovery. The notice must also explain the possible consequences to the recipient of a failure to withhold. The notice need not disclose the information on which the agent's statement is based. The agent must also furnish a copy of the notice to the IRS by the date on which the notice is required to be given to the recipient. The copy of the notice must be delivered to the address provided in § 1.1445–1(g)(10) and must be accompanied by a cover letter stating that the copy is being filed pursuant to the requirements of this paragraph (c)(2).

(3) *Failure to provide notice.* Any agent who is required to provide notice under paragraph (c)(1) of this section, but fails to do so in the manner required in paragraph (c)(2) of this section, is liable for the tax that the person who should have been provided notice in accordance with paragraph (c)(2) of this section was required to withhold under section 1446(f) if the notice had been given.

(4) *Limitation on liability.* An agent's liability under paragraph (c)(3) of this section is limited to the amount of compensation that the agent derives from the transaction. In addition, an agent that assists in the preparation of, or fails to disclose knowledge of, a false certification may be liable for civil and criminal penalties.

(d) *Applicability date.* This section applies to transfers that occur on or after January 29, 2021.

■ **Par. 12.** Section 1.1461–1 is amended:
■ 1. By revising the fourth and fifth sentences of paragraph (a)(1) and removing the sixth sentence.
■ 2. By revising the second sentence and removing the third sentence of paragraph (c)(1)(i).
■ 3. By revising paragraph (c)(1)(ii)(A)(*8*).
■ 4. By removing the word ''and'' at the end of paragraph (c)(1)(ii)(B)(*3*).
■ 5. By removing the period at the end of paragraph (c)(1)(ii)(B)(*4*) and adding ''; and'' in its place.
■ 6. By adding paragraph (c)(1)(ii)(B)(*5*).
■ 7. In paragraph (c)(2)(i) introductory text, by revising the first sentence and removing the second sentence.
■ 8. In paragraph (c)(2)(i)(N), by removing the word ''and'' from the end of the paragraph.
■ 9. In paragraph (c)(2)(i)(O), by removing the period at the end of the paragraph and adding a semicolon in its place.
■ 10. By adding paragraphs (c)(2)(i)(P), (Q), and (R).
■ 11. By adding a sentence at the end of paragraph (c)(4)(ii)(A).
■ 12. Revising paragraph (i).

The revisions and additions read as follows:

§ 1.1461–1 Payment and returns of tax withheld.

(a) * * *

(1) * * * With respect to withholding under section 1446, this section shall

apply only to publicly traded partnerships and nominees that withhold under § 1.1446–4 and brokers and publicly traded partnerships that withhold (or are otherwise liable for underwithholding) under § 1.1446(f)–4 on transfers of publicly traded partnership interests. See § 1.1461–3 regarding withholding tax liabilities under sections 1446(a) and 1446(f) and penalties that apply for failure to withhold under either of those sections.

* * * * *

(c) * * *

(1) * * *

(i) * * * Notwithstanding the preceding sentence, any person that withholds or is required to withhold an amount under section 1441, 1442, or 1443 or § 1.1446–4(a) (applicable to publicly traded partnerships required to pay tax under section 1446(a) on distributions) or § 1.1446(f)–4(a) (applicable to brokers required to withhold on transfers of publicly traded partnership interests) must file a Form 1042–S for the payment withheld upon whether or not that person is engaged in a trade or business and whether or not the payment is an amount subject to reporting. * * *

(ii) * * *

(A) * * *

(*8*) A partner (including a foreign partnership or a partner for which a qualified intermediary provides partner-specific documentation under § 1.1446–4(e)) receiving a distribution from a publicly traded partnership subject to withholding under section 1446(a) and § 1.1446–4 on distributions of effectively connected income, and a partner (including a foreign partnership or a partner for which a qualified intermediary provides partner-specific documentation under § 1.1446(f)–4(a)(7)) receiving an amount realized from a transfer of a publicly traded partnership interest under section 1446(f)(1) and § 1.1446(f)–4.

* * * * *

(B) * * *

(*5*) A foreign broker withheld upon under § 1.1446(f)–4(a)(2)(ii) by another broker paying an amount realized from the transfer of a PTP interest.

* * * * *

(2) * * *

(i) * * * Subject to the exceptions described in paragraph (c)(2)(ii) of this section, amounts subject to reporting on Form 1042–S are amounts paid to a foreign payee or partner (including persons presumed to be foreign) that are amounts subject to withholding as defined in § 1.1441–2(a), distributions of effectively connected income under § 1.1446–4, or amounts realized from transfers of PTP interests under § 1.1446(f)–4. * * *

(P) The amount of any distribution made by a publicly traded partnership that is an amount subject to withholding under § 1.1446–4, or that is paid to a qualified intermediary or a U.S. branch of a foreign person that agrees to be treated as a U.S. person;

(Q) Except with respect to a broker that is a U.S. clearing organization, an amount realized on the transfer of a PTP interest under § 1.1446(f)–4 (unless an exception to withholding applies under § 1.1446(f)–4(b)(2) through (4)); and

(R) In the case of a broker that is a U.S. clearing organization—

(*1*) An amount realized (as determined under § 1.1446(f)–4(c)(2)(iii)) on a distribution made by a publicly traded partnership for which withholding is required under § 1.1446(f)–4(a); and

(*2*) An amount realized on the sale of a PTP interest cleared and settled through a net settlement system maintained by the clearing organization acting as a central counterparty in the sale (with the reporting on the non-netted amount), unless an exception to withholding would apply under § 1.1446(f)–4(b)(2) or (3).

* * * * *

(4) * * *

(ii) * * *

(A) * * * For a payment to a foreign partnership on the transfer of a publicly traded partnership interest subject to § 1.1446(f)–4(a), see paragraph (c)(1)(ii)(A)(*8*) of this section (treating the foreign partnership as a recipient).

* * * * *

(i) *Applicability date.* This section applies to payments made on or after January 1, 2022. For payments made before January 1, 2022, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2020.

■ **Par. 13.** Section 1.1461–2 is amended by:

■ 1. Revising paragraph (a)(1).

■ 2. Revising the first sentence and removing the last sentence of paragraph (b).

■ 3. Revising paragraph (d).

The revisions read as follows:

§ 1.1461–2 Adjustments for overwithholding or underwithholding of tax.

(a) * * *

(1) *In general.* Except as otherwise provided in this paragraph (a)(1), a withholding agent that has overwithheld under chapter 3 of the Internal Revenue Code, and made a deposit of the tax as provided in § 1.6302–2(a), may adjust the overwithheld amount either pursuant to the reimbursement procedure described in paragraph (a)(2) of this section or pursuant to the set-off procedure described in paragraph (a)(3) of this section. The rules in the preceding sentence do not apply to partnerships or nominees required to withhold under section 1446(a), other than on a distribution by a publicly traded partnership subject to withholding under § 1.1446–4(a) and a payment of an amount realized on the transfer of an interest in a publicly traded partnership subject to § 1.1446(f)–4.

* * * * *

(b) * * * A withholding agent may withhold from future payments (including distributions of effectively connected income subject to withholding under § 1.1446–4 and the amount realized from the transfer of an interest in a publicly traded partnership subject to § 1.1446(f)–4) made to a beneficial owner the tax that should have been withheld from previous payments to that beneficial owner under chapter 3 of the Code. * * *

(d) *Applicability date.* This section applies to payments made on or after January 1, 2022. For payments made before January 1, 2022, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2020.

■ **Par. 14.** Section 1.1461–3 is amended by revising the first sentence and last sentence of the paragraph to read as follows:

§ 1.1461–3 Withholding under section 1446.

For rules relating to the withholding tax liability of a partnership, nominee, or transferee under section 1446, see §§ 1.1446–1 through 1.1446–7 and 1.1446(f)–1 through 1.1446(f)–5. * * * The references in this section to §§ 1.1446–1 through 1.1446–7 apply to partnership taxable years beginning after May 18, 2005, or such earlier time as the regulations under §§ 1.1446–1 through 1.1446–5 apply by reason of an election under § 1.1446–7, and the references in this section to §§ 1.1446(f)–1 through 1.1446(f)–5 shall apply with respect to returns for transfers that occur on or after January 29, 2021.

■ **Par. 15.** Section 1.1463–1 is amended by revising the fourth and fifth sentences of paragraph (a) to read as follows:

§ 1.1463–1 Tax paid by recipient of income.

(a) * * * See §§ 1.1446–3(e) and (f) and 1.1446(f)–5(a) for application of the rule of this paragraph (a), and for additional rules, in which the withholding tax was required to be paid

under section 1446. The references in the previous sentence to § 1.1446–3(e) and (f) apply to partnership taxable years beginning after May 18, 2005, or such earlier time as the regulations under §§ 1.1446–1 through 1.1446–5 apply by reason of an election under § 1.1446–7, and the reference in the previous sentence to § 1.1446(f)–5(a) shall apply to the tax required to be withheld under section 1446(f) for transfers that occur on or after January 29, 2021.

* * * * *

■ **Par. 16.** Section 1.1464–1 is amended by revising the last sentence of paragraph (a) and paragraph (c) to read as follows:

§ 1.1464–1 Refunds or credits.

(a) * * * With respect to section 1446(a), this section applies only to a publicly traded partnership or nominee described in § 1.1446–4 and, with respect to section 1446(f), only to a publicly traded partnership or broker described in § 1.1446(f)–4.

* * * * *

(c) *Applicability date.* The last sentence of paragraph (a) of this section applies to nominees and publicly traded partnerships described in § 1.1446–4 for partnership taxable years beginning after April 29, 2008, and to brokers required to withhold and publicly traded partnerships liable for underwithholding under § 1.1446(f)–4 on transfers that occur on or after January 1, 2022.

■ **Par. 17.** Section 1.6050K–1 is amended by:

■ 1. Redesignating paragraphs (c) introductory text and (c)(1) through (3) as the paragraphs (c)(1) introductory text and (c)(1)(i) through (iii), respectively.

■ 2. Adding a heading to newly redesignated paragraph (c)(1).

■ 3. Adding paragraphs (c)(2) and (3), (d)(3), and (h).

The additions read as follows:

§ 1.6050K–1 Returns relating to sales or exchanges of certain partnership interests.

* * * * *

(c) * * *

(1) *In general.* * * *

(2) *Information to be provided to transferors.* The statement a partnership must provide to a transferor partner pursuant to paragraph (c)(1) of this section must also include the information necessary for the transferor to make the transferor's required statement under § 1.751–1(a)(3).

(3) *Transfers of partnership interests by foreign persons.* For additional information required to be provided by the partnership if section 864(c)(8) applies to the transfer of a partnership interest by a foreign person, see § 1.864(c)(8)–2(b).

(d) * * *

(3) *Transfers of partnership interests by foreign persons.* For notifications required by foreign transferors of partnership interests, see § 1.864(c)(8)–2(a).

* * * * *

(h) *Applicability date.* Paragraphs (c)(2) and (3) of this section apply to returns filed on or after November 30, 2020. Paragraph (d)(3) of this section applies to transfers that occur on or after November 30, 2020.

■ **Par. 18.** Section 1.6302–2 is amended by:

■ 1. Revising the last sentence of paragraph (a)(1)(i).

■ 2. Revising the heading and second sentence of paragraph (g).

The revisions read as follows:

§ 1.6302–2 Deposit rules for tax withheld on nonresident aliens and foreign corporations.

(a) * * *

(1) * * *

(i) * * * With respect to section 1446(a), this section applies only to a publicly traded partnership or nominee described in § 1.1446–4 and, with respect to section 1446(f), only to a publicly traded partnership or broker described in § 1.1446(f)–4.

* * * * *

(g) *Applicability dates.* * * * In the last sentence of paragraph (a)(1)(i) of this section, the reference to § 1.1446–4 shall apply to partnership taxable years beginning after April 29, 2008, and the reference to § 1.1446(f)–4 shall apply to tax required to be withheld on or after January 1, 2022.

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

Approved: October 1, 2020.

David J. Kautter,

Assistant Secretary of the Treasury (Tax Policy).

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