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

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Presidential Documents

Title 3—

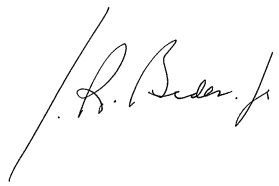
The President

Notice of February 10, 2023

Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID–19) Pandemic

On March 13, 2020, by Proclamation 9994, the President declared a national emergency concerning the coronavirus disease 2019 (COVID–19) pandemic. Today, we are in a different phase of the response to that pandemic than we were in March of 2020, and my Administration is planning for an end to the national emergency, but an orderly transition is critical to the health and safety of the Nation. For this reason, the national emergency declared on March 13, 2020, and beginning March 1, 2020, must continue in effect beyond March 1, 2023. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing the national emergency declared in Proclamation 9994 concerning the COVID–19 pandemic. I anticipate terminating the national emergency concerning the COVID–19 pandemic on May 11, 2023.

This notice shall be published in the *Federal Register* and transmitted to the Congress.



THE WHITE HOUSE,
February 10, 2023.

[FR Doc. 2023–03218
Filed 2–13–23; 8:45 am]
Billing code 3395–F3–P

Rules and Regulations

Federal Register
Vol. 88, No. 30
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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–1477; Project Identifier MCAI–2022–00632–E; Amendment 39–22327; AD 2023–03–02]

RIN 2120–AA64

Airworthiness Directives; Pratt & Whitney Canada Corp. Turboprop Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Pratt & Whitney Canada Corp. (P&WC) PT6E–67XP model turboprop engines with serial number HP0194 and earlier. This AD is prompted by multiple reports of engines failing to achieve required power (torque) during high power applications due to internal leaks in the bleed-off valves (BOVs). This AD requires replacement of the compressor BOV assembly, replacement of the BOV orifice feed air tube assembly, and installation of a redesigned P3 probe snorkel, as specified in a Transport Canada AD, which is incorporated by reference (IBR). The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective March 21, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of March 21, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2022–1477; 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 final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For material that is IBR in this final rule, contact Transport Canada, Transport Canada National Aircraft Certification, 159 Cleopatra Drive, Nepean, Ontario K1A 0N5, Canada; phone: (888) 663–3639; email: *AD-CN@tc.gc.ca;* website: *tc.canada.ca/en/aviation.*
- 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 (817) 222–5110. It is also available at *regulations.gov* under Docket No. FAA–2022–1477.

FOR FURTHER INFORMATION CONTACT: Barbara Caufield, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7146; email: *barbara.caufield@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain P&WC PT6E–67XP model turboprop engines with serial number HP0194 and earlier. The NPRM published in the **Federal Register** on November 18, 2022 (87 FR 69218). The NPRM was prompted by Transport Canada AD CF–2022–26–E, dated May 12, 2022 (Transport Canada AD CF–2022–26–E) (referred to after this as the MCAI). The MCAI states that there have been reports of multiple incidents in which engines were unable to achieve the required power (torque) during high power applications. A manufacturer investigation found that contamination from the glass beads used in the manufacturing process during the gas generator casing (GGC) production caused internal leaks in the BOVs, preventing the BOVs from fully closing at high power settings.

In the NPRM, the FAA proposed to require replacement of the compressor BOV assembly, replacement of the BOV orifice feed air tube assembly, and installation of a redesigned P3 probe snorkel, as specified in Transport Canada AD CF–2022–26. The FAA is issuing this AD to address the unsafe condition on these products.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2022–1477.

Discussion of Final Airworthiness Directive

Comments

The FAA received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA reviewed the relevant data and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on this product. Except for minor editorial changes, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Transport Canada AD CF–2022–26, which specifies procedures for the replacement of the compressor BOV assembly, replacement of the BOV orifice feed air tube assembly, and installation of a redesigned P3 probe snorkel.

This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

Costs of Compliance

The FAA estimates that this AD affects 100 engines installed on airplanes of U.S. registry.

The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Replace compressor BOV assembly	5 work-hours × $85 per hour = $425.	$13,102	$13,527	$1,352,700
Replace BOV orifice feed air tube assembly with P3 probe snorkel and BOV orifice feed air tube assembly.	6 work-hours × $85 per hour = $510.	22,000	22,510	2,251,000

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

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

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

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

(2) 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 Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2023–03–02 Pratt & Whitney Canada Corp.: Amendment 39–22327; Docket No. FAA–2022–1477; Project Identifier MCAI–2022–00632–E.

(a) Effective Date

This airworthiness directive (AD) is effective March 21, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Pratt & Whitney Canada Corp. (P&WC) PT6E–67XP model turboprop engines with serial number HP0194 and earlier, as identified in Transport Canada AD CF–2022–26, dated May 12, 2022 (Transport Canada AD CF–2022–26).

(d) Subject

Joint Aircraft Service Component (JASC) Code 7230, Turbine Engine Compressor Section.

(e) Unsafe Condition

This AD was prompted by reports of multiple incidents in which engines were unable to achieve the required power (torque) during high power applications due to internal leaks in the bleed-off valves (BOVs) caused by glass bead contamination. The FAA is issuing this AD to prevent internal leaks in the BOVs, and to prevent the failure of the engine to achieve the required power (torque) during high power applications. The unsafe condition, if not addressed, could result in loss of thrust control and loss of the airplane.

(f) Compliance

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

(g) Required Actions

Except as specified in paragraphs (h) and (i) of this AD: Perform all required actions within the compliance times specified in, and in accordance with, Transport Canada AD CF–2022–26.

(h) Exceptions to Transport Canada AD CF–2022–26

(1) Where Transport Canada AD CF–2022–26 refers to hours air time, this AD requires using flight hours.

(2) Where Transport Canada AD CF–2022–26 specifies compliance from its effective date, this AD requires using the effective date of this AD.

(i) No Reporting Requirement

Although the service information referenced in Transport Canada AD CF–2022–26 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

(j) 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 § 39.19. In accordance with § 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 paragraph (k) of this AD or email 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.

(k) Additional Information

For more information about this AD, contact Barbara Caufield, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7146; email: *barbara.caufield@faa.gov.*

(l) Material Incorporated by Reference

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

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

(i) Transport Canada AD CF–2022–26, dated May 12, 2022.

(ii) [Reserved]

(3) For Transport Canada AD CF–2022–26–E, contact Transport Canada, Transport Canada National Aircraft Certification, 159 Cleopatra Drive, Nepean, Ontario K1A 0N5, Canada; phone: (888) 663–3639; email: *AD-CN@tc.gc.ca;* website: *tc.canada.ca/en/aviation.*

(4) 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 (817) 222–5110.

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

Issued on February 1, 2023.

Christina Underwood,

Acting Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2023–03069 Filed 2–13–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 744

[Docket No. 230209–0041]

RIN 0694–AJ14

Additions to the Entity List

AGENCY: Bureau of Industry and Security, Department of Commerce.

ACTION: Final rule.

SUMMARY: In this rule, the Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR) by adding six entities to the Entity List, under the destination of the People's Republic of China (China). These six entities have been determined by the U.S. Government to be acting contrary to the national security or foreign policy interests of the United States.

DATES: This rule is effective on February 10, 2023.

FOR FURTHER INFORMATION CONTACT: Chair, End-User Review Committee, Office of the Assistant Secretary for Export Administration, Bureau of Industry and Security, Department of Commerce, Phone: (202) 482–5991, Email: *ERC@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Entity List (supplement no. 4 to part 744 of the EAR (15 CFR parts 730–774)) identifies entities for which there is reasonable cause to believe, based on specific and articulable facts, that the entities have been involved, are involved, or pose a significant risk of being or becoming involved in activities contrary to the national security or foreign policy interests of the United States, pursuant to § 744.11(b). The EAR impose additional license requirements on, and limit the availability of, most license exceptions for exports, reexports, and transfers (in-country) when a listed entity is a party to the transaction. The license review policy for each listed entity is identified in the ''License Review Policy'' column on the Entity List, and the impact on the availability of license exceptions is described in the relevant **Federal Register** document that added the entity to the Entity List. The Bureau of Industry and Security (BIS) places entities on the Entity List pursuant to part 744 (Control Policy: End-User and End-Use Based) and part 746 (Embargoes and Other Special Controls) of the EAR.

The End-User Review Committee (ERC), composed of representatives of the Departments of Commerce (Chair), State, Defense, Energy and, where appropriate, the Treasury, makes all decisions regarding additions to, removals from, or other modifications to the Entity List. The ERC makes all decisions to add an entry to the Entity List by majority vote and makes all decisions to remove or modify an entry by unanimous vote.

Entity List Decisions

A. Additions to the Entity List

The ERC determined to add Beijing Nanjiang Aerospace Technology Co., Ltd.; China Electronics Technology Group Corporation 48th Research Institute; Dongguan Lingkong Remote Sensing Technology Co., Ltd.; Eagles Men Aviation Science and Technology Group Co., Ltd. (EMAST); Guangzhou Tian-Hai-Xiang Aviation Technology Co., Ltd.; and Shanxi Eagles Men Aviation Science and Technology Group Co., Ltd. all under the destination of China, to the Entity List. These entities are being added for their support to China's military modernization efforts, specifically the People's Liberation Army's (PLA) aerospace programs including airships and balloons and related materials and components. The PLA is utilizing High Altitude Balloons (HAB) for intelligence and reconnaissance activities. This activity is contrary to U.S. national security and foreign policy interests under § 744.11 of the EAR. For these six entities, BIS imposes a license requirement for all items subject to the EAR and will review license applications under a presumption of denial.

For the reasons described above, this final rule adds the following six entities to the Entity List and includes, where appropriate, aliases:

China

- Beijing Nanjiang Aerospace Technology Co., Ltd.;
- China Electronics Technology Group Corporation 48th Research Institute;
- Dongguan Lingkong Remote Sensing Technology Co., Ltd.;
- Eagles Men Aviation Science and Technology Group Co., Ltd. (EMAST);
- Guangzhou Tian-Hai-Xiang Aviation Technology Co., Ltd.; *and*
- Shanxi Eagles Men Aviation Science and Technology Group Co., Ltd.

Savings Clause

For the changes being made in this final rule, shipments of items removed from eligibility for a License Exception or export, reexport, or transfer (in-country) without a license (NLR) as a result of this regulatory action that were en route aboard a carrier to a port of export, reexport, or transfer (in-country), on February 10, 2023, pursuant to actual orders for export, reexport, or transfer (in-country) to or within a foreign destination, may proceed to that destination under the previous eligibility for a License Exception or export, reexport, or transfer (in-country) without a license (NLR) before March 13, 2023. Any such items not actually exported, reexported or transferred (in-country) before midnight, on March 13, 2023, require a license in accordance with this final rule.

Export Control Reform Act of 2018

On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which included the Export Control Reform Act of 2018 (ECRA) (50 U.S.C. 4801–4852). ECRA provides the legal basis for BIS's principal authorities and serves as the authority under which BIS issues this rule.

Rulemaking Requirements

1. This rule has been determined to be not significant for purposes of Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to or be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves an information collection approved by OMB under control number 0694–0088, Simplified Network Application Processing System. BIS

does not anticipate a change to the burden hours associated with this collection as a result of this rule. Information regarding the collection, including all supporting materials, can be accessed at *https://www.reginfo.gov/public/do/PRAMain.*

3. This rule does not contain policies with federalism implications as that term is defined in Executive Order 13132.

4. Pursuant to section 1762 of the Export Control Reform Act of 2018, this action is exempt from the Administrative Procedure Act (5 U.S.C. 553) requirements for notice of proposed rulemaking, opportunity for public participation, and delay in effective date.

5. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

List of Subjects in 15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

Accordingly, part 744 of the Export Administration Regulations (15 CFR parts 730–774) is amended as follows:

PART 744—CONTROL POLICY: END-USER AND END-USE BASED

■ 1. The authority citation for 15 CFR part 744 is revised to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 3201 *et seq.;* 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of September 19, 2022, 87 FR 57569 (September 21, 2022); Notice of November 8, 2022, 87 FR 68015 (November 10, 2022).

■ 2. Supplement no. 4 to part 744 is amended under CHINA, PEOPLE'S REPUBLIC OF by adding, in alphabetical order, entries for ''Beijing Nanjiang Aerospace Technology Co., Ltd.''; ''China Electronics Technology Group Corporation 48th Research Institute''; ''Dongguan Lingkong Remote Sensing Technology Co., Ltd.''; ''Eagles Men Aviation Science and Technology Group Co., Ltd.''; ''Guangzhou Tian-Hai-Xiang Aviation Technology Co., Ltd.''; and ''Shanxi Eagles Men Aviation Science and Technology Group Co., Ltd.'' to read as follows:

Supplement No. 4 to Part 744—Entity List

* * * * *

Country	Entity	License requirement	License review policy	**Federal Register** citation
*	* *	*	* *	*
CHINA, PEOPLE'S REPUBLIC OF.	* *	*	* *	*
	Beijing Nanjiang Aerospace Technology Co., Ltd., Room 1104–2, Floor 11, Building 2, No. 19–1, Haidian Road, Haidian District, Beijing, China; and Room 813, Floor 8, Building 2, No. 19–1 Haidian Road, Haidian District, Beijing, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER AND 2/14/2023.
	* *	*	* *	*
	China Electronics Technology Group Corporation 48th Research Institute, a.k.a., the following one alias: —CETC 48 Institute. No. 1025, Xinkaipu Road, Tianxin District, Changsha City, Hunan, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER AND 2/14/2023.
	* *	*	* *	*
	Dongguan Lingkong Remote Sensing Technology Co., Ltd., a.k.a., the following one alias: —Dongguan Lingkong Yaogan Technology Co., Ltd. Building 6, Dongfeng Science and Technology Park, Songshan Lake, Dongguan City, Guangdong Province, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER AND 2/14/2023.
	* *	*	* *	*
	Eagles Men Aviation Science and Technology Group Co., Ltd., a.k.a., the following two aliases: —Beijing Yige Siman Aviation Technology Group Co., Ltd.; *and* —EMAST. Room 1113, No. 1 Zhichun Road, Haidian District, Beijing, China; *and* Room 314, 3rd Floor, Block C, Zhizao Street, Zhongguancun, No. 45 Chengfu Road, Haidian District, Beijing, China; *and* Eagles Men Building, No. 7 Wande Zhihui Center, Changping District, Beijing, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER AND 2/14/2023.
	* *	*	* *	*
	Guangzhou Tian-Hai-Xiang Aviation Technology Co., Ltd., a.k.a., the following two aliases: —Guangzhou Tianhaixiang Aviation Technology Co., Ltd.; *and* —THX Aviation.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER AND 2/14/2023.

Country	Entity	License requirement	License review policy	Federal Register citation
	1st Floor, Building 6, No. 4, Erheng Road, Second District, Jiangnan Industrial Zone, Nancun Town, Panyu District, Guangzhou, China.			
*	*	*	*	*
	Shanxi Eagles Men Aviation Science and Technology Group Co., Ltd., a.k.a., the following two aliases: —Shanxi Yige Siman Aviation Technology Group Co., Ltd.; *and* —Shanxi EMAST. Zhaidian Industrial Park, Changzhi High-tech Zone, Shanxi Province, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER AND 2/14/2023.
*	*	*	*	*

* * * * *

Thea D. Rozman Kendler,

Assistant Secretary for Export Administration.

[FR Doc. 2023–03193 Filed 2–10–23; 4:15 pm]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 922

[Docket No. 230206–0037]

RIN 0648–BL38

Flower Garden Banks National Marine Sanctuary Regulations

AGENCY: Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Final rule.

SUMMARY: The National Oceanic and Atmospheric Administration (NOAA) is issuing this final rule to remove a provision from one section of the existing Flower Garden Banks National Marine Sanctuary (FGBNMS) regulations, regarding the resolution of conflicting Federal agency regulations by the Director of the Office of National Marine Sanctuaries.

DATES: This final rule is effective on March 16, 2023.

ADDRESSES: George P. Schmahl, Superintendent, Flower Garden Banks National Marine Sanctuary, 4700 Avenue U, Building 216, Galveston, Texas 77551, at 409–356–0383, or *george.schmahl@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: George P. Schmahl, Superintendent, Flower Garden Banks National Marine Sanctuary, 4700 Avenue U, Building 216, Galveston, Texas 77551, at 409–356–0383, or *george.schmahl@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

A. Flower Garden Banks National Marine Sanctuary

The National Marine Sanctuaries Act (NMSA) authorizes the Secretary of Commerce (Secretary) to designate and protect, as national marine sanctuaries, areas of the marine environment that are of special national significance due to their conservation, recreational, ecological, historical, scientific, cultural, archeological, educational, or aesthetic qualities. Day-to-day management of national marine sanctuaries is delegated by the Secretary to NOAA's ONMS. The primary objective of the NMSA is to protect nationally significant marine resources, including biological features such as coral reefs, and cultural resources, such as historic shipwrecks and archaeological sites. The mission of FGBNMS is to identify, protect, conserve, and enhance the natural and cultural resources, values, and qualities of the sanctuary and its regional environment for this and future generations.

FGBNMS is located in the northwestern Gulf of Mexico approximately 70 to 115 miles (113 to 185 kilometers) off the coasts of Texas and Louisiana. These offshore areas encompass a wide range of geologic features and habitat conditions that support several distinct biological communities, including the northernmost stony coral reefs in the continental United States. The banks, reefs, and similar formations provide the foundation for essential benthic habitats that support a wide variety of species. They are home to the most significant examples of coral and algal reefs, mesophotic and deepwater coral communities, and other biological assemblages in the Gulf of Mexico. The combination of location and geology makes FGBNMS extremely productive and diverse, and presents a unique set of challenges for managing and protecting its natural wonders.

When NOAA first designated FGBNMS on December 5, 1991 (56 FR 63634) and Congress subsequently passed a law recognizing the designation on January 17, 1992 (Pub. L. 102–251, Title I, Sec. 101), the sanctuary consisted of only two areas known as East and West Flower Garden Banks (56 FR 63634). Among other things, FGBNMS regulated a narrow range of activities, established permit and certification procedures, and exempted certain U.S. Department of Defense (DOD) activities from the sanctuary's prohibitions (56 FR 63634). The regulations also exempted activities necessary to respond to emergencies threatening life, property, or the environment (56 FR 63634). Those regulations became effective on January 18, 1994 (58 FR 65664). In 1996, Congress added Stetson Bank to the sanctuary (Pub. L. 104–283). The boundaries of Stetson Bank and West Flower Garden Bank were later amended to improve administrative efficiencies and increase the precision of all boundary coordinates based on new positioning technology (65 FR 81175, Dec. 22, 2000). Subsequently, on January 19, 2021, NOAA issued a final rule for the expansion of FGBNMS (86 FR 4953). The final rule went into effect on March 22, 2021 (86 FR 15404), and expanded the boundaries of FGBNMS from approximately 56 square miles to approximately 160 square miles (145 square kilometers to 414 square kilometers), and increased the number of protected reefs and banks (86 FR 4953). FGBNMS now protects East and West Flower Garden Banks, Stetson Bank, Horseshoe Bank, MacNeil Bank, Rankin/28 Fathom Banks, Bright Bank, Geyer Bank, Elvers Bank, McGrail Bank, Bouma Bank, Sonnier Bank, Rezak Bank, Sidner Bank, Parker Bank, and Aldrice Bank.

The areas designated as FGBNMS are currently managed by several Federal

agencies that share jurisdiction over the area and its resources. These agencies include: the U.S. Department of the Interior, Bureau of Ocean Energy Management and Bureau of Safety and Environmental Enforcement, who share primary jurisdiction over offshore energy exploration and development; the U.S. Environmental Protection Agency, which is responsible for protecting the quality of the nation's waters; NOAA's National Marine Fisheries Service and Gulf of Mexico Fishery Management Council, which jointly manage the U.S fisheries; and, as previously stated above, NOAA's ONMS, which provides comprehensive management and protection to the sanctuary. Additionally, DoD and U.S. Coast Guard activities, as well as commercial shipping and other marine activities, occur in and around the waters of FGBNMS.

B. Summary of This Final Rule's Revision

This action responds to the issues raised by Federal agency partners during interagency review of the final rule to expand FGBNMS (86 FR 4953), and during interagency review of a separate, unrelated interim final rule to update and reorganize the existing sanctuary regulations and eliminate redundancies (87 FR 29606). Specifically, the Federal agency partners expressed concern that the sanctuary regulation at 15 CFR 922.122(b) does not reflect existing practice and may be an overreach of the ONMS Director's delegated authority under the NMSA. Specifically, section 922.122(b) provides that if a Federal agency regulation and a Sanctuary regulation conflict, then the regulation deemed by the Director of the ONMS as being more protective of sanctuary resources and qualities shall govern. The NMSA does not contain express language that prescribes how potential conflicts with other Federal regulations are to be resolved. The NMSA instead establishes a framework ''to facilitate to the extent compatible with the primary objective of resource protection, all public and private uses of the resources of these marine areas not prohibited pursuant to other authorities'' (16 U.S.C. 1431(b)(6)). The NMSA also ''provide[s] authority for comprehensive and coordinated conservation and management of . . . marine areas, and activities affecting them, in a manner which complements existing regulatory authorities'' (16 U.S.C. 1431(b)(2)). To ensure sanctuary regulations facilitate compatible use and complement existing regulatory authorities, the NMSA directs NOAA to consult with other Federal agencies on the proposed designation of new sites or expansion of existing sites (16 U.S.C. 1433(b)(2), 1434(a)(4)). It is through this consultation process, which occurs before the designation or expansion of sanctuaries, that potential conflicts among Federal agency regulations are typically resolved or avoided. NOAA is unaware of any situation in which 15 CFR 922.122(b) has ever been triggered, and section 922.122(b) does not reflect NOAA's preferred approach to resolve potential interagency regulatory conflicts. Therefore, to address the concerns raised by Federal partners, NOAA finalizes the proposal to remove the existing language from 15 CFR 922.122(b) to reflect existing practice and better track the NMSA. The remaining paragraphs of 15 CFR 922.122 will remain unchanged.

A provision similar to 15 CFR 922.122(b) also appears in Article V of the terms of designation codified in appendix B of 15 CFR part 922, subpart L. This action does not modify that provision. Pursuant to section 304(a)(4) of the NMSA, the terms of designation may only be modified by the same procedures by which the designation is made. The process includes scoping, proposal, consultation with Federal agency partners and public review, as well as review by Congress. Because additional procedures are required to alter the terms of designation, NOAA is using regulatory action as the first step in the process.

II. Public Comments Received

NOAA received one comment in response to the proposed rule, and it is posted and publicly available on *regulations.gov*, under docket number NOAA–NOS–2022–0047. The comment is summarized and NOAA provides a response to the comment below.

Comment: The commenter asks if the rule evaluated any insurance, capacity, or regulatory impacts on small businesses, or if environmental and marine protections have been considered in the promulgation of the rule. The commenter also asks if competitive labor interests or equitable contract leverage will be available, or if construction would cause environmental disturbance.

Response: No, the rule does not evaluate the insurance, capacity, or regulatory impacts on small businesses, nor does it consider the competitive labor interests. NOAA believes this comment is out of scope for this rulemaking. This final rule is strictly administrative in nature, and does not create any new requirements for small businesses nor does it create or remove any environmental protections. This final rule is a technical solution for a regulatory provision for FGBNMS that did not accurately describe how potential conflicts between the sanctuary regulations and other Federal regulations are to be resolved. The existing regulations establish that if a Federal agency regulation and a FGBNMS regulation conflict, then the regulation deemed as being more protective of sanctuary resources and qualities by the Director of ONMS shall govern. In actual practice, NOAA consults with other agencies on regulations that conflict with sanctuary regulations, so as to facilitate uses of sanctuary resources that are compatible with resource protection. Therefore, NOAA is finalizing the proposal without change so that existing practices are better reflected.

III. Classification

A. National Environmental Policy Act

NOAA's Policy and Procedures for Compliance with the National Environmental Policy Act (NEPA) and Related Authorities (NOAA Administrative Order (NAO) 216–6A and Companion Manual for NAO 216–6A) provide that all NOAA major Federal actions be reviewed with respect to environmental consequences on the human environment. Based on the NAO and Companion Manual, NOAA examined the proposed rule for its potential to impact the quality of the human environment and concluded that it is categorically excluded from the requirement to prepare an Environmental Assessment or Environmental Impact Statement in accordance with the NOAA Categorical Exclusion G7 because, this action is a notice of an administrative and legal nature, any future effects of subsequent actions are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will be subject to later NEPA analysis, and there are no extraordinary circumstances precluding the application of this categorical exclusion. NOAA received no public comments related to effects on the human environment. As such, this final rule has been determined to be categorically excluded under G7 as described in the Companion Manual for NAO 216–6A, Appendix, page E–14, and which applies to preparation of policy directives, rules, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature, or for which the environmental effects are too broad, speculative or conjectural to lend themselves to meaningful analysis.

B. Executive Order 12866: Regulatory Impact

This final rule has been determined to be not significant within the meaning of Executive Order 12866.

C. Regulatory Flexibility Act

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities for purposes of the Regulatory Flexibility Act. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification, but NOAA did receive one public comment about the evaluation of the insurance, capacity, or regulatory impacts on small businesses. However, NOAA has determined that said public comment is outside the scope of this rulemaking given the fact that this final rule is strictly administrative in nature, the amendment addresses how potential conflict among other Federal agency regulations and FGBNMS sanctuary regulations are to be resolved, and the final rule does not create any new requirements for small businesses nor does it create or remove any environmental protections. As a result, a regulatory flexibility analysis was not required and none was prepared.

List of Subjects in 15 CFR Part 922

Administrative practice and procedure, Marine resources, Natural resources.

Nicole R. LeBoeuf,

Assistant Administrator for Ocean Services and Coastal Zone Management, National Ocean Service, National Oceanic and Atmospheric Administration.

Accordingly, for the reasons set forth above, NOAA amends part 922, title 15 of the Code of Federal Regulations as follows:

PART 922—NATIONAL MARINE SANCTUARY PROGRAM REGULATIONS

■ 1. The authority citation for part 922 continues to read as follows:

Authority: 16 U.S.C. 1431 *et seq.*

Subpart L—Flower Garden Banks National Marine Sanctuary

§ 922.122 [Amended]

■ 2. Amend § 922.122 by removing and reserving paragraph (b).

[FR Doc. 2023–03063 Filed 2–13–23; 8:45 am]

BILLING CODE 3510–NK–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 157

[Docket No. RM81–19–000]

Natural Gas Pipelines; Project Cost and Annual Limits

AGENCY: Federal Energy Regulatory Commission, Energy.

ACTION: Final rule.

SUMMARY: Pursuant to the authority delegated by the Commission's regulations, the Director of the Office of Energy Projects (OEP) computes and publishes the project cost and annual limits for natural gas pipelines blanket construction certificates for each calendar year.

DATES: This final rule is effective February 14, 2023 and establishes cost limits applicable from January 1, 2023, through December 31, 2023.

FOR FURTHER INFORMATION CONTACT: Daniel Green, Chief, Certificates Branch 2, Division of Pipeline Certificates, (202) 502–8755.

SUPPLEMENTARY INFORMATION: Section 157.208(d) of the Commission's Regulations provides for project cost limits applicable to construction, acquisition, operation, and miscellaneous rearrangement of facilities (Table I) authorized under the blanket certificate procedure (Order No. 234, 19 FERC ¶ 61,216). Section 157.215(a) specifies the calendar year dollar limit which may be expended on underground storage testing and development (Table II) authorized under the blanket certificate. Section 157.208(d) requires that the ''limits specified in Tables I and II shall be adjusted each calendar year to reflect the 'GDP implicit price deflator' published by the Department of Commerce for the previous calendar year.''

Pursuant to § 375.308(x)(1) of the Commission's Regulations, the authority for the publication of such cost limits, as adjusted for inflation, is delegated to the Director of the Office of Energy Projects. The cost limits for calendar year 2023, as published in Table I of § 157.208(d) and Table II of § 157.215(a), are hereby issued.

Effective Date

This final rule is effective February 14, 2023. The provisions of 5 U.S.C. 804 regarding Congressional review of Final Rules does not apply to the Final Rule because the rule concerns agency procedure and practice and will not substantially affect the rights or obligations of non-agency parties. The final rule merely updates amounts published in the Code of Federal Regulations to reflect the Department of Commerce's latest annual determination of the Gross Domestic Product (GDP) implicit price deflator, a mathematical updating required by the Commission's existing regulations.

List of Subjects in 18 CFR Part 157

Administrative practice and procedure, Natural Gas, Reporting and recordkeeping requirements.

Issued: February 7, 2023.

Terry L. Turpin,

Director, Office of Energy Projects.

Accordingly, 18 CFR part 157 is amended as follows:

PART 157—APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND FOR ORDERS PERMITTING AND APPROVING ABANDONMENT UNDER SECTION 7 OF THE NATURAL GAS ACT

■ 1. The authority citation for part 157 is revised to read as follows:

Authority: 15 U.S.C. 717–717w, 3301–3432; 42 U.S.C. 7101–7352.

■ 2. In § 157.208, in paragraph (d), remove table I to part 157 and add table 1 to paragraph (d) in its place to read as follows:

§ 157.208 Construction, acquisition, operation, replacement, and miscellaneous rearrangement of facilities.

* * * * *

(d) * * *

TABLE I TO PARAGRAPH (d)

Year	Limit	
	Auto. proj. cost limit (col. 1)	Prior notice proj. cost limit (col. 2)
1982	$4,200,000	$12,000,000
1983	4,500,000	12,800,000
1984	4,700,000	13,300,000
1985	4,900,000	13,800,000
1986	5,100,000	14,300,000
1987	5,200,000	14,700,000
1988	5,400,000	15,100,000

TABLE I TO PARAGRAPH (d)—Continued

Year	Limit	
	Auto. proj. cost limit (col. 1)	Prior notice proj. cost limit (col. 2)
1989	5,600,000	15,600,000
1990	5,800,000	16,000,000
1991	6,000,000	16,700,000
1992	6,200,000	17,300,000
1993	6,400,000	17,700,000
1994	6,600,000	18,100,000
1995	6,700,000	18,400,000
1996	6,900,000	18,800,000
1997	7,000,000	19,200,000
1998	7,100,000	19,600,000
1999	7,200,000	19,800,000
2000	7,300,000	20,200,000
2001	7,400,000	20,600,000
2002	7,500,000	21,000,000
2003	7,600,000	21,200,000
2004	7,800,000	21,600,000
2005	8,000,000	22,000,000
2006	9,600,000	27,400,000
2007	9,900,000	28,200,000
2008	10,200,000	29,000,000
2009	10,400,000	29,600,000
2010	10,500,000	29,900,000
2011	10,600,000	30,200,000
2012	10,800,000	30,800,000
2013	11,000,000	31,400,000
2014	11,200,000	31,900,000
2015	11,400,000	32,400,000
2016	11,600,000	32,800,000
2017	11,800,000	33,200,000
2018	12,000,000	33,800,000
2019	12,300,000	34,600,000
2020	12,500,000	35,200,000
2021	12,600,000	35,600,000
2022	13,100,000	37,100,000
2023	14,000,000	39,700,000

* * * * *

■ 3. In § 157.215, in paragraph (a)(5), remove table II to part 157 and add table 1 to paragraph (a)(5) in its place to read as follows:

§ 157.215 Underground storage testing and development.

(a) * * *

(5) * * *

TABLE 1 TO PARAGRAPH (a)(5)

Year	Limit
1982	$2,700,000
1983	2,900,000
1984	3,000,000
1985	3,100,000
1986	3,200,000
1987	3,300,000
1988	3,400,000
1989	3,500,000
1990	3,600,000
1991	3,800,000
1992	3,900,000
1993	4,000,000
1994	4,100,000
1995	4,200,000
1996	4,300,000

TABLE 1 TO PARAGRAPH (a)(5)—Continued

Year	Limit
1997	4,400,000
1998	4,500,000
1999	4,550,000
2000	4,650,000
2001	4,750,000
2002	4,850,000
2003	4,900,000
2004	5,000,000
2005	5,100,000
2006	5,250,000
2007	5,400,000
2008	5,550,000
2009	5,600,000
2010	5,700,000
2011	5,750,000
2012	5,850,000
2013	6,000,000
2014	6,100,000
2015	6,200,000
2016	6,300,000
2017	6,400,000
2018	6,500,000
2019	6,600,000
2020	6,700,000
2021	6,800,000
2022	7,100,000
2023	7,600,000

* * * * *

[FR Doc. 2023–02996 Filed 2–13–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Part 591

Publication of Venezuela Sanctions Regulations Web General Licenses 16, 17, 18, and Subsequent Iterations

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 seven general licenses (GLs) issued in the Venezuela Sanctions program: GLs 16, 16A, 16B, 16C, 17, 18, and 18A, each of which was previously made available on OFAC's website.

DATES: GLs 16, 17, and 18 were issued on March 22, 2019. See **SUPPLEMENTARY INFORMATION** for additional relevant dates.

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.treas.gov/ofac.*

Background

On March 22, 2019, OFAC issued GLs 16 and 17 to authorize certain transactions otherwise prohibited by Executive Order (E.O.) 13850 of November 1, 2018, ''Blocking Property of Additional Persons Contributing to the Situation in Venezuela'' (83 FR 55243, November 2, 2018). Subsequently, OFAC issued three further iterations of GL 16. On April 17, 2019, OFAC issued GL 16A, which superseded GL 16. On August 5, 2019, OFAC issued GL 16B, which superseded GL 16A and also authorized certain transactions otherwise prohibited by E.O. 13884 of August 5, 2019, ''Blocking Property of the Government of Venezuela'' (84 FR 38843, August 7, 2019). On November 22, 2019, OFAC incorporated the prohibitions of E.O. 13850, as well as any other Executive orders issued pursuant to the national emergency declared in E.O. 13692 of March 8, 2015, ''Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela,'' into the Venezuela Sanctions Regulations, 31 CFR part 591 (VSR). On March 12, 2020, OFAC issued GL 16C, which superseded GL 16B, pursuant to the VSR. GL 17 expired on May 21, 2019.

Also on March 22, 2019, OFAC issued GL 18 to authorize certain transactions otherwise prohibited by E.O. 13808 of August 24, 2017, ''Imposing Additional Sanctions with Respect to the Situation in Venezuela'' (82 FR 41155, August 29, 2017) or E.O. 13850. On August 5, 2019, OFAC issued GL 18A, which superseded GL 18 and also authorized certain transactions otherwise prohibited by E.O. 13884.

Each GL was made available on OFAC's website (*www.treas.gov/ofac*) when it was issued. The text of these GLs is provided below.

OFFICE OF FOREIGN ASSETS CONTROL

Executive Order 13850 of November 1, 2018

Blocking Property of Additional Persons Contributing to the Situation in Venezuela

GENERAL LICENSE NO. 16

Authorizing Maintenance of U.S. Person Accounts and Noncommercial, Personal Remittances Involving Certain Banks

(a) Except as provided in paragraph (d) of this general license, the following transactions and activities involving Banco

de Venezuela, S.A. Banco Universal (Banco de Venezuela) or Banco Bicentenario del Pueblo, de la Clase Obrera, Mujer y Comunas, Banco Universal C.A. (Banco Bicentenario del Pueblo) prohibited by Executive Order (E.O.) 13850, as amended by E.O. 13857 of January 25, 2019 (''Taking Additional Steps to Address the National Emergency With Respect to Venezuela''), are authorized through 12:01 a.m. eastern daylight time, March 22, 2020:

(1) All transactions and activities ordinarily incident and necessary to maintaining, operating, or closing accounts of U.S. persons in Banco de Venezuela or Banco Bicentenario del Pueblo; and

(2) All transactions and activities ordinarily incident and necessary to processing noncommercial, personal remittances.

(b) Noncommercial, personal remittances do not include charitable donations of funds to or for the benefit of an entity or funds transfers for use in supporting or operating a business, including a family-owned business.

(c) U.S. financial institutions processing transactions authorized by paragraph (a)(2) of this general license may rely on the originator of a funds transfer with regard to compliance with paragraph (a)(2), provided that the transferring institution does not know or have reason to know that the funds transfer is not in compliance with paragraph (a)(2).

(d) This general license does not authorize:

(1) Any transactions or dealings with Banco de Desarrollo Economico y Social de Venezuela (BANDES) or Banco Bandes Uruguay S.A. (Bandes Uruguay);

(2) The unblocking of any property blocked pursuant to E.O. 13850, as amended by E.O. 13857, or any part of 31 CFR chapter V, except as authorized by paragraph (a); or

(3) Any transaction that is otherwise prohibited under E.O. 13850 of November 1, 2018, E.O. 13835 of May 21, 2018, E.O. 13827 of March 19, 2018, E.O. 13808 of August 24, 2017, E.O. 13692 of March 8, 2015, each as amended by E.O. 13857, or any part of 31 CFR chapter V, or any transactions or dealings with any blocked person other than the blocked persons described in paragraph (a) of this general license.

Bradley T. Smith,
Deputy Director, Office of Foreign Assets Control.

Dated: March 22, 2019.

OFFICE OF FOREIGN ASSETS CONTROL

Executive Order 13850 of November 1, 2018

Blocking Property of Additional Persons Contributing to the Situation in Venezuela

GENERAL LICENSE NO. 16A

Authorizing Maintenance of U.S. Person Accounts and Noncommercial, Personal Remittances Involving Certain Banks

(a) Except as provided in paragraph (e) of this general license, all transactions and activities ordinarily incident and necessary to maintaining, operating, or closing accounts of U.S. persons in Banco de Venezuela, S.A. Banco Universal (Banco de Venezuela) or Banco Bicentenario del Pueblo, de la Clase Obrera, Mujer y Comunas, Banco Universal C.A. (Banco Bicentenario del Pueblo) prohibited by Executive Order (E.O.) 13850, as amended by E.O. 13857 of January 25, 2019 (''Taking Additional Steps to Address the National Emergency With Respect to Venezuela'') (E.O. 13850), are authorized through 12:01 a.m. eastern daylight time, March 22, 2020.

(b) Except as provided in paragraph (e) of this general license, all transactions and activities ordinarily incident and necessary to processing noncommercial, personal remittances involving Banco de Venezuela, Banco Bicentenario del Pueblo, or Banco Central de Venezuela are authorized through 12:01 a.m. eastern daylight time, March 22, 2020.

(c) Noncommercial, personal remittances do not include charitable donations of funds to or for the benefit of an entity or funds transfers for use in supporting or operating a business, including a family-owned business.

(d) U.S. financial institutions processing transactions authorized by paragraph (a) or (b) of this general license may rely on the originator of a funds transfer with regard to compliance with paragraph (a) or (b), provided that the transferring institution does not know or have reason to know that the funds transfer is not in compliance with paragraph (a) or (b).

(e) This general license does not authorize:

(1) Any transactions or dealings with Banco de Desarrollo Economico y Social de Venezuela (BANDES) or Banco Bandes Uruguay S.A. (Bandes Uruguay);

(2) The unblocking of any property blocked pursuant to E.O. 13850 or any part of 31 CFR chapter V, except as authorized by paragraph (a) or (b); or

(3) Any transaction that is otherwise prohibited under E.O. 13850, E.O. 13835 of May 21, 2018, E.O. 13827 of March 19, 2018, E.O. 13808 of August 24, 2017, E.O. 13692 of March 8, 2015, each as amended by E.O. 13857, or any part of 31 CFR chapter V, or any transactions or dealings with any blocked person other than the blocked persons described in paragraph (a) or (b) of this general license.

(f) Effective April 17, 2019, General License No. 16, dated March 22, 2019, is replaced and superseded in its entirety by this General License No. 16A.

Andrea Gacki,
Director, Office of Foreign Assets Control.

Dated: April 17, 2019.

OFFICE OF FOREIGN ASSETS CONTROL

Executive Order 13850 of November 1, 2018

Blocking Property of Additional Persons Contributing to the Situation in Venezuela

Executive Order of August 5, 2019

Blocking Property of the Government of Venezuela

GENERAL LICENSE NO. 16B

Authorizing Maintenance of U.S. Person Accounts and Noncommercial, Personal Remittances Involving Certain Banks

(a) Except as provided in paragraph (e) of this general license, all transactions and activities ordinarily incident and necessary to maintaining, operating, or closing accounts of U.S. persons in Banco de Venezuela, S.A. Banco Universal (Banco de Venezuela), Banco Bicentenario del Pueblo, de la Clase Obrera, Mujer y Comunas, Banco Universal C.A. (Banco Bicentenario del Pueblo), or Banco del Tesoro, C.A. Banco Universal (Banco del Tesoro) prohibited by Executive Order (E.O.) 13850, as amended by E.O. 13857 of January 25, 2019, or E.O. of August 5, 2019, are authorized through 12:01 a.m. eastern daylight time, March 22, 2020.

(b) Except as provided in paragraph (e) of this general license, all transactions and activities ordinarily incident and necessary to processing noncommercial, personal remittances involving Banco de Venezuela, Banco Bicentenario del Pueblo, Banco del Tesoro, or Banco Central de Venezuela are authorized through 12:01 a.m. eastern daylight time, March 22, 2020.

(c) Noncommercial, personal remittances do not include charitable donations of funds to or for the benefit of an entity or funds transfers for use in supporting or operating a business, including a family-owned business.

(d) U.S. financial institutions processing transactions authorized by paragraph (a) or (b) of this general license may rely on the originator of a funds transfer with regard to compliance with paragraph (a) or (b), provided that the transferring institution does not know or have reason to know that the funds transfer is not in compliance with paragraph (a) or (b).

(e) This general license does not authorize:

(1) Any transactions or dealings with Banco de Desarrollo Economico y Social de Venezuela (BANDES) or Banco Bandes Uruguay S.A. (Bandes Uruguay);

(2) The unblocking of any property blocked pursuant to E.O. of August 5, 2019, E.O. 13850, as amended, or any part of 31 CFR chapter V, except as authorized by paragraph (a) or (b); or

(3) Any transaction that is otherwise prohibited by E.O. of August 5, 2019, or E.O. 13850, E.O. 13835 of May 21, 2018, E.O. 13827 of March 19, 2018, E.O. 13808 of August 24, 2017, or E.O. 13692 of March 8, 2015, each as amended by E.O. 13857, or any part of 31 CFR chapter V, or any transactions or dealings with any blocked person other than the blocked persons described in paragraph (a) or (b) of this general license.

(f) Effective August 5, 2019, General License No. 16A, dated April 17, 2019, is replaced and superseded in its entirety by this General License No. 16B.

Andrea Gacki,
Director, Office of Foreign Assets Control.

Dated: August 5, 2019.

OFFICE OF FOREIGN ASSETS CONTROL

Venezuela Sanctions Regulations

31 CFR Part 591

GENERAL LICENSE NO. 16C

Authorizing Maintenance of U.S. Person Accounts and Noncommercial, Personal Remittances Involving Certain Banks

(a) Except as provided in paragraph (e) of this general license, all transactions and activities prohibited by Executive Order (E.O.) 13850 of November 1, 2018, as amended by E.O. 13857 of January 25, 2019,

or by E.O. 13884 of August 5, 2019, each as incorporated into the Venezuela Sanctions Regulations, 31 CFR part 591 (the VSR), that are ordinarily incident and necessary to maintaining, operating, or closing accounts of U.S. persons in Banco de Venezuela, S.A. Banco Universal (Banco de Venezuela), Banco Bicentenario del Pueblo, de la Clase Obrera, Mujer y Comunas, Banco Universal C.A. (Banco Bicentenario del Pueblo), or Banco del Tesoro, C.A. Banco Universal (Banco del Tesoro) are authorized.

(b) Except as provided in paragraph (e) of this general license, all transactions and activities prohibited by E.O. 13850, as amended, or by E.O. 13884, each as incorporated into the VSR, that are ordinarily incident and necessary to processing noncommercial, personal remittances involving Banco de Venezuela, Banco Bicentenario del Pueblo, Banco del Tesoro, or Banco Central de Venezuela are authorized.

(c) Noncommercial, personal remittances do not include charitable donations of funds to or for the benefit of an entity or funds transfers for use in supporting or operating a business, including a family-owned business.

(d) U.S. financial institutions processing transactions authorized by paragraph (a) or (b) of this general license may rely on the originator of a funds transfer with regard to compliance with paragraph (a) or (b), provided that the transferring institution does not know or have reason to know that the funds transfer is not in compliance with paragraph (a) or (b).

(e) This general license does not authorize:

(1) Any transactions or activities with Banco de Desarrollo Economico y Social de Venezuela (BANDES) or Banco Bandes Uruguay S.A. (Bandes Uruguay);

(2) The unblocking of any property blocked pursuant to the VSR, or any other part of 31 CFR chapter V, except as authorized by paragraph (a) or (b); or

(3) Any transactions or activities otherwise prohibited by the VSR, or any other part of 31 CFR chapter V, or any transactions or activities with any blocked person other than the blocked persons identified in paragraph (a) or (b) of this general license.

(f) Effective March 12, 2020, General License No. 16B, dated August 5, 2019, is replaced and superseded in its entirety by this General License No. 16C.

Andrea Gacki,
Director, Office of Foreign Assets Control.

Dated: March 12, 2020.

OFFICE OF FOREIGN ASSETS CONTROL

Executive Order 13850 of November 1, 2018

Blocking Property of Additional Persons Contributing to the Situation in Venezuela

GENERAL LICENSE NO. 17

Authorizing Certain Activities Necessary to Wind Down of Operations or Existing Contracts With Certain Banks

(a) Except as provided in paragraph (b) of this general license, all transactions and activities prohibited by Executive Order (E.O.) 13850, as amended by E.O. 13857 of January 25, 2019 (''Taking Additional Steps to Address the National Emergency With Respect to Venezuela''), that are ordinarily incident and necessary to the wind down of operations, contracts, or other agreements involving Banco de Venezuela, S.A. Banco Universal (Banco de Venezuela), Banco Bicentenario del Pueblo, de la Clase Obrera, Mujer y Comunas, Banco Universal C.A. (Banco Bicentenario del Pueblo), or Banco Prodem S.A. that were in effect prior to March 22, 2019, are authorized through 12:01 a.m. eastern daylight time, May 21, 2019.

(b) This general license does not authorize:

(1) Any transactions or dealings with Banco de Desarrollo Economico y Social de Venezuela (BANDES) or Banco Bandes Uruguay S.A. (Bandes Uruguay);

(2) The unblocking of any property blocked pursuant to E.O. 13850, as amended by E.O. 13857, or any part of 31 CFR chapter V, except as authorized by paragraph (a); or

(3) Any transactions or dealings otherwise prohibited by E.O. 13850 of November 1, 2018, E.O. 13835 of May 21, 2018, E.O. 13827 of March 19, 2018, E.O. 13808 of August 24, 2017, E.O. 13692 of March 8, 2015, each as amended by E.O. 13857, or any part of 31 CFR chapter V, or any transactions or dealings with any blocked person other than the blocked persons identified in paragraph (a) of this general license.

Bradley T. Smith,
Deputy Director, Office of Foreign Assets Control.

Dated: March 22, 2019.

OFFICE OF FOREIGN ASSETS CONTROL

Executive Order 13808 of August 24, 2017

Imposing Additional Sanctions With Respect to the Situation in Venezuela

Executive Order 13850 of November 1, 2018

Blocking Property of Additional Persons Contributing to the Situation in Venezuela

GENERAL LICENSE NO. 18

Authorizing Certain Transactions Involving Integración Administradora de Fondos de Ahorro Previsional, S.A.

(a) Except as provided in paragraph (c) of this general license, all transactions and activities prohibited by Section 1(b) of Executive Order (E.O.) 13808, as amended by E.O. 13857 of January 25, 2019 (''Taking Additional Steps to Address the National Emergency With Respect to Venezuela''), or E.O. 13850, as amended by E.O. 13857, that are ordinarily incident and necessary to maintain or operate Integración Administradora de Fondos de Ahorro Previsional, S.A., whose fund administrator is owned 50 percent or more by Banco Bandes Uruguay S.A. (Bandes Uruguay), are authorized.

(b) For the purposes of this general license, the transactions and activities authorized in paragraph (a) include the purchase from or sale to the Integración Administradora de Fondos de Ahorro Previsional, S.A. of securities or serving as a custodian for securities held by the Integración Administradora de Fondos de Ahorro Previsional, S.A.

(c) This general license does not authorize:

(1) Any transactions or dealings with Banco de Desarrollo Economico y Social de Venezuela (BANDES), or any transactions or dealings with Bandes Uruguay, other than as authorized by paragraph (a) of this general license;

(2) The unblocking of any property blocked pursuant to E.O. 13850, as amended by E.O. 13857, or any part of 31 CFR chapter V, except as authorized by paragraph (a); or

(3) Any transaction that is otherwise prohibited under E.O. 13850 of November 1, 2018, E.O. 13835 of May 21, 2018, E.O. 13827 of March 19, 2018, E.O. 13808 of August 24, 2017, E.O. 13692 of March 8, 2015, each as amended by E.O. 13857, or any part of 31 CFR chapter V, or any transactions or dealings with any blocked person other than the blocked persons described in paragraph (a) of this general license.

Bradley T. Smith,
Deputy Director, Office of Foreign Assets Control.

Dated: March 22, 2019.

OFFICE OF FOREIGN ASSETS CONTROL

Executive Order 13808 of August 24, 2017

Imposing Additional Sanctions With Respect to the Situation in Venezuela

Executive Order 13850 of November 1, 2018

Blocking Property of Additional Persons Contributing to the Situation in Venezuela

Executive Order of August 5, 2019

Blocking Property of the Government of Venezuela

GENERAL LICENSE NO. 18A

Authorizing Certain Transactions Involving Integración Administradora de Fondos de Ahorro Previsional, S.A.

(a) Except as provided in paragraph (c) of this general license, all transactions and activities prohibited by Section l(b) of Executive Order (E.O.) 13808 or by E.O. 13850, each as amended by E.O. 13857 of January 25, 2019, or by E.O. of August 5, 2019, that are ordinarily incident and necessary to maintain or operate Integración Administradora de Fondos de Ahorro Previsional, S.A., whose fund administrator is owned 50 percent or more by Banco Bandes Uruguay S.A. (Bandes Uruguay), are authorized.

(b) For the purposes of this general license, the transactions and activities authorized in paragraph (a) include the purchase from or sale to the Integración Administradora de Fondos de Ahorro Previsional, S.A. of securities or serving as a custodian for securities held by the Integración Administradora de Fondos de Ahorro Previsional, S.A.

(c) This general license does not authorize:

(1) Any transactions or dealings with Banco de Desarrollo Economico y Social de Venezuela (BANDES), or any transactions or dealings with Bandes Uruguay, other than as authorized by paragraph (a) of this general license;

(2) The unblocking of any property blocked pursuant to E.O. of August 5, 2019, or E.O. 13850, as amended, or any part of 31 CFR chapter V, except as authorized by paragraph (a); or

(3) Any transaction that is otherwise prohibited by E.O. of August 5, 2019, or E.O.

13850, E.O. 13835 of May 21, 2018, E.O. 13827 of March 19, 2018, E.O. 13808, or E.O. 13692 of March 8, 2015, each as amended by E.O. 13857, or any part of 31 CFR chapter V, or any transactions or dealings with any blocked person other than the blocked persons described in paragraph (a) of this general license.

(d) Effective August 5, 2019, General License No. 18, dated March 22, 2019, is replaced and superseded in its entirety by this General License No. 18A.

Andrea Gacki,
Director, Office of Foreign Assets Control.

Dated: August 5, 2019.

Andrea M. Gacki,

Director, Office of Foreign Assets Control.

[FR Doc. 2023–03075 Filed 2–13–23; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Part 591

Publication of Venezuela Sanctions Regulations Web General License 31B

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Publication of Web General License.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing general license (GL) 31B issued pursuant to the Venezuela Sanctions Regulations. GL 31B was previously made available on OFAC's website.

DATES: GL 31B was issued on January 9, 2023. See **SUPPLEMENTARY INFORMATION** for additional relevant dates.

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.treas.gov/ofac.*

Background

On January 9, 2023, OFAC issued GL 31B to authorize certain transactions otherwise prohibited by the Venezuela Sanctions Regulations, 31 CFR part 591. The GL was made available on OFAC's website (*www.treas.gov/ofac*) when it was issued. The text of GL 31B is provided below.

OFFICE OF FOREIGN ASSETS CONTROL

Venezuela Sanctions Regulations

31 CFR Part 591

GENERAL LICENSE NO. 31B

Certain Transactions Involving the IV Venezuelan National Assembly and Certain Other Persons

(a) Except as provided in paragraph (c) of this general license, U.S. persons are authorized to engage in all transactions prohibited by Executive Order (E.O.) 13884, as incorporated into the Venezuela Sanctions Regulations, 31 CFR part 591 (the VSR), involving the IV Venezuelan National Assembly seated on January 5, 2016 (''IV National Assembly''); its Delegated Commission; any entity established by, or under the direction of, the IV National Assembly to exercise its mandate (''IV National Assembly Entity''); or any person appointed or designated by, or whose appointment or designation is retained by, the IV National Assembly, its Delegated Commission, or a IV National Assembly Entity, including their respective members and staff.

(b) Except as provided in paragraph (c) of this general license, U.S. persons are authorized to engage in all transactions prohibited by E.O. 13850, as amended by E.O. 13857, and incorporated into the VSR, involving any person appointed or designated by, or whose appointment or designation is retained by, the IV National Assembly, its Delegated Commission, or a IV National Assembly Entity to the board of directors (including any ad hoc board of directors) or as an executive officer of a Government of Venezuela entity (including entities owned or controlled, directly or indirectly, by the Government of Venezuela).

(c) This general license does not authorize:

(1) Any transaction involving the Venezuelan National Constituent Assembly convened by Nicolas Maduro or the National Assembly seated on January 5, 2021, including their respective members and staff; or

(2) Any transaction otherwise prohibited by the VSR, including transactions involving any person blocked pursuant to the VSR other than the persons identified in paragraph (a) or (b) of this general license, unless separately authorized.

(d) Effective January 9, 2023, General License No. 31A, dated January 4, 2021, is replaced and superseded in its entirety by this General License No. 31B.

Andrea M. Gacki,
Director, Office of Foreign Assets Control.

Dated: January 9, 2023.

Andrea M. Gacki,

Director, Office of Foreign Assets Control.

[FR Doc. 2023–03072 Filed 2–13–23; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Part 594

Publication of Global Terrorism Sanctions Regulations Web General Licenses 21A and 21B

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Publication of web general license.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing two general licenses (GL) issued pursuant to the Global Terrorism Sanctions Regulations, GLs 21A and 21B, which of which was previously made available on OFAC's website.

DATES: GL 21A was issued on December 14, 2022. See **SUPPLEMENTARY INFORMATION** for additional relevant dates.

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.treas.gov/ofac.*

Background

On December 14, 2022, OFAC issued GL 21A to authorize certain transactions otherwise prohibited by the Global Terrorism Sanctions Regulations, 31 CFR part 594. GL 21A superseded GL 21. Subsequently, OFAC issued one further iteration of GL 21: on January 13, 2023, OFAC issued GL 21B, which superseded GL 21A. Each GL was made available on OFAC's website (*www.treas.gov/ofac*). The text of GLs 21A and 21B are provided below.

Office of Foreign Assets Control

Global Terrorism Sanctions Regulations

31 CFR Part 594

General License No. 21A

Authorizing Limited Safety and Environmental Transactions Involving Certain Vessels

(a) Except as provided in paragraph (c) of this general license, all transactions that are ordinarily incident and necessary to one of the following activities involving the persons or vessels described in paragraph (b) of this

general license that are prohibited by the Global Terrorism Sanctions Regulations, 31 CFR part 594 (GTSR), are authorized through 12:01 a.m. eastern standard time, January 14, 2023, provided that any payment to a blocked person must be made into a blocked account in accordance with the GTSR:

(1) The safe docking and anchoring of any of the blocked vessels listed in paragraph (b) of this general license (''blocked vessels'') in port;

(2) The preservation of the health or safety of the crew of any of the blocked vessels; and

(3) Emergency repairs of any of the blocked vessels or environmental mitigation or protection activities relating to any of the blocked vessels.

(b) The authorization in paragraph (a) of this general license applies to the following blocked persons and vessels listed on the Office of Foreign Assets Control's Specially Designated Nationals and Blocked Persons List and any entity in which any of the following persons own, directly or indirectly, a 50 percent or greater interest:

- Artemov, Victor Sergioyovich
  - BOCEANICA, IMO 9267132
  - ZEPHYR I (f.k.a. ZHEN I), IMO 9255880
- Azul Vista Shipping Corp.
  - JULIA A (f.k.a. AZUL), IMO 9236353
- Blue Berri Shipping Inc.
  - RAIN DROP, IMO 9233208
- Harbour Ship Management Limited
  - B LUMINOSA, IMO 9256016
  - BLUEFINS, IMO 9221657
  - BUENO, IMO 9282443
- Pontus Navigation Corp.
  - NOLAN (f.k.a. OSLO), IMO 9179701
- Technology Bright International Ltd.
  - YOUNG YONG, IMO 9194127
- Triton Navigation Corp.
  - ADISA, IMO 9304667
- Vista Clara Shipping Corp.
  - LARA I (f.k.a. CLARA), IMO 9231767

(c) This general license does not authorize:

(1) The entry into any new commercial contracts involving the property or interests in property of any of the blocked persons or vessels described in paragraph (b) of this general license, except as authorized by paragraph (a);

(2) The offloading of any cargo onboard any of the blocked vessels; or

(3) Any transactions otherwise prohibited by the GTSR, including transactions involving the property or interests in property of any person blocked pursuant to the GTSR, other than the blocked persons described in paragraph (b) of this general license, unless separately authorized.

(d) Effective December 14, 2022, General License No. 21, dated November 15, 2022, is replaced and superseded in its entirety by this General License No. 21A.

Andrea M. Gacki,
Director, Office of Foreign Assets Control.

Dated: December 14, 2022.

Office of Foreign Assets Control

Global Terrorism Sanctions Regulations

31 CFR Part 594

General License No. 21B

Authorizing Limited Safety and Environmental Transactions Involving Certain Vessels

(a) Except as provided in paragraph (c) of this general license, all transactions that are ordinarily incident and necessary to one of the following activities involving the persons or vessels described in paragraph (b) of this general license that are prohibited by the Global Terrorism Sanctions Regulations, 31 CFR part 594 (GTSR), are authorized through 12:01 a.m. eastern daylight time, April 13, 2023, provided that any payment to a blocked person must be made into a blocked account in accordance with the GTSR:

(1) The safe docking and anchoring of any of the blocked vessels listed in paragraph (b) of this general license (''blocked vessels'') in port;

(2) The preservation of the health or safety of the crew of any of the blocked vessels; and

(3) Emergency repairs of any of the blocked vessels or environmental mitigation or protection activities relating to any of the blocked vessels.

(b) The authorization in paragraph (a) of this general license applies to the following blocked persons and vessels listed on the Office of Foreign Assets Control's Specially Designated Nationals and Blocked Persons List and any entity in which any of the following persons own, directly or indirectly, a 50 percent or greater interest:

- Artemov, Victor Sergioyovich
  - BOCEANICA, IMO 9267132
  - ZEPHYR I (f.k.a. ZHEN I), IMO 9255880
- Azul Vista Shipping Corp.
  - JULIA A (f.k.a. AZUL), IMO 9236353
- Blue Berri Shipping Inc.
  - RAIN DROP, IMO 9233208
- Harbour Ship Management Limited
  - B LUMINOSA, IMO 9256016
  - BLUEFINS, IMO 9221657
  - BUENO, IMO 9282443
- Pontus Navigation Corp.
  - NOLAN (f.k.a. OSLO), IMO 9179701
- Technology Bright International Ltd.
  - YOUNG YONG, IMO 9194127
- Triton Navigation Corp.
  - ADISA, IMO 9304667
- Vista Clara Shipping Corp.
  - LARA I (f.k.a. CLARA), IMO 9231767

(c) This general license does not authorize:

(1) The entry into any new commercial contracts involving the property or interests in property of any of the blocked persons or vessels described in paragraph (b) of this general license, except as authorized by paragraph (a);

(2) The offloading of any cargo onboard any of the blocked vessels; or

(3) Any transactions otherwise prohibited by the GTSR, including transactions involving the property or interests in property of any person blocked pursuant to the GTSR, other than the blocked persons described in paragraph (b) of this general license, unless separately authorized.

(d) Effective January 12, 2023, General License No. 21A, dated December 14, 2022, is replaced and superseded in its entirety by this General License No. 21B.

Andrea M. Gacki,
Director, Office of Foreign Assets Control.

Dated: December 14, 2022.

Andrea M. Gacki,

Director, Office of Foreign Assets Control.

[FR Doc. 2023–03074 Filed 2–13–23; 8:45 am]

BILLING CODE 4810–AL–P

POSTAL SERVICE

39 CFR Part 20

Removal of Priority Mail International Regional Rate Boxes—Non-Published Rates and Priority Mail International Regional Rate Boxes

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: On November 21, 2022, the Postal Service published notice of international product changes concerning requests by the Postal Service for classification changes filed with the Postal Regulatory Commission (PRC) about Priority Mail International Regional Rate Boxes. On December 20, 2022, the PRC favorably reviewed the classification changes which have an effective date of January 22, 2023. Therefore, the Postal Service is revising *Mailing Standards of the United States Postal Service,* International Mail Manual (IMM®), to reflect the discontinuation of Priority Mail International Regional Rate Boxes—Non-Published Rates and Priority Mail International Regional Rate Boxes, which were available only to commercial customers with an agreement with the Postal Service specifically for Priority Mail International Regional Rate Boxes.

DATES: Effective: February 14, 2023.

FOR FURTHER INFORMATION CONTACT: Dale Kennedy at 202–268–6592 or Kathy Frigo at 202–268–4178.

SUPPLEMENTARY INFORMATION:

I. Proposed Rule and Response

On November 10, 2022, in PRC Docket No. MC2023–45, the Postal Service filed a request to remove Priority Mail International Regional Rate Boxes—Non-Published Rates and Priority Mail International Regional Rate Boxes Contracts from the Competitive Price List. In addition, on November 10, 2022, in PRC Docket No. MC2023–46, the Postal Service filed a request for changes to the Global Reseller Expedited Package Contracts product to remove mention of Priority Mail International Regional Rate Box. On

November 21, 2022, the Postal Service published notice of the filings in PRC Docket Nos. MC2023–45 and MC2023–46 in the **Federal Register** notices entitled ''International Product Change—Removal of Priority Mail International Regional Rates Boxes—Non-Published Rates and Priority Mail International Regional Rates Boxes Contracts'' and ''International Product Change—Global Reseller Expedited Package Contracts'' (87 FR 70869).

II. Review by the Postal Regulatory Commission

As stated in the PRC's Order No. 6378 issued in Docket Nos. MC2023–45 and MC2023–46 on December 20, 2022, the PRC favorably reviewed the requests, which have an effective date of January 22, 2023. The order is available on the PRC's website at *http://www.prc.gov.*

The Postal Service adopts the described changes to the IMM, which is incorporated by reference in the *Code of Federal Regulations.* We will publish an appropriate amendment to 39 CFR part 20 to reflect these changes.

List of Subjects in 39 CFR Part 20

Foreign relations, International postal services.

Accordingly, the Postal Service amends Mailing Standards of the United States Postal Service, International Mail Manual (IMM), incorporated by reference in the Code of Federal Regulations as follows (see 39 CFR 20.1):

PART 20—INTERNATIONAL POSTAL SERVICE

■ 1. The authority citation for 39 CFR part 20 continues to read as follows:

Authority: 5 U.S.C. 552(a); 13 U.S.C. 301–307; 18 U.S.C. 1692–1737; 39 U.S.C. 101, 401, 403, 404, 407, 414, 416, 3001–3011, 3201–3219, 3403–3406, 3621, 3622, 3626, 3632, 3633, and 5001.

■ 2. Revise the following sections of the IMM as follows:

* * * * *

Mailing Standards of the United States Postal Service, International Mail Manual (IMM)

* * * * *

1 International Mail Services

* * * * *

110 General Information

* * * * *

116 Trademarks of the USPS

116.1 USPS Trademarks in the IMM

* * * * *

Exhibit 116.1

USPS Trademarks in the IMM

[Remove from the list the entry for ''Priority Mail International Regional Rate.'']

* * * * *

2 Conditions for Mailing

* * * * *

230 Priority Mail International

* * * * *

232 Eligibility

* * * * *

[Revise 232.5 by removing the title of 232.51 and the title and text of 232.52]

* * * * *

Sarah Sullivan,

Attorney, Ethics & Legal Compliance.

[FR Doc. 2023–03041 Filed 2–13–23; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2017–0090; FRL–10222–02–R3]

Air Plan Approval; Delaware; Removal of Excess Emissions Provisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a portion of a state implementation plan (SIP) revision submitted by the State of Delaware, through the Delaware Department of Natural Resources and Environmental Control (DNREC), on November 22, 2016. The revision was submitted in response to EPA's finding of substantial inadequacy and SIP call published on June 12, 2015, which included certain provisions in the Delaware SIP related to excess emissions during startup, shutdown, and malfunction (SSM) events. EPA is approving two specific provisions of the submitted SIP revision and finds that such SIP revision corrects some of the deficiencies in Delaware's SIP identified in the 2015 SSM SIP Action. EPA plans to act on the remainder of the SIP revision in a separate action or actions.

DATES: This final rule is effective on March 16, 2023.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2017–0090. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Mallory Moser, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, Four Penn Center, 1600 John F. Kennedy Boulevard, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814–2030. Ms. Moser can also be reached via electronic mail at *moser.mallory@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, wherever ''we,'' ''us,'' or ''our'' is used, it means the EPA.

I. Background

On October 12, 2022 (87 FR 61555), we proposed to approve two specific provisions of a SIP revision submitted by the State of Delaware, through DNREC, on November 22, 2016. In that proposal, we also proposed to determine that the portion of the SIP revision we are approving corrects some of the deficiencies with respect to Delaware's SIP that we identified in our June 12, 2015 action entitled ''State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction'' (2015 SSM SIP Action). 80 FR 33840. The reasons for our proposed approval and determination are stated in the proposal for this action and will not be restated here. 87 FR 61555 (October 12, 2022). The public comment period for our proposed approval and determination ended on November 14, 2022. One comment was received and is described below.

II. Summary of Delaware's SIP Revision Related to This Action

Delaware submitted a SIP revision on November 22, 2016, in response to the SIP call issued in the 2015 SSM SIP Action. Delaware's 2016 SIP submission

addressed all the SIP provisions identified in the SIP call, but this action is only addressing the portion of Delaware's submittal that pertains to Title 7 of Delaware's Administrative Code (7 DE Admin. Code) 1124, Section 1.4, and 7 DE Admin. Code 1142 Section 2.3.1.6. The provisions of 7 DE Admin. Code 1124 regulate various coating and non-coating sources of volatile organic compounds, while 7 DE Admin. Code 1142 controls emissions of oxides of nitrogen (NO_X) from industrial boilers and process heaters at petroleum refineries. Both 7 DE Admin. Code 1124, Section 1.4 and 7 DE Admin. Code 1142, Section 2.3.1.6, allowed for exemptions from otherwise applicable emission limitations during periods of startup and shutdown of equipment. On July 11, 2022, EPA published a Final Rule which removed the SSM provisions contained in 7 DE Admin. Code 1108, from the Delaware SIP.[1] EPA is acting on these two provisions next because they are subject to a court ordered deadline of February 22, 2023, whereas the four remaining provisions have court ordered deadlines of June 22, 2023, for a proposed action, and October 20, 2023, for a final action. Delaware's 2016 SIP submission showed that these two regulatory provisions had been removed from Delaware's regulations, and therefore Delaware requested that EPA remove these provisions from the Delaware SIP.

III. EPA's Response to Comments Received

EPA received one comment which can be found in the docket. The commenter expressed support for this action to the extent that it approved Delaware's revision to correct two of the SSM exemptions identified in the 2015 SSM SIP Action. However, the commenter urged EPA to take action to address the other four SSM provisions in Delaware's SIP that were identified in the 2015 SSM SIP Action. EPA acknowledges this comment supporting the removal of the two provisions at issue in this action, and notes that additional actions are planned for the other Delaware SIP provisions cited in the 2015 SSM SIP Action.

IV. Final Action

EPA is approving the portion of Delaware's November 22, 2016, SIP submission addressing 7 DE Admin. Code 1124 Section 1.4, and 7 DE Admin. Code 1142 Section 2.3.1.6. EPA has also determined this SIP revision partially corrects the deficiency identified in EPA's 2015 SSM SIP Action. EPA will address the remaining deficiencies in 7 DE Admin. Code 1104 Section 1.5, 7 DE Admin. Code 1105 Section 1.7, 7 DE Admin. Code 1109 Section 1.4, and 7 DE Admin. Code 1114 Section 1.3 in a separate action or actions.

V. Incorporation by Reference

In this document, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of the State of Delaware's revised 7 DE Admin Code 1124, Control of Volatile Organic Compound Emissions, and 1142, Specific Emission Control Requirements, as described in Section II of this preamble and set forth below in the amendments to part 52. EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region III Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the Clean Air Act (CAA) as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[2]

VI. Statutory and Executive Order Reviews

A. General Requirements

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

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

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

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

[1] 87 FR 41074.

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

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 17, 2023. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action, which corrects two of the deficiencies in Delaware's SIP identified in the 2015 SSM SIP Action may not be challenged later in proceedings to enforce its requirements (See section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Volatile organic compounds.

Adam Ortiz,

Regional Administrator, Region III.

For the reasons stated in the preamble, the EPA amends 40 CFR part 52 as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart I—Delaware

■ 2. Amend § 52.420, the table in paragraph (c):

■ a. Under the heading ''1124 Control of Volatile Organic Compound Emissions'' by revising the entry ''Section 1.0''; and

■ b. Under the heading ''1142 Specific Emission Control Requirements'' by revising the entries ''Section 1.0'' and ''Section 2.0''.

The revisions read as follows:

§ 52.420 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED REGULATIONS AND STATUTES IN THE DELAWARE SIP

State regulation (7 DNREC 1100)	Title/subject	State effective date	EPA approval date	Additional explanation
*	*	*	*	*
1124 Control of Volatile Organic Compound Emissions				
Section 1.0	General Provisions	1/11/2017	February 14, 2023 [INSERT **Federal Register** CITATION].	Removing subsection 1.4 from the Delaware SIP. Previous approval August 11, 2010.
*	*	*	*	*
1142 Specific Emission Control Requirements				
Section 1.0	Control of NO_X Emissions from Industrial Boilers.	1/11/2017	February 14, 2023, [INSERT **Federal Register** CITATION].	Making small, non-substantive style changes. Previous approval August 11, 2010.
Section 2.0	Control of NO_X Emissions from Industrial Boilers and Process Heaters at Petroleum Refineries.	1/11/2017	February 14, 2023, [INSERT **Federal Register** CITATION].	Removing subsection 2.3.1.6 from the Delaware SIP and making small, non-substantive style changes. Previous approval May 15, 2012.
*	*	*	*	*

* * * * *

[FR Doc. 2023–03099 Filed 2–13–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2022–0866; FRL–10415–02–R1]

Air Plan Approval; New Hampshire; Approval of Single Source Order

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a State Implementation Plan (SIP) revision submitted by the State of New Hampshire. This revision establishes reasonably available control technology (RACT) requirements for Fujifilm Dimatix Incorporated located in Lebanon, NH. The intended effect of this action is to approve the state's order for this facility into the New Hampshire SIP. This action is being taken in accordance with the Clean Air Act (CAA).

DATES: This rule is effective on March 16, 2023.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R01–OAR–2022–0866. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available at *https://www.regulations.gov* or at the U.S. Environmental Protection Agency, EPA Region 1 Regional Office, Air and Radiation Division, 5 Post Office Square—Suite 100, Boston, MA. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to

4:30 p.m., excluding legal holidays and facility closures due to COVID–19.

FOR FURTHER INFORMATION CONTACT: Michele Kosin, Physical Scientist, Air Quality Planning Unit, Air Programs Branch (Mail Code OEP5–MI), U.S. Environmental Protection Agency, Region 1, 5 Post Office Square, Suite 100, Boston, Massachusetts 02109–3912; (617) 918–1175; *Kosin.michele@epa.gov.*

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

Table of Contents

I. Background and Purpose

On November 15, 2022 (87 FR–68415), EPA published a notice of proposed rulemaking (NPRM) for the State of New Hampshire. The NPRM proposed approval of revisions to the New Hampshire SIP consisting of an order establishing reasonably available control technology (RACT) requirements to limit emissions of volatile organic compounds (VOCs) for Fujifilm Dimatix, Inc. located in Lebanon, New Hampshire. The formal SIP revision was submitted by New Hampshire on August 26, 2021.

Other specific requirements of New Hampshire's RACT orders and the rationale for EPA's proposed action are explained in the NPRM and will not be restated here. No public comments were received on the NPRM.

II. Final Action

EPA is approving RACT Order RO–0006, dated July 8, 2021, establishing RACT for Fujifilm Dimatix, Inc. to limit emissions of VOCs as a revision to the New Hampshire SIP.

III. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference RACT Order RO–0006, dated July 8, 2021, issued to Fujifilm Dimatix, Inc., discussed in the Final Action section of this preamble. The EPA has made, and will continue to make, these documents generally available through *https://www.regulations.gov* and at the EPA Region 1 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the State implementation plan, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[1]

IV. Statutory and Executive Order Reviews

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

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

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 17, 2023. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: January 30, 2023.

David Cash,

Regional Administrator, EPA Region 1.

Part 52 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

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

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart EE—New Hampshire

■ 2. In § 52.1520(d), amend the table by adding an entry, at the end of the table, for ''Fujifilm Dimatix Incorporated'' to read as follows:

§ 52.1520 Identification of plan.

* * * * *

(d) * * *

EPA-APPROVED NEW HAMPSHIRE SOURCE SPECIFIC REQUIREMENTS

Name of source	Permit No.	State effective date	EPA approval date	Additional explanations/ § 52.1535 citation
*	*	*	*	*
Fujifilm Dimatix Incorporated	RACT Order RO–0006.	7/8/2021	2/14/2023, [Insert **Federal Register** citation].	VOC RACT Order.

* * * * *

[FR Doc. 2023–02291 Filed 2–13–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2021–0320; FRL–10599–01–OCSPP]

Glycerides, Soya Mono- and Di-, Ethoxylated; Exemption From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of glycerides, soya mono- and di-, ethoxylated (CAS Reg. No. 68553–06–0) when used as an inert ingredient in a pesticide chemical formulation. Spring Regulatory Sciences on behalf of Nouryon Chemicals LLC (USA), submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of glycerides, soya mono- and di-, ethoxylated on food or feed commodities when used in accordance with the terms of those exemptions.

DATES: This regulation is effective February 14, 2023. Objections and requests for hearings must be received on or before April 17, 2023 and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2021–0320, is available at *https://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room and the OPP Docket is (202) 566–1744. For the latest status information on EPA/DC services, docket access, visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Daniel Rosenblatt, Registration Division (7505T), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (202) 566–2875; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

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

C. Can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a(g), any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2021–0320 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing and must be received by the Hearing Clerk on or before April 17, 2023. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2021–0320, by one of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.

• *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *https://www.epa.gov/send-comments-epa-dockets*.

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

II. Background and Statutory Findings

In the **Federal Register** of June 1, 2021, (86 FR 29231) (FRL–10023–95), EPA issued a document pursuant to FFDCA section 408, 21 U.S.C. 346a, announcing the receipt of a pesticide petition (*PP* IN–11514) filed by Spring Regulatory Sciences on behalf of Nouryon Chemicals LLC (USA), 131 S Dearborn, Suite 1000, Chicago, IL 60603–5566. The petition requested that the existing exemption from the requirement of a tolerance for residues of polyoxyalkylated glycerol fatty acid esters under 40 CFR 180.960 be amended by adding glycerides, soya mono- and di-, ethoxylated (CAS Reg. No. 68553–06–0). That document included a summary of the petition prepared by the petitioner and solicited comments on the petitioner's request. The Agency did not receive any comments.

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and use in residential settings but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing an exemption from the requirement of a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue . . . .'' and specifies factors EPA is to consider in establishing an exemption.

III. Risk Assessment and Statutory Findings

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

Consistent with FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action and considered its validity, completeness and reliability and the relationship of this information to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. In the case of certain chemical substances that are defined as polymers, the Agency has established a set of criteria to identify categories of polymers expected to present minimal or no risk. The definition of a polymer is given in 40 CFR 723.250(b) and the exclusion criteria for identifying these low-risk polymers are described in 40 CFR 723.250(d). Glycerides, soya mono- and di-, ethoxylated (CAS Reg. No. 68553–06–0) conforms to the definition of a polymer given in 40 CFR 723.250(b) and meets the following criteria that are used to identify low-risk polymers.

1. The polymer is not a cationic polymer nor is it reasonably anticipated to become a cationic polymer in a natural aquatic environment.

2. The polymer does contain as an integral part of its composition at least two of the atomic elements carbon, hydrogen, nitrogen, oxygen, silicon, and sulfur.

3. The polymer does not contain as an integral part of its composition, except as impurities, any element other than those listed in 40 CFR 723.250(d)(2)(ii).

4. The polymer is neither designed nor can it be reasonably anticipated to substantially degrade, decompose, or depolymerize. An available biodegradation study supports that glycerides, soya mono- and di-, ethoxylated is not readily biodegradable (MRID: 51796501).

5. The polymer is manufactured or imported from monomers and/or reactants that are already included on the TSCA Chemical Substance Inventory or manufactured under an applicable TSCA section 5 exemption.

6. The polymer is not a water absorbing polymer with a number average molecular weight (MW) greater than or equal to 10,000 Daltons.

7. The polymer does not contain certain perfluoroalkyl moieties consisting of a CF_3- or longer chain length as listed in 40 CFR 723.250(d)(6).

Additionally, the polymer also meets as required the following exemption criteria: specified in 40 CFR 723.250(e):

The polymer's number average MW of 1,500 Daltons is greater than 1,000 and less than 10,000 Daltons. The polymer contains less than 10% oligomeric material below MW 500 and less than 25% oligomeric material below MW 1,000, and the polymer does not contain any reactive functional groups.

Thus, glycerides, soya mono- and di-, ethoxylated meets the criteria for a polymer to be considered low risk under 40 CFR 723.250. Additionally, no soy protein is present as an impurity. Based on its conformance to the criteria in this unit, no mammalian toxicity is anticipated from dietary, inhalation, or dermal exposure to glycerides, soya mono- and di-, ethoxylated.

IV. Aggregate Exposures

For the purposes of assessing potential exposure under this exemption, EPA considered that glycerides, soya mono- and di-, ethoxylated could be present in all raw and processed agricultural commodities and drinking water, and that non-occupational non-dietary exposure was possible. The number average MW of glycerides, soya mono- and di-, ethoxylated is 1,500 Daltons. Generally, a polymer of this size would be poorly absorbed through the intact gastrointestinal tract or through intact human skin. Since glycerides, soya mono- and di-, ethoxylated conform to the criteria that identify a low-risk polymer, there are no concerns for risks associated with any potential exposure scenarios that are reasonably foreseeable. The Agency has determined that a tolerance is not necessary to protect the public health.

V. Cumulative Effects From Substances With a Common Mechanism of Toxicity

Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular

pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not found glycerides, soya mono- and di-, ethoxylated to share a common mechanism of toxicity with any other substances, and glycerides, soya mono- and di-, ethoxylated does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance exemption, therefore, EPA has assumed that glycerides, soya mono- and di-, ethoxylated does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *https://www.epa.gov/pesticide-science-and-assessing-pesticide-risks/cumulative-assessment-risk-pesticides*.

VI. Additional Safety Factor for the Protection of Infants and Children

Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold 10X margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. Due to the expected low toxicity of glycerides, soya mono- and di-, ethoxylated, EPA has not used a safety factor analysis to assess the risk. For the same reasons no additional safety factor is needed for assessing risk to infants and children.

VII. Determination of Safety

Based on the conformance to the criteria used to identify a low-risk polymer, EPA concludes that there is a reasonable certainty of no harm to the U.S. population, including infants and children, from aggregate exposure to residues of glycerides, soya mono- and di-, ethoxylated.

VIII. Other Considerations

Analytical Enforcement Methodology

An analytical method is not required for enforcement purposes since the Agency is establishing an exemption from the requirement of a tolerance without any numerical limitation.

IX. Conclusion

Accordingly, EPA finds that exempting residues of glycerides, soya mono- and di-, ethoxylated from the requirement of a tolerance will be safe.

X. Statutory and Executive Order Reviews

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

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

This action directly regulates growers, food processors, food handlers, and food retailers, not States or Tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or Tribal Governments, on the relationship between the National Government and the States or Tribal Governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian Tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

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

XI. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: February 7, 2023.

Daniel Rosenblatt,

Acting Director, Registration Division, Office of Pesticide Programs.

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

PART 180—TOLERANCES AND EXEMPTIONS FOR PESTICIDE CHEMICAL RESIDUES IN FOOD

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.960, amend table 1 to 180.960 by revising the entry for ''Polyoxyalkylated glycerol fatty acid esters; the mono-, di-, or triglyceride mixtures of C_8 through C_{22}, primarily C_8 through C_{18} saturated and unsaturated, fatty acids containing up to 15% water by weight reacted with a minimum of three moles of either ethylene oxide or propylene oxide; the resulting polyoxyalkylated glycerol ester polymer minimum number average molecular weight (in amu), 1,500'' to read as follows:

§ 180.960 Polymers; exemptions from the requirement of a tolerance.

* * * * *

TABLE 1 TO 180.960

Polymer	CAS No.
* * * * * * *	
Polyoxyalkylated glycerol fatty acid esters; the mono-, di-, or triglyceride mixtures of C_8 through C_{22}, primarily C_8 through C_{18} saturated and unsaturated, fatty acids containing up to 15% water by weight reacted with a minimum of three moles of either ethylene oxide or propylene oxide; the resulting polyoxyalkylated glycerol ester polymer minimum number average molecular weight (in amu), 1,500.	61791–23–9, 68201–46–7, 68440–49–3, 68458–88–8, 68553–06–0, 68606–12–2, 68648–38–4, 70377–91–2, 70914–02–2, 72245–12–6, 72698–41–3, 180254–52–8, 248273–72–5, 308063–50–5, 952722–33–7.
* * * * * * *	

[FR Doc. 2023–02976 Filed 2–13–23; 8:45 am]

BILLING CODE 6560–50–P

Proposed Rules

Federal Register
Vol. 88, No. 30
Tuesday, February 14, 2023

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF ENERGY

10 CFR Part 431

[EERE–2022–BT–STD–0015]

Appliance Standards and Rulemaking Federal Advisory Committee: Notice of Public Meetings of the Commercial Unitary Air Conditioner and Commercial Unitary Heat Pump Working Group

AGENCY: Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy.

ACTION: Notice of public meetings and webinars.

SUMMARY: The U.S. Department of Energy (DOE or the Department) announces public meetings and webinars for the Commercial Unitary Air Conditioner and Commercial Unitary Heat Pump (CUAC and CUHP) working group.

DATES: See the **SUPPLEMENTARY INFORMATION** section for meeting dates.

ADDRESSES: The next several rounds of public meetings will be held at the U.S. Department of Energy, Forrestal Building, 1000 Independence Avenue SW, Washington, DC 20585–0121. Please see the **SUPPLEMENTARY INFORMATION** section of this notice to find the specific room in the Forrestal Building for each date. For additional information the public meeting, including webinar registration information, participant instructions, and information about the capabilities available to webinar participants, please see the Public Participation section of this notice.

FOR FURTHER INFORMATION CONTACT: Mr. Lucas Aiden, U.S. Department of Energy, Office of Building Technologies, EE–5B, 950 L'Enfant Plaza SW, Washington, DC 20024. Telephone: (202) 287–5904. Email: *ASRAC@ee.doe.gov.*

SUPPLEMENTARY INFORMATION: On July 7, 2022, the Appliance Standards and Rulemaking Federal Advisory Committee (ASRAC) met and passed the recommendation to form a CUAC and CUHP working group to meet and discuss and, if possible, reach a consensus on proposed Federal test procedures and energy conservation standards for CUACs and CUHPs. On August 2, 2022, DOE published a notice of intent to establish a working group for CUACs and CUHPs to negotiate recommended test procedures and energy conservations standards for CUACs and CUHP equipment. Once the working group reaches consensus on recommended test procedures and energy conservation standards, these recommendations are made to ASRAC, which may then use such consensus as the basis for making a recommendation to the Department. The Department, consistent with its legal obligations, may use such consensus as the basis of a rulemaking, which then is published in the **Federal Register**.

The working group for CUACs and CUHPs held public meetings on September 20–21, 2022, October 11–12, 2022, November 9–10, 2022, November 29–30, 2022, December 7–8, 2022, and December 14–15, 2022. As a result of these meetings, the working group successfully reached consensus on an amended test procedure for CUAC and CUHP equipment. This notice announces public meetings to begin negotiations in an attempt to reach consensus on energy conservation standards for CUACs and CUHPs.

DOE will host a public meeting and webinar on the following dates:

- Wednesday, February 22nd, 2023 from 10:00 a.m. to 5:00 p.m. at U.S. Department of Energy, Forrestal Building, Room 6E–069.
- Thursday, February 23rd, 2023 from 9:00 a.m. to 3:00 p.m. at U.S. Department of Energy, Forrestal Building, Room 6E–069.
- Tuesday, March 7th, 2023 from 10:00 a.m. to 5:00 p.m. at U.S. Department of Energy, Forrestal Building, Room 4A–104.
- Wednesday, March 8th, 2023 from 9:00 a.m. to 3:00 p.m. at U.S. Department of Energy, Forrestal Building, Room 4A–104.
- Tuesday, March 21st, 2023 from 10:00 a.m. to 5:00 p.m. at U.S. Department of Energy, Forrestal Building, Room 1E–245.
- Wednesday, March 22nd, 2023 from 9:00 a.m. to 3:00 p.m. at U.S. Department of Energy, Forrestal Building, Room 1E–245.

Public Participation

Attendance at Public Meeting

The times, dates, and locations of the public meetings are listed in the **SUPPLEMENTARY INFORMATION** section of this document. If you plan to attend the public meeting, please notify the ASRAC staff at *asrac@ee.doe.gov.* In the email, please indicate your name, organization (if appropriate), citizenship, and contact information.

Please note that foreign nationals participating in the public meeting or webinar are subject to advance security screening procedures which require advance notice prior to attendance at the public meeting. If a foreign national wishes to participate in the public meeting or webinar, please inform DOE as soon as possible by contacting Ms. Regina Washington at (202) 586–1214 or by email: *Regina.Washington@ee.doe.gov* so that the necessary procedures can be completed.

Anyone attending the meetings will be required to present a government photo identification, such as a passport, driver's license, or government identification. Due to the required security screening upon entry, individuals attending should arrive early to allow for the extra time needed.

In addition, you can attend the public meeting via webinar. Webinar registration information, participant instructions, and information about the capabilities available to webinar participants will be published on DOE's website: *https://energy.gov/eere/buildings/appliance-standards-and-rulemaking-federal-advisory-committee.* Participants are responsible for ensuring their systems are compatible with the webinar software.

Public Participation and Submission of Written Comments

Members of the public will be heard in the order in which they sign up for the Public Comment Period. Time allotted per speaker will depend on the number of individuals who wish to speak but will not exceed five minutes. Reasonable provisions will be made to include the scheduled oral statements on the agenda. A third-party neutral facilitator will make every effort to allow the presentations of views of all interested parties and to facilitate the orderly conduct of business.

Any person who has plans to present a prepared general statement may

request that copies of his or her statement be made available at the public meeting. Such persons may submit requests, along with an advance electronic copy of their statement in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format, to the appropriate address shown in the **FOR FURTHER INFORMATION CONTACT** section of this notice. The request and advance copy of statements must be received at least one week before the public meeting and may be emailed, hand-delivered, or sent by postal mail. DOE prefers to receive requests and advance copies via email. Please include a telephone number to enable DOE staff to make a follow-up contact, if needed.

Conduct of the Public Meetings

ASRAC's Designated Federal Officer will preside at the public meetings and may also use a professional facilitator to aid discussion. The meetings will not be judicial or evidentiary-type public hearings, but DOE will conduct them in accordance with section 336 of EPCA (42 U.S.C. 6306). A court reporter will be present to record the proceedings and prepare a transcript. A transcript of each public meeting will be included on DOE's website: *https://energy.gov/eere/buildings/appliance-standards-and-rulemaking-federal-advisory-committee.* In addition, any person may buy a copy of each transcript from the transcribing reporter. Public comment and statements will be allowed prior to the close of each meeting.

Docket

The docket is available for review at: *www.regulations.gov/docket/EERE-2022-BT-STD-0015,* including **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials. All documents in the docket are listed in the *https://www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

Signing Authority

This document of the Department of Energy was signed on February 7, 2023, by Francisco Alejandro Moreno, Acting Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on February 8, 2023.

Treena V. Garrett,

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

[FR Doc. 2023–03035 Filed 2–13–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Parts 2550, 2560, and 2570

RIN 1210–AB64

Amendment and Restatement of Voluntary Fiduciary Correction Program

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Proposed program amendments and amendments to prohibited transaction exemption; reopening of comment period.

SUMMARY: This document reopens the comment period with respect to amendments to the Voluntary Fiduciary Correction Program (VFC Program or Program) under Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and to the proposed amendment to Prohibited Transaction Exemption 2002–51 (PTE 2002–51), both published in the **Federal Register** on November 21, 2022. The Employee Benefits Security Administration (EBSA) published the modifications to the Program and a proposed amendment to PTE 2002–51 to both simplify and expand the original VFC Program, and solicited comment from interested persons by January 20, 2023. On December 29, 2022, the Consolidated Appropriations Act, 2023, which includes a provision pertaining to the VFC Program, was signed into law. The Department is reopening the comment period to allow commenters to address any issues raised by the new statutory provision.

DATES: The comment periods for the documents published on November 21, 2022, at 87 FR 70753 and 87 FR 71164, are reopened. Written comments should be submitted on or before April 17, 2023. The Department will notify the public of the availability of the amended and restated VFC Program in a subsequent **Federal Register** document. The Department will also publish any final amendments to PTE 2002–51 in a subsequent **Federal Register** document.

ADDRESSES: You may submit written comments, identified by RIN 1210–AB64, to one of the following addresses:

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N–5655, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, Attention: Amendment and Restatement of Voluntary Fiduciary Correction Program.

Instructions: Persons submitting comments electronically are encouraged not to submit paper copies. Comments will be available to the public, without charge online at *www.regulations.gov,* at *www.dol.gov/agencies/ebsa,* and at the Public Disclosure Room, EBSA, U.S. Department of Labor, Suite N–1513, 200 Constitution Avenue NW, Washington, DC 20210.

Warning: Do not include any personally identifiable or confidential business information that you do not want publicly disclosed. Comments are public records and can be retrieved by most internet search engines.

FOR FURTHER INFORMATION CONTACT: Yolanda R. Wartenberg, Office of Regulations and Interpretations, EBSA, (202) 693–8500, for questions regarding the VFC Program amendments in this document; Susan Wilker, Office of Exemption Determinations, EBSA, (202) 693–8540, for questions regarding the proposed amendments to the associated class exemption PTE 2002–51; and James Butikofer, Office of Research and Analysis, EBSA, (202) 693–8410, for questions regarding the regulatory impact analysis. (These are not toll-free numbers.)

For general questions regarding the VFC Program: contact Dawn Miatech-Plaska, Office of Enforcement, EBSA, (202) 693–8691. For questions regarding specific applications and self-corrections under the VFC Program, contact the appropriate EBSA Regional Office listed in Appendix C of the document at 87 FR 71164 (Nov. 21, 2022). (These are not toll-free numbers.)

Customer Service Information: Individuals interested in obtaining information from the Department concerning ERISA and employee benefit plans may call the Employee Benefits Security Administration (EBSA) Toll-Free Hotline, at 1–866–444–EBSA

(3272) or visit the Department's website (*www.dol.gov/ebsa*).

SUPPLEMENTARY INFORMATION: The Department of Labor's (Department) authority to establish the Voluntary Fiduciary Correction Program (VFC Program or Program) derives from its authority to enforce the fiduciary standards in Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(2) and 1132(a)(5), and thereby to establish policies on how this authority will be implemented. The Department also has the authority under section 408(a) of ERISA (29 U.S.C. 1108) to issue exemptions from the prohibited transaction rules in sections 406 and 407 of ERISA (29 U.S.C. 1106 and 1107) and in section 4975 of the Internal Revenue Code (Code).[1]

The Employee Benefits Security Administration (EBSA) originally adopted the VFC Program in 2002, and later revised it in 2005 and 2006.[2] EBSA designed the VFC Program to encourage employers and plan fiduciaries to voluntarily comply with ERISA and allow those potentially liable for certain specified fiduciary breaches under ERISA to voluntarily apply for relief from civil enforcement actions and certain civil penalties, provided they meet the Program's criteria and follow the procedures outlined in the Program. Based on a review of the current VFC Program, the Department concluded that certain revisions to the Program would facilitate more efficient and less costly corrections of fiduciary breaches under the Program, encourage greater participation in the Program, and respond to requests from stakeholders for adjustments based on their experiences using the Program. Accordingly, on November 21, 2022, the Department published in the **Federal Register** an amended and restated VFC Program.[3] On the same date, EBSA also published a proposed amendment to PTE 2002–51, the Program's associated class exemption, to make certain conforming amendments to the class exemption.[4] The Department solicited general comment on any aspect of the VFC Program, including the amendments being announced, and furthermore expressed particular interest in public comments on whether there are other circumstances in which the VFC Program could be integrated with corrections under the Voluntary Correction Program of the Internal Revenue Service's Employee Plans Compliance Resolution System (EPCRS). The Department requested that comments on the amended and restated VFC Program be submitted on or before January 20, 2023. For a more comprehensive discussion of the VFC Program, please see 87 FR 71164.

H.R. 2617, Consolidated Appropriations Act, 2023 (CAA) was signed into law on December 29, 2022. CAA includes a number of provisions related to retirement and other types of plans in Division T, which is also cited as SECURE 2.0 Act of 2022 (SECURE 2.0). Section 305 of SECURE 2.0 provides for expansion of EPCRS to cover any ''eligible inadvertent failure.'' The term ''eligible inadvertent failure'' as defined in section 305(e) generally includes a failure that occurs despite the existence of practices and procedures that satisfy EPCRS standards and is not egregious, related to the diversion or misuse of plan assets, or related to an abusive tax avoidance transaction. Section 305(b) specifically provides for correction of an ''eligible inadvertent failure'' relating to a loan from a plan to a participant, and furthermore indicates that the Department shall treat any such loan failures self-corrected in accordance with applicable requirements as meeting the requirements of the VFC Program, although the Department may impose reporting or other procedural requirements. Section 305(g) contemplates the issuance of further guidance by the Department of Treasury (''Treasury'') on EPCRS to take into account the provisions of section 305.

Given the general effect of section 305 of SECURE 2.0 on EPCRS and the specific references to the VFC Program in connection with corrected loans to participants, the Department is reopening for 60 days the period for submitting comments on the amended and restated VFC Program and proposed amendment to PTE 2002–51.[5] The Department is interested in comments on what revisions, if any, should be made to the VFC Program to reflect the treatment of corrections of loans to participants as described in SECURE 2.0 section 305(b). Specifically, how should the VFC Program be modified in the future to implement the new deeming provision in SECURE 2.0 section 305(b)(2) (''the Secretary of Labor shall treat any such failure which is so self-corrected under subsection (a) as meeting the requirements of the Voluntary Fiduciary Correction Program of the Department of Labor if . . . .'')? For example, should Section 7.3 be amended to include a specific paragraph treating items self-corrected under EPCRS as meeting the requirements of the VFC Program? In addition, should the VFC Program impose additional reporting or other procedural requirements for these specific corrections, and why? Are changes needed to PTE 2002–51 to implement SECURE 2.0 section 305(b)(2)? The Department is interested in comments that address these and related issues. The Department also is interested more generally in any other aspects of section 305 as it affects EPCRS that should be taken into account by the Department in making further revisions to the VFC Program and PTE 2002–51.

Signed at Washington, DC, this 1st day of February, 2023.

Lisa M. Gomez,

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

[FR Doc. 2023–02545 Filed 2–13–23; 8:45 am]

BILLING CODE 4510–29–P

[1] Under Reorganization Plan No. 4 of 1978, 5 U.S.C. App. at 237 (2012), the authority of the Secretary of Treasury to issue exemptions pursuant to section 4975 of the Internal Revenue Code was transferred, with certain exceptions not relevant here, to the Secretary of Labor.

[2] 70 FR 17516 (Apr. 6, 2005), 71 FR 20262 (April 19, 2006).

[3] 87 FR 71164 (Nov. 21, 2022).

[4] 87 FR 70753 (Nov. 21, 2022).

[5] The Department has advised Treasury of the reopening of this comment period, and the Department understands that Treasury and the Internal Revenue Service intend to review comments submitted to the Department (as well as other stakeholder input) in developing updates to EPCRS with respect to section 305 of SECURE 2.0. The Department will forward to Treasury comments as they are received.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[EPA–R04–OAR–2022–0741; FRL–10507–01–R4]

Approval and Promulgation of State Plans for Designated Facilities and Pollutants; South Carolina; Control of Emissions From Existing Municipal Solid Waste Landfills

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a Clean Air Act (CAA) section 111(d) plan submitted by the South Carolina Department of Health and Environmental Control (SCDHEC) on January 19, 2022. This state plan was submitted to fulfill the requirements of the CAA and is responsive to EPA's promulgation of Emissions Guidelines and Compliance Times for municipal solid waste (MSW) landfills. The South

Carolina state plan establishes emission limits for existing MSW landfills and provides for the implementation and enforcement of those standards and requirements.

DATES: Written comments must be received on or before March 16, 2023.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2022–0741 at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, 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: Tracy Watson, Communities and Air Toxics Section, Air Analysis and Support Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth St. SW, Atlanta, Georgia 30303. The telephone number is (404) 562–8998. Mr. Watson can also be reached via electronic mail at *watson.marion@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On August 29, 2016, EPA finalized revised Standards of Performance for new MSW landfills and Emission Guidelines and Compliance Times for existing MSW landfills in 40 CFR part 60 subpart XXX and Cf, respectively (81 FR 59332 and 81 FR 59276). These actions were taken in accordance with section 111 of the CAA.

Section 111(d) of the CAA requires EPA to establish a procedure for a state to submit a plan to EPA which establishes standards of performance for any existing source of any air pollutant: (1) for which air quality criteria have not been issued or which is not included on a list published under CAA section 108 or emitted from a source category which is regulated under CAA section 112, but (2) to which a standard of performance under CAA section 111 would apply if such existing source were a new source. EPA established these requirements for state plan submittals in 40 CFR part 60, subpart B. State submittals under CAA sections 111(d) must be consistent with the relevant emission guidelines, in this instance 40 CFR part 60, subpart Cf, and the requirements of 40 CFR part 60, subpart B and 40 CFR part 62, subpart A. If the state plan is complete and approvable with reference to these requirements, EPA notifies the public, promulgates the plan pursuant to 40 CFR part 62, and delegates implementation and enforcement of the standards and requirements of the emission guidelines to the state under the terms of the state plan as published in the CFR.

On January 19, 2022, the SCDHEC submitted to EPA a formal section 111(d) plan for existing MSW landfills. The section 111(d) plan was submitted in response to the August 29, 2016, promulgation, and the March 26, 2020, subsequent amendments, of the emission guidelines requirements for MSW landfills, 40 CFR part 60, Cf (81 FR 59276 and 85 FR 17244, respectively).

II. Summary and Analysis of the Plan Submittal

EPA has reviewed the South Carolina section 111(d) plan submittal in the context of the plan completeness and approvability requirements of 40 CFR part 60, subparts B and Cf, and part 62, subpart A. EPA is proposing to determine that the submitted section 111(d) plan meets the above cited requirements. The South Carolina state plan submittal package includes all materials necessary to be deemed administratively and technically complete according to the criteria of 40 CFR 60.27. Included within the section 111(d) plan are regulations under the South Carolina Code of State Regulations Annotated (S.C. Code Ann. Regs.) specifically, S.C. Code Ann. Regs. 61–62.60, Subpart Cf—''Performance Standards and Compliance Times for Existing Municipal Solid Waste Landfills.'' South Carolina houses its implementation and enforcement authority for the state plan requirements in this regulation. In this action, EPA is proposing to incorporate by reference S.C. Code Ann. Regs. 61–62.60, Subpart Cf, which became effective in the State of South Carolina on November 26, 2021. A detailed explanation of the rationale behind this proposed approval is available in the Technical Support Document (TSD) included in the docket for this action.

III. Proposed Action

EPA is proposing to approve the South Carolina section 111(d) plan for MSW landfills pursuant to 40 CFR part 60, subparts B and Cf. Therefore, EPA is proposing to amend 40 CFR part 62, subpart PP to reflect this action. This approval is based on the rationale previously discussed and in further detail in the TSD associated with this action.

The EPA Administrator continues to retain authority for approval of alternative methods to determine the nonmethane organic compound concentration or a site-specific methane generation rate constant (k), as stipulated in 40 CFR 60.30f(c).

IV. Incorporation by Reference

In this document, EPA is proposing to include regulatory text that incorporates by reference the state plan. In accordance with requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference S.C. Code Ann. Regs. 61–62.60, Subpart Cf, which became effective in the State of South Carolina on November 26, 2021. The regulatory provisions of this section of the South Carolina rule incorporate all the CAA 111(d)/129 state plan elements required by the EG for existing MSW landfill units promulgated at 40 CFR part 60, subpart Cf. The emissions standards and compliance times established within the South Carolina state plan are at least as stringent as those required by the EG for existing MSW landfill units subject to subpart Cf. EPA has made, and will continue to make, these materials generally available through the docket for this action, EPA–R04–OAR–2022–0741, at *https://www.regulations.gov* and at EPA Region 4 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

In reviewing state plan submissions, EPA's role is to approve state choices, provided they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);

• Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

• Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

• Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

• Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

• Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed approval of South Carolina's state plan for existing MSW landfills does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the state plan is not approved to apply in Indian country located in the state, and the EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 62

Administrative practice and procedure, Air pollution control, Environmental protection, Landfills, Incorporation by reference, Intergovernmental relations, Methane, Ozone, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: February 3, 2023.

Daniel Blackman,

Regional Administrator Region 4.

[FR Doc. 2023–02700 Filed 2–13–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 1355 and 1356

RIN 0970–AC91

Separate Licensing Standards for Relative or Kinship Foster Family Homes

AGENCY: Children's Bureau (CB); Administration on Children, Youth and Families (ACYF); Administration for Children and Families (ACF); Department of Health and Human Services (HHS).

ACTION: Notice of proposed rulemaking.

SUMMARY: ACF is proposing to revise the definition of ''foster family home'' to allow each title IV–E agency to adopt foster family home licensing or approval standards for foster family homes of individuals related to a child by blood, marriage, or adoption and other individuals who have an emotionally significant relationship with the child, including fictive kin, (referred herein as ''relative(s) and kin(ship)'') that differ from non-relative foster family homes agency standards. In this context, a ''non-relative'' foster family home means a home of an unrelated individual who is not kin or fictive kin. This notice of proposed rulemaking (NPRM) would allow a title IV–E agency to claim title IV–E federal financial participation (FFP) for the cost of foster care maintenance payments (FCMP) on behalf of an otherwise eligible child who is placed in a relative or kinship licensed or approved foster family home when the agency uses different licensing or approval standards for relative or kinship foster family homes and non-relative foster family homes. In addition, the NPRM would amend the requirement that title IV–E agencies review the amount of FCMPs to also assure that the agency provides a licensed or approved relative and kinship foster family home the same amount of FCMP that would have been made if the child was placed in a non-related foster family home.

DATES: In order to be considered, ACF must receive written comments on this NPRM on or before April 17, 2023.

ADDRESSES: ACF encourages the public to submit comments electronically to ensure they are received in a timely manner. Please be sure to include identifying information on any correspondence. To download an electronic version of the proposed rule, please go to *http://www.regulations.gov/.* You may submit comments, identified by docket number, by any of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.

• *Email: CBComments@acf.hhs.gov*. Include [docket number and/or Regulatory Information Number (RIN) number] in subject line of the message.

Instructions: All submissions received must include the agency name and docket number or RIN for this rulemaking. All comments received will be posted without change to *www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Kathleen McHugh, Director, Policy Division, Children's Bureau, (202) 401–5789 *cbcomments@acf.hhs.gov*.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Statutory Authority

This NPRM is published under the authority granted to the Secretary of Health and Human Services (the Secretary) by section 1102 of the Social Security Act (the Act), 42 U.S.C. 1302. Section 1102 of the Act authorizes the Secretary to publish regulations, not inconsistent with the Act, as may be necessary for the efficient administration of the functions with which the Secretary is responsible under the Act.

II. Background

When parents are unable to safely care for their own children, it is often grandparents, other relatives, or kin who step forward to provide a loving home for those children, either temporarily or permanently. All over the nation, there is a preference to prioritize placing children entering foster care with relatives and kin over non-relative foster families when appropriate (''How can we prioritize kin in the home study and licensure process, and make placement with relatives the norm?'' Casey Family Programs, 2020.). This preference stems from the knowledge that it is generally best for children to be with family and also from the increasing shortage of qualified foster parents (Miller, Jennifer, ''Creating a Kin-First Culture,'' *American Bar Association,* July 1, 2017). The Government Accountability Office found ''in 2018, an estimated 2.7

million children lived with kin caregivers—grandparents, other relatives, or close family friends—because their parents were unable to care for them.'' (U.S. Government Accountability Office, *Child Welfare and Aging Programs: HHS Could Enhance Support for Grandparents and Other Relative Caregivers* (GAO–20–434), July 2020).

Title IV–E agencies have discretion to define ''relative'' and ''kin'' with regard to licensing standards. The definitions among title IV–E agencies vary, and sometimes ''kin'' is used more broadly than ''relative''. Fictive kin often include people who are not related by blood, marriage or adoption, but who have an emotionally significant relationship with the child, and those who are treated ''like family.'' (American Bar Association, *Legally Recognized Fictive Kin Relationships: A Call for Action,* March 1, 2022). For purpose of this NPRM, we use the term ''relative(s) and kin(ship)'' to allow title IV–E agencies to adopt one set of licensing or approval standards for individuals related to a child by blood, marriage or adoption and other individuals who have an emotionally significant relationship with the child, including fictive kin, that is different from the licensing or approval standards used for non-relative foster family homes. A child is in foster care when a title IV–E agency has placement and care responsibility for a child, removes the child from the parent's home, and places the child in 24-hour substitute care (45 CFR 1355.20). A child is in foster care in accordance with this definition regardless of whether the placement is licensed or approved and payments are made by the state or tribe for the care of the child (45 CFR 1355.20). Placement and care responsibility means that a title IV–E agency is legally accountable for the day-to-day care and protection of the child, decides with whom the child in foster care will be placed, and provides the child with federally mandated protections such as case plans and court reviews (sections 471(a)(16) and 475(5) of the Act; CWPM 8.3A.12 #4). We also use the terms ''licensing'' and ''approval'' interchangeably, depending on the state terminology (65 FR 4020 at 4032; CWPM 8.3A.8c #5). Each state and tribe operating a title IV–E program must designate an authority responsible for establishing and maintaining licensing or approval standards for foster family homes.

Encouraging and assisting relative and kin caregivers to become a licensed or approved foster care placement is important, in part, because it allows families to receive financial support through FCMPs (sections 472(b)(1) and (c)(1) of the Act and section I of ACYF–CB–PI–10–11). Licensing or approval is also one component of eligibility for the title IV–E Kinship Guardianship Assistance Program, which can provide longer-term financial support and benefits to a guardian that provides permanency to a child who cannot safely return home (section 473(d)(3)(A)(i)(II) of the Act). The section-by-section discusses other reasons why licensing or approving relative and kinship foster family homes is important for children in foster care.

Although the Act includes provisions requiring each agency to give priority consideration to relatives as foster care placements over a non-related caregiver when determining an out-of-home placement for a child, we understand that title IV–E agencies take varied approaches to licensing and approving relative and kin foster family homes. Research identifies that many agencies have policies that prioritize placements with appropriate relatives and kin and provide them with an option to become a licensed or approved foster parent so that they may receive FCMPs (Beltran, Ana, and Redlich Epstein, Heidi. *Improving Foster Care Licensing Standards around the United States: Using Research Findings to Effect Change.* Washington, DC: Generations United and American Bar Association, February 2013). Conversely, research also shows that some agencies may not routinely pursue licensing and approving relatives or kin as a possible licensed foster care placement for a child. For example, relatives and kin who provide care for a child in foster care may be denied a foster family home license or approval because they have not met strict licensing standards, including non-safety standards that the state may waive under current federal law. Thus, the relative or kin caregiver is not eligible for FCMPs.

State licensing and approval standards for foster family homes were developed before research demonstrated that relative and kinship care is often the best option for children in foster care. As a result, standards were created to ensure safety for children living with someone they did not know, making many licensing standards irrelevant for children living with a relative or kin (Miller, ''Creating a Kin-First Culture,'' July 1, 2017). For example:

- The Act requires only that licensing or approval standards established by the state or tribe are reasonably in accordance with recommended standards of national organizations for foster family homes related to admission policies, safety, sanitation, protection of civil rights, and use of the reasonable and prudent parenting standard (section 471(a)(10)(A) of the Act), and that the caregiver fully meet federal requirements under section 471(a)(20) of the Act (concerning criminal background checks for all foster parents). However, in 2000, ACF promulgated regulations that interpreted the Act to require that each state establish and apply its licensing or approval standards to all relative and non-relative foster family homes equally (45 CFR 1355.20). A title IV–E agency may waive non-safety-related licensing or approval standards for relative foster family homes on a case-by-case basis (section 471(a)(10)(D) of the Act). In 2020, ACF reported that 42 states, the District of Columbia, Puerto Rico, the Virgin Islands, and 3 tribes reported using waivers for non-safety licensing standards for relative foster family homes. Examples of non-safety waivers include waiving requirements for the home itself (the physical dimensions of home, room size requirements, the size and location of bedrooms, well water testing, proximity of the relative foster care provider's home to the child's parents), financial standards of the kinship caregiver, pre-service or training standards, and the age and marital status of the caregiver (ACYF–CB–IM–20–08). However, the Act does not allow a title IV–E agency to establish a policy or procedure that provides a blanket waiver of the standards for licensing or approving relative foster family homes (section 471(a)(10)(D) of the Act). Subsequent research found that, partially as a result of the 2000 rule, more than half of states changed their licensing standards. Some states implemented stricter licensing standards for relatives than they had previously. Many states that had standards specific to licensing relatives and kin repealed those standards in their entirety (Beltran and Redlich Epstein, *Improving Foster Care Licensing Standards around the United States: Using Research Findings to Effect Change,* February 2013).

State licensing or approval standards developed for un-related foster parents also may be unnecessary for relative or kin foster parents. For example, many states require the same time-consuming and intensive foster parent training classes for relatives and kin as they do for non-relatives. However, relative caregivers may require a different level or type of foster parent training to take care of their kin, particularly when they already know the child for whom they are going to provide care. Non-relative

foster parents may need training about how to integrate a child into a home with which the child is unfamiliar, or how to determine the child's interests and skills. Similarly, in contrast with non-relative foster parents, who prepare for the arrival of children in foster care over months and years, relatives often receive a request to care for a child in emergency situations. In addition, relatives become licensed to care for a child who is a relative, not because they want to be a foster parent to children in foster care. Therefore, relative licensing standards that allow for training that is condensed and more relevant to relative and kinship families along with the necessary essential agency support for foster parents could pave the way to remove barriers to licensing relatives (Miller, ''Creating a Kin-First Culture,'' July 1, 2017). Several examples of condensed training may be found on pages 5 and 6 of ACYF–CB–IM–20–08.

Title IV–E of the Act includes provisions requiring each agency to identify relatives of a child placed in foster care and to give priority consideration to relatives as foster care placements. Specifically, a title IV–E agency shall consider giving preference to an adult relative over a non-related caregiver when determining an out-of-home placement for a child, provided that the relative caregiver meets all relevant state or tribal child protection standards (section 471(a)(19) of the Act). Also, the Act requires that within 30 days after the removal of a child from their home, the title IV–E agency must exercise due diligence to identify and provide notice to certain relatives that the child has been or is being removed from the home, explain the options for relatives to participate in the care and placement of the child, describe how to become a foster family home, describe the additional services and supports that are available to the relative, as well as how a relative guardian of the child may participate in the title IV–E Kinship Guardianship Assistance Program if the title IV–E agency elected to operate the optional program (section 471(a)(29) of the Act).

This NPRM would allow a title IV–E agency to adopt one set of licensing or approval standards for all relative or kinship foster family homes that is different from the licensing or approval standards used for non-relative foster family homes. ACF encourages title IV–E agencies to adopt licensing or approval standards for all relative or kinship foster family homes that place as few burdens on such families as possible, consistent with ensuring the safety and wellbeing of children in foster care. Specifically, ACF encourages title IV–E agencies to strongly consider developing standards for relative and kinship foster family homes that meet only the requirements in the Act described earlier (*i.e.,* section 471(a)(10)(A) and (a)(20)), and not additional standards the agency requires non-relative foster family homes to meet. This eliminates the need for agencies to issue non-safety related waivers to relatives on a case-by-case basis which can delay the licensure process.

Finally, title IV–E of the Act and regulations require title IV–E agencies to provide a periodic review of the standards referred to in the preceding paragraph and amounts paid as foster care maintenance payments and adoption assistance to assure their continuing appropriateness (section 471(a)(11) of the Act; 45 CFR 1356.21(m)). The NPRM would also revise this requirement to assure that the agency provides a licensed or approved relative and kinship foster family home the same amount of foster care maintenance payments that would have been made if the child was placed in a non-related foster family home.

III. Section-by-Section Discussion of Proposed Regulatory Changes

Section § 1355.20

ACF proposes to revise the definition of ''foster family home'' by removing ''Foster family homes that are approved must be held to the same standards as foster family homes that are licensed[.]'' and replacing it with ''Agencies may establish foster family home licensing or approval standards for all relative or kinship foster family homes that are different from standards for non-relative foster family homes.'' This would allow a title IV–E agency to establish a set of foster family home licensing or approval standards that apply to all relative or kinship foster family homes, and that are different from non-relative foster family homes. An agency may also designate different names for the different type of standards. For example, an agency may designate the term ''approval'' to relative foster family home standards for relatives, and ''licensing'' to non-relative foster family homes. However, all standards and foster family homes must meet the requirements under title IV–E of the Act.

As a result of this NPRM, a title IV–E agency would be able to remove a possible barrier to claiming title IV–E FCMP on behalf of an otherwise eligible child who is placed in a licensed or approved relative or kinship foster family home. For example, the agency could require that relative and kinship families only meet the licensing requirements in the Act stated earlier, and not additional standards the agency requires non-relative foster family homes to meet. Or, the agency could implement state or tribal licensing standards for all relative or kinship foster family homes to extend age limits for relative or kinship foster care providers; allow relative children to share sleeping spaces; disregard certain income, transportation, literacy, language, and education requirements; and remove disqualifications for non-child-related past crimes such as issuing bad checks (Beltran and Redlich Epstein, *Improving Foster Care Licensing Standards around the United States: Using Research Findings to Effect Change,* February 2013; ; ''How can we prioritize kin in the home study and licensure process, and make placement with relatives the norm?'' *Casey Family Programs,* 2020.). A title IV–E agency has the discretion to define who is a relative or kinship provider in reference to this regulatory change.

This NPRM proposes to allow title IV–E agencies to establish a set of foster family home licensing or approval standards that apply to all relative or kinship foster family homes, for several reasons. First, this proposed change is consistent with long-standing recommendations of stakeholders and experts in child welfare to license or approve more relative and kinship foster family homes to significantly increase the services and financial resources available to relative and kinship caregivers., ACF has heard from stakeholders and discussed their recommendations. Second, placing children in licensed or approved relative foster family homes has multiple benefits to relatives and children. Third, the proposed change allows title IV–E agencies more flexibility without compromising child safety and well-being.

The current regulation requires the same licensing or approval standards for all foster family homes. This can lead to placing children with unlicensed relative foster family caregivers because some relatives are not able to meet the agency's licensing or approval standards. (Children's Defense Fund. *Recommendations to Ensure Children's Well-being through Support of Kinship Caregivers*). Stakeholders in the child welfare community have long advocated for a change to federal regulations that would remove common licensing barriers for relatives and kin, and allow foster family home licensing or approval standards that reflect the unique needs and circumstances of relative and

kinship caregivers (''How can we prioritize kin in the home study and licensure process, and make placement with relatives the norm?'' Casey Family Programs, 2020). Allowing more relatives and kin to become licensed or approved as foster parents would significantly increase the services and financial resources available to kin caregivers. (Foster Family-based Treatment Association. The Kinship Treatment Foster Care Initiative Toolkit. Hackensack, NJ: Foster Family-Based Treatment Association, 2015, Page 14). Most children in nonparental care lived with grandparents (63%), others lived with foster parents (15%), some of whom were related, or with other relatives and nonrelatives such as aunts, godparents, or friends (22%) (Radel, Bramlett, Chow, Waters, 2016). Many relatives who care for their kin are older, more likely to be single, more likely to be African American, more likely to live in poverty, and more likely to be less well educated (Bramlett, Radel, Chow, 2017) (U.S. Government Accountability Office, Child Welfare and Aging Programs: HHS Could Enhance Support for Grandparents and Other Relative Caregivers (GAO–20–434), July 2020);). When children are placed with relative caregivers, it is most often in emergency situations which may result in unanticipated expenses. Many relatives, especially those on a fixed income cannot financially afford to care for their kin in the child welfare system unless they receive support. Relatives who do not meet licensing standards are not eligible for title IV–E FCMP and instead rely on financial assistance from Temporary Assistance for Needy Families (TANF). TANF typically provides less than half of the monthly FCMP. Lower foster care payments for kinship care providers negatively affects the number of relatives that can care for children (''How can we prioritize kin in the home study and licensure process, and make placement with relatives the norm?'' *Casey Family Programs,* 2020). Thus, relatives are often in greater need of financial support; providing care for a child who has been removed from home places financial strains on the relatives providing that care. This NPRM can help low-income families who are adversely affected by poverty and struggling to raise their kin by providing financial assistance to maintain the child in the relative's home until the child can be reunified.

Second, allowing a title IV–E agency to establish different foster family home licensing or approval standards for all relative or kinship foster family homes so that more children can be placed with relatives and kin has multiple benefits to relatives and to children. Research confirms that children in foster care often do best when placed with relatives and kin and that family connections are critical to healthy child development and a sense of belonging (Miller, ''Creating a Kin-First Culture,'' July 1, 2017). Relative and kinship care also helps to preserve children's cultural identity and relationship to their community. This regulation would allow children placed with a relative or kin to remain connected to their families, communities, and schools. For youth in foster care, having a strong cultural identity can lead to greater self-esteem, higher education levels, improved coping abilities, and decreased levels of loneliness and depression (Child Welfare Information Gateway. (2022). Kinship care and the child welfare system. U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau. *https://www.childwelfare.gov/pubs/f-kinshi/*). For example, in American Indian and Alaskan Native communities, the cultural knowledge children acquire from grandparents, other adult family members or close family friends who are caring for them can be critical to developing the survival skills and resilience needed in the face of multiple challenges and overcoming barriers to positive outcomes. Culture and kinship relationships are strong resources that support their children in their care (Generations United and National Indian Child Welfare Association. (2020). TOOLKIT—American Indian and Alaska Native Grandfamilies: Helping Children Thrive Through Connection to Family and Cultural Identity. *www.gu.org* and *www.nicwa.org*). Further, research indicates that children living with relatives experience fewer behavioral problems and higher placement stability rates compared to children living with non-relatives in foster care (Child Welfare Information Gateway. (2022). Kinship care and the child welfare system. U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau. *https://www.childwelfare.gov/pubs/f-kinshi/;* Foster Family-based Treatment Association, *The Kinship Treatment Foster Care Initiative Toolkit,* 2015). However, restrictive licensing standards and inadequate information about standards places relatives at a disadvantage and reduce the positive effects associated with kinship care (''How can we prioritize kin in the home study and licensure process, and make placement with relatives the norm?'' *Casey Family Programs,* 2020).

ACF believes that title IV–E agencies can develop different foster family home licensing or approval standards for relatives in a manner that does not compromise child safety and well-being. The Act requires that all foster family home licensing standards be reasonably in accord with recommended standards of national organizations concerned with these standards for foster family homes related to admission policies, safety, sanitation, protection of civil rights and use of the reasonable and prudent parenting standard (section 471(a)(10) of the Act). Further, the Act specifies that a child is only eligible to receive a title IV–E FCMP if placed in a licensed or approved placement, which includes federal requirements that the foster parent fully meet the requirements concerning criminal background checks (section 471(a)(20) of the Act). A child is not eligible for FCMP if the criminal records check reveals that the prospective foster or adoptive parent has been convicted of a felony related to child abuse or neglect, spousal abuse, a crime against a child or children (including child pornography), or a crime involving violence, including rape, sexual assault, or homicide. In addition, a child is not eligible for FCMP if the criminal record checks reveal that within the last 5 years, the prospective foster or adoptive parent has been convicted of a felony involving physical assault, battery, or a drug-related offense (Section 471(a)(20)(A) of the Act; 45 CFR 1356.30). This NPRM does not propose to change those important safety requirements for relative or kinship caregivers. Therefore, a title IV–E agency may choose to develop standards for relative and kinship foster family homes that meet only the federal requirements outlined in the Act. As previously discussed, research shows that children placed in foster care with relatives are just as safe, or safer, when compared with children placed with unrelated foster families (Beltran and Redlich Epstein, *Improving Foster Care Licensing Standards around the United States: Using Research Findings to Effect Change,* February 2013).

Finally, we propose to revise the definition of ''foster family home'' by removing ''[T]he term may include group homes, agency-operated boarding homes or other facilities licensed or approved for the purpose of providing foster care by the State or Tribal agency responsible for approval or licensing of such facilities.'' Public Law 115–123, the Family First Prevention Services

Act, amended section 472(c)(1)(A)(ii) of the Act to limit the definition of a foster family home to the ''home of an individual or family,'' and to require that the foster parent resides in the home with the child. Title IV–E agencies are required to comply with these statutory amendments regardless of the regulatory language, so this change is merely a technical amendment that aligns the definition with the law and clarifies that these entities are not homes of individuals and therefore, not considered foster family homes.

With these proposed revisions, the definition would read, '' 'Foster family home' means, for the purpose of title IV–E eligibility, the home of an individual or family licensed or approved as meeting the standards established by the licensing or approval authority(ies), that provides 24-hour out-of-home care for children. The licensing authority must be a state authority in the state in which the foster family home is located, a tribal authority with respect to a foster family home on or near an Indian Reservation, or a tribal authority of a tribal title IV–E agency with respect to a foster family home in the tribal title IV–E agency's service area. Agencies may establish foster family home licensing or approval standards for all relative or kinship foster family homes that are different from standards for non-relative foster family homes. Anything less than full licensure or approval is insufficient for meeting title IV–E eligibility requirements. Title IV–E agencies may, however, claim title IV–E reimbursement during the period of time between the date a prospective foster family home satisfies all requirements for licensure or approval and the date the actual license is issued, not to exceed 60 days.''

Section § 1356.21

The NPRM would also revise section § 1356.21(m) to require that title IV–E agencies review the amount of foster care maintenance payments to assure that the agency provides a licensed or approved relative and kinship foster family home the same amount of foster care maintenance payments that would have been made if the child was placed in a non-related foster family home. This proposed revision codifies the holding in Miller v. Youakim, 440 U.S. 125 (1979). In Miller, the Supreme Court established that children placed with relative foster homes that met approval or licensing standards were full participants in the IV–E program. The Court stated that ''neither the legislative history nor the structure of the [Social Security] Act indicates that Congress intended to differentiate among neglected children based on their relationship to their foster parents.'' (Id. at 138–139). Further, the definition of ''foster care maintenance payments'' for IV–E purposes is based on the costs of the services and supplies provided to the foster child, not the relationship of the child to the foster parent (42 U.S.C. 675(4)(A)). This proposed revision means that a title IV–E agency must use the same payment schedule(s) for relative and non-relative licensed or approved foster family homes. The agency may not establish a separate payment schedule for licensed or approved relative and kinship foster family homes. For example, a title IV–E agency has a foster care maintenance payment schedule of monthly payments based on age and including basic maintenance and difficulty-of-care Levels 1, 2 & 3. The agency determines that, if placed with a non-relative, the child of a certain age in title IV–E foster care requires level 3 care at $31.00 per day. However, the child is placed in a relative foster family home that is licensed or approved using separate licensing standards, established consistent with this proposal. The amount of the level 3 foster care maintenance payment based on the child's age must also be $31.00 per day.

With this proposed revision, the regulation would read, ''(m) Review of payments and licensing standards. In meeting the requirements of section 471(a)(11) of the Act, the title IV–E agency must review at reasonable, specific, time-limited periods to be established by the agency: (1) The amount of the payments made for foster care maintenance to assure their continued appropriateness, and that the amount made to a licensed or approved relative or kinship foster family home is the same as the amount that would have been made if the child was placed in a licensed or approved non- relative foster family home; (2) The amount of the payments made for adoption assistance to assure their continued appropriateness; and (3) The licensing or approval standards for child care institutions and foster family homes.''

Equity Impact

This NPRM supports the Administration's priority of advancing equity for those historically underserved and adversely affected by persistent poverty and inequality (U.S. President. Executive Order. ''Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Executive Order 13985 of January 20, 2021.''). The current regulation prohibits a title IV–E agency from uniformly adopting separate foster family home licensing or approval standards for relative or kinship caregivers. This disadvantages lower income prospective relative caregivers, some of whom are disqualified from providing care as a result of not meeting income and other standards established for licensing or approving foster family homes.

This NPRM would especially provide a support to low-income prospective relative caregivers, many of whom are families of color, are from underserved rural areas, or are members of other communities in which long-term systemic factors such as poverty hamper families from making intergenerational progress. Ethnically and culturally diverse populations are disproportionately represented in relative and kinship families. ''While Black or African American individuals represent just 13% of the U.S. population, they make up nearly a quarter of all children in households where a grandparent is responsible for the needs of the child'' (Advisory Council to Support Grandparents Raising Grandchildren with Assistance from the HHS Administration for Community Living. *Supporting Grandparents Raising Grandchildren (SGRG) Act, Initial Report to Congress.* Washington, DC: Author, p. 4, November 16, 2021.). ''Similarly, American Indian and Alaska Natives make up only 1.3% of the U.S. population, but their representation in grandparent-led households where the grandparent is providing for most of their needs, is more than double that rate (U.S. Census Bureau, 2019). The available data on grandparents responsible for grandchildren suggests that underserved racial and ethnic populations are disproportionately taking responsibility for grandchildren.'' (Advisory Council to Support Grandparents Raising Grandchildren with assistance from the HHS Administration for Community Living. [November 16, 2021]. *Supporting Grandparents Raising Grandchildren (SGRG) Act, Initial Report to Congress.* Washington, DC: Author, p. 12). Moreover, many individuals in these communities face simultaneous, multiple barriers when attempting to provide care to a relative who has been removed from their home.

Policies that expand access to FCMPs can have an especially strong impact on underserved groups. Encouraging and removing barriers to kinship placement also is consistent with cultural norms of some underserved groups that traditionally rely more heavily on kin

and family in times of need. For example:

- Children age 3 to 5 who are the subject of a child maltreatment report in rural areas and those in households with incomes less than 50 percent of federal poverty level were more likely to be placed in informal kinship settings than similarly situated children in urban areas (*Walsh, W.A. Informal Kinship Care Most Common Out-of-Home Placement After an Investigation of Child Maltreatment [Fact Sheet no. 24]. Durham, NH: University of New Hampshire, Carsey Institute, 2013.*).
- African American families rely on extended family and other informal systems of care not only because these informal systems are cultural strengths, but because African American children historically were excluded from public and private sector child welfare programs and supports (U.S. Government Accountability Office, Child Welfare and Aging Programs: HHS Could Enhance Support for Grandparents and Other Relative Caregivers (GAO–20–434), July 2020).
- Traditionally, grandparents and other family members assume integral roles in raising children within American Indian/Alaska Native communities. This type of extensive familial support system helps parents to pass on to their children the knowledge of customs, culture, and language essential to community survival and well-being (Capacity Building Center for Tribes. Engaging and Supporting Native Grandfamilies. 2022. *https://tribalinformationexchange.org/files/products/GrandfamiliesResourceList2022.pdf*; Lewis, Jordan & Boyd, Keri & Allen, James & Rasmus, Stacy & Henderson, Tammy. (2018). ''We Raise our Grandchildren as our Own:'' Alaska Native Grandparents Raising Grandchildren in Southwest Alaska. Journal of Cross-Cultural Gerontology. 33.10.1007/s10823–018–9350–z.).

IV. Regulatory Process Matters

Regulatory Planning and Review Executive Order 12866 and Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects; distributive impacts; and equity). Executive Order 13563 is supplemental to, and reaffirms the principles, structures, and definitions governing regulatory review as established in Executive Order 12866, emphasizing the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Section 3(f) of Executive Order 12866 defines ''a significant regulatory action'' as an action that is likely to result in a rule that may (1) have an annual effect on the economy of $100 million or more in any 1 year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, and tribal governments or communities (also referred to as ''economically significant''); (2) create a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. A regulatory impact analysis must be prepared for rules determined to be significant regulatory actions within the scope of section 3(f)(1) of Executive Order 12866, and all significant regulatory actions are subject to review by the Office of Management and Budget (OMB).

ACF consulted OMB and determined that this proposed rule meets the criteria for a significant regulatory action under Executive Order 12866 and subject to OMB review. Based on ACF's estimates of the likely costs associated with this proposal, OMB designated this proposed rule as a significant regulatory action within the scope of section 3(f)(1) of Executive Order 12866.

The estimated cost and transfer impacts of this regulatory proposal are provided below (see the sections titled ''Federal cost estimate with implementation of this proposal in a final rule'' and ''Estimated costs of this proposal to title IV–E agencies''). As described in the Section-by-Section above, children in foster care do best when placed with relatives and kin and family connections are critical to healthy child development and a sense of belonging. Relative and kinship care also helps to preserve children's cultural identity and relationship to their family, community and school, which can help buffer depressive symptoms. Children living with relatives experience fewer behavioral problems and higher placement stability rates then children living with unrelated foster parents. Situating relatives and kin to become a licensed or approved foster care placement is important, in part, because it allows families to receive financial support through FCMPs (sections 472(b)(1) and (c)(1) of the Act and section I.C. of ACYF–CB–PI–10–11), and it meets one component of eligibility for the title IV–E Kinship Guardianship Assistance Program, which can provide longer-term financial support and benefits to a family that provides permanency to a child who cannot safely return home (section 473(d)(3)(A)(i)(II) of the Act). Relative and kinship placements also support cultural norms of some underserved groups that traditionally rely more heavily on kin and family in times of need. In addition, there is an increasing shortage of qualified foster parents, and research demonstrates that when a parent(s) is not able to safely care for their child, it is best for child to be cared for by family who step forward to provide the child(ren) with a loving home.

Alternatives Considered: We considered providing a federal definition of relative and kinship, which would allow title IV–E agencies to apply relative standards to only those who would meet the federal definition, rather than a potentially broader state/tribal definition of these terms. For example, one federal definition could allow only a subset of relatives to whom the standards would apply, such as those who meet the former Aid to Families with Dependent Children income standards. However, we determined that the title IV–E agency should continue to define relative and kin because providing a federal definition could interfere with the goal of the proposal to provide FCMPs on behalf of a child in foster care in need. In addition, providing a federal definition of relative and kinship would be a burden on title IV–E agencies because it would likely require many states and Tribes to change their definitions in policy regulations or statutes. Without this NPRM, title IV–E agencies must maintain the same licensing or approval standards for relative and non-related foster family homes and may continue issuing non-safety related waivers on a case-by-case basis for relatives that do not meet the agency's foster family home standards.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) (see 5 U.S.C. 605(b) as amended by the Small Business Regulatory Enforcement Fairness Act) requires federal agencies to determine, to the extent feasible, a rule's impact on small entities, explore regulatory options for reducing any significant impact on a substantial

number of such entities, and explain their regulatory approach. The term ''small entities,'' as defined in the RFA, 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. HHS considers a rule to have a significant impact on a substantial number of small entities if it has at least a 3 percent impact on revenue on at least 5 percent of small entities. However, the Secretary certifies, under 5 U.S.C. 605(b), as enacted by the RFA (Pub. L. 96–354), that this rule would not result in a significant impact on a substantial number of small entities. This proposed rule does not affect small entities because it is applicable only to state and tribal title IV–E agencies. Therefore, an initial regulatory flexibility analysis is not required for this notice.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4) was enacted to avoid imposing unfunded federal mandates on state, local, and tribal governments, or on the private sector. Section 202 of UMRA requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2022, that threshold is approximately $165 million. This rule does not contain mandates that would impose spending costs on state, local, or tribal governments in the aggregate, or on the private sector, in excess of the threshold.

Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 2000 requires federal agencies to determine whether a policy or regulation may negatively affect family well-being. If the agency determines a policy or regulation negatively affects family well-being, then the agency must prepare an impact assessment addressing seven criteria specified in the law. ACF believes it is not necessary to prepare a family policymaking assessment (see Pub. L. 105–277) because the action it takes in this NPRM would not have any impact on the autonomy or integrity of the family as an institution.

Executive Order 13132

Executive Order 13132 requires federal agencies to consult with state and local government officials if they develop regulatory policies with federalism implications. Federalism is rooted in the belief that issues that are not national in scope or significance are most appropriately addressed by the level of government close to the people. This rule would not have substantial direct impact on the 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 because allowing each title IV–E agency to adopt foster family home licensing or approval standards for relative foster family homes is optional and not mandatory. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this action does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (Pub. L. 104–13) seeks to minimize government-imposed burden from information collections on the public. In keeping with the notion that government information is a valuable asset, it also is intended to improve the practical utility, quality, and clarity of information collected, maintained, and disclosed.

The Paperwork Reduction Act defines ''information'' as any statement or estimate of fact or opinion, regardless of form or format, whether numerical, graphic, or narrative form, and whether oral or maintained on paper, electronic, or other media (5 CFR 1320.3(h)). This includes requests for information to be sent to the government, such as forms, written reports and surveys, recordkeeping requirements, and third-party or public disclosures (5 CFR 1320.3(c)). There is no burden to the Federal government or to title IV–E agencies as a result of this proposed regulation. First, it is optional for a title IV–E agency to develop separate licensing standards for relative and kinship foster family homes. If the agency elects to do so, there are no new reporting requirements. Second, title IV–E agencies are already required by section 471(a)(11) of the Act to conduct periodic reviews of the rates and standards related to foster care maintenance payments. Therefore, the regulatory proposal that during these reviews, agencies ensure that the rate of FCMP to relative and non-related foster family homes is equal, does not impose any new reporting requirements. Finally, title IV–E agencies were required to make changes consistent with Public Law 115–123, the Family First Prevention Services Act. Therefore, the proposed technical change to bring federal regulations up to date with title IV–E of the Act does not impose any new reporting requirements.

Annualized Cost to the Federal Government

Total Projections to Implement Final Rule. The estimate for this NPRM was derived using fiscal year (FY) 2019 data from the Adoption and Foster Care Analysis and Reporting System (AFCARS) on title IV–E relative foster family home placements and FY 2019 claiming data from the Form CB–496 ''Title IV–E Programs Quarterly Financial Report (Foster Care, Adoption Assistance, Guardianship Assistance, Prevention Services and Kinship Navigator Programs).'' We did not use FY 2020 or 2021 data from AFCARS because such data would likely reflect anomalies due to the COVID19 public health emergency period.

If this proposed regulatory action becomes final, ACF estimates that there would be annual increases in the number of title IV–E relative foster family home placements and annual increases in federal costs for foster care maintenance payments (FCMPs) and administration. ACF estimates that the proposed regulatory change would cost the federal government $28,753,988 in title IV–E FFP *i.e.,* FCMPs and administration, the first year after the rule becomes final and $3.085 billion over a total of 10 years.

Assumptions: ACF made several assumptions when calculating the cost of FCMPs and administrative costs.

- First, we anticipate that without any changes to the regulation, the annual caseload growth rate (*i.e.,* the increase in title IV–E relative and non-relative foster family home placements) would be 1 percent, and the annual title IV–E claiming growth factor would be two percent. We retain this same annual two percent claiming growth factor in estimating the FFP to implement the final rule because relative and non-relative foster family homes receive the same amount of title IV–E foster care maintenance payments.
- Second, if the NPRM becomes final, we assume a varied implementation rate of title IV–E relative and kinship foster family home placements. The estimate assumes a slow rate of change because agencies may not immediately decide to implement new or revised relative foster family home licensing or approval standards. In addition, states and tribes vary on whether policy, regulation or statutory change must precede such changes.

• Finally, the title IV–E participation rate for relative foster family home placements was 27.6 percent in FY 2019. Conversely, the title IV–E participation rate for other foster care placements was 47.7 percent in FY 2019. We assume that this percentage would increase for relative foster family home placements over time as a result of the proposed regulation because it allows different licensing or approval standards for relative and non-relative foster family home placements. We also assume that the difference in the title IV–E participation rate of relatives and non-relatives is almost entirely due to the use of the same licensing or approval standard for both relative and non-relative foster family home placements. We anticipate incremental changes in the IV–E participation rate for relative and kinship foster family home placements over a total of 10 years, and that by year ten, this rate would increase to 41.7 percent.

Average title IV–E FCMP and Administrative costs per child. To determine the FY 2019 average FFP cost per child, we divided the total number of children in foster care in FY 2019 receiving title IV–E maintenance payments (170,446) by the total FFP claimed on the Form CB–496 for this time period. This resulted in an average title IV–E FCMP cost of $9,240 per child; and an average title IV–E administrative cost of $12,907 (This is the baseline FFP). We used the annual average per child costs to calculate the FFP that would be claimed over a total of 10 years with and without implementation of the proposed rule. We made an assumption that 15 percent of the increased relative placement title IV–E caseload in each year would have already been subject to title IV–E claiming for administrative cost purposes (without the NPRM) based on current law that allows these costs for the period specified in the law, up to 12 months, that an application for licensure is pending (see section 472(i)(1)(A) of the Act).

Federal Cost Estimates Without Implementation of the Proposed Rule

Line 1. Estimates of the number of title IV–E relative foster family home placements. As of September 30, 2019, there were 36,953 title IV–E relative foster family home placements. Applying our assumptions, on line 1 on the table below, we display the annual increases in title IV–E relative placements without implementation of the proposed rule for 5 different years, beginning with FY 2023 and ending with 2032. For example, in FY 2023, there would be 37,322 title IV–E relative foster family home placements if the regulation is not implemented: 36,953 + (36,953 × .01) = 37,322.

Lines 2 through 5. Estimates of FFP for title IV–E relative foster family home placements. To determine increases in the annual FCMP and administrative costs of title IV–E relative foster family home placements, we multiplied the average annual federal cost per child (lines 2 and 3) by the annual number of title IV–E relative foster home placements on line 1. On the table below, line 4 displays the increased FCMP costs and line 5 displays increased administrative costs for 5 different years beginning with 2023 and ending with 2032. The baseline FCMP costs for 2019 is $9,240 × 36,953 = $341,462,572. The baseline administrative costs for 2019 is $12,907 × 36,953 = $476,934,437.

Federal Cost Estimate With Implementation of This Proposal in a Final Rule

Lines 6 and 7. Number of title IV–E relative foster family home placements. On line 6 of the table below, we estimate the annual increases in title IV–E relative foster family home placements if the proposed rule becomes final. We used a caseload growth rate of 5 percent in year 1, 15 percent in year 2, 25 percent in year 3, 45 percent in year 5. By year 10, this implementation rate is expected to reach 70 percent based on our assumptions described earlier. On line 7 of the table below, we determined the annual number of *new* title IV–E relative foster family home placements as a result of the regulation. To calculate the annual number of *new* title IV–E relative foster family home placements due to implementation of the final rule, we subtracted the projected caseload without application of the final rule on line 1 from the projected caseload of the proposed rule on line 6. For example, in 2023 there would be 1,392 new title IV–E relative foster family home placements: 38,714 − 37,323 = 1,392.

Lines 8 through 10. Annual federal costs of title IV–E relative foster family home placements. Lines 8 and 9 display the annual increases in FCMPs and administrative costs for the *new* title IV–E relative foster family home placements (on line 6) if the final rule is implemented. To determine the annual federal cost of the NPRM on lines 8 and 9, we multiplied the annual number of new title IV–E relative foster family home placements on line 6 by the average child costs for FCMPs and administration on lines 2 and 3. This information is displayed for 5 different years beginning with 2023 and ending with 2032. For example, on line 8, the cost in 2023 for FCMPs is approximately $13,117,787 (1,392 children × $9,425 average FCMP). Line 10 displays the annual incremental federal costs of the NPRM if it becomes a final rule.

	Estimates without regulatory changes						
	2019 Baseline	2023 (Year 1)	2024 (Year 2)	2025 (Year 3)	2027 (Year 5)	2032 (Year 10)	Ten year total cost
1. Number of title IV–E relative placements @1% growth	36,953	37,323	37,696	38,073	38,838	40,819	
2. Avg. title IV–E FCMP FFP claim per child@2% claiming growth factor	$9,240	$9,425	$9,614	$9,806	$10,202	$11,264	
3. Avg. title IV–E Administrative cost FFP claim per child@2% claiming growth factor	$12,907	$13,165	$13,428	$13,696	$14,250	$15,733	
4. FCMP cost	$341,462,572	$351,774,691	$362,398,575	$373,343,289	$396,233,652	$459,790,346	$4,036,424,435
5. Administrative cost	$476,934,437	$491,337,785	$506,176,589	$521,463,509	$553,435,395	$642,207,572	$5,637,835,507
Estimated FFP with proposed regulatory changes							
	2019	2023 (Year 1)	2024 (Year 2)	2025 (Year 3)	2027 (Year 5)	2032 (Year 10)	Ten year total cost
6. Number of title IV–E relative placement @varied caseload growth rates	36,953	38,714	41,849	45,042	51,609	61,680	
7. Total annual increase in title IV–E relative placements		1,392	4,153	6,970	12,771	20,861	
8. Annual increase in FCMP costs		$13,117,787	$39,926,838	$68,344,565	$130,295,804	$234,976,401	$1,304,789,018
9. Increase in administrative costs		$15,636,201	$50,233,323	$89,758,368	$175,938,591	$324,690,283	$1,780,051,762
10. Total incremental increase in FFP		$28,753,988	$90,160,161	$158,102,933	$306,234,395	$559,666,684	$3,084,840,780
Title IV–E agency estimates with proposed regulatory changes							
	2019	2023	2024	2025	2027 (Year 5)	2032 (Year 10)	Ten year total cost
11. Maintenance Portion—Incremental Non-Federal Share (Using FY 2019 Avg. FMAP rate of 56.61%)		$10,054,421	$30,602,817	$52,384,220	$99,868,132	$180,102,915	$1,000,084,711
12. Administration Portion—Incremental Non-Federal Share (50% FFP)		$15,636,201	$50,233,323	$89,758,368	$175,938,591	$324,960,283	$1,780,051,762
13. Total Incremental Increase in Non-Federal Share		$25,690,622	$80,836,140	$142,142,587	$275,806,723	$504,793,199	$2,780,136,473

Estimated costs of this proposal to title IV–E agencies. Title IV–E agencies may claim reimbursement for the federal cost of FCMPs and administrative costs, and the title IV–E agency pays its share with state or tribal funds. Line 11 displays the agency's estimated FCMP costs and line 12 displays the estimated agency costs for administration. Line 13 displays the total incremental increase in cost for the state/tribal share. This information is displayed for 5 different years beginning with 2023 and ending with 2032. The estimates provided are calculated using the national average federal medical assistance percentage (FMAP) rate of 56.61 percent for FY 2019 and an administrative cost FFP rate of 50 percent. This proposal is optional; therefore, agencies are not *required* to incur any costs.

Accounting Statement

From a society-wide perspective, many of the effects estimated above are transfers. We seek comment on estimation of the portion that represents new resource use attributable to the proposed rule. Preliminary, as shown in the table below, the full amounts are categorized as transfers—from either the federal government or Title IV–E agencies to Title IV–E participants.

Category	Primary estimate (millions)	Units		
		Year dollars	Discount rate (%)	Period covered (years)
Federal Budget Transfers (annualized)	$439 362	2019 2019	7 3	10 10
From/To	From: Federal government	To: Title IV–E participants		
Other Transfers (annualized)	395 326	2019 2023	7 3	10 10
From/To	From: Title IV–E agencies	To: Title IV–E participants		

V. Tribal Consultation Statement

Executive Order 13175, *Consultation and Coordination With Indian Tribal Governments,* requires agencies to consult with Indian tribes when regulations have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. This NPRM does not propose any mandatory action on Tribal governments or impose any tribal burden or cost, and therefore does not have substantial direct effects on Indian tribes. Rather it proposes to provide tribal title IV–E agencies an option for implementing the foster family home licensing requirements for the title IV–E foster care program. Accordingly, a tribal title IV–E agency can adopt separate licensing or approval

standards for relative or kinship foster family homes, but is not required to do so. We intend to notify tribal title IV–E agency leadership about the opportunity to provide comment on the NPRM no later than the day of publication. Further, shortly after publication of the NPRM, we plan to hold briefing sessions with tribal title IV–E agencies and any other interested tribe on the contents of the NPRM.

January Contreras, Assistant Secretary of the Administration for Children and Families, approved this document on January 20, 2023.

List of Subjects

45 CFR Part 1355

Administrative costs, Adoption Assistance, Child welfare, Fiscal requirements (title IV–E), Grant programs—social programs, Statewide information systems, Adoption and foster care, Child welfare, Grant programs—social programs.

45 CFR Part 1356

Adoption and foster care, Child welfare, Grant programs—social programs.

(Catalog of Federal Domestic Assistance Program Number 93.658, Foster Care Maintenance; 93.659, Adoption Assistance; 93.645, Child Welfare Services—State Grants).

Dated: February 8, 2023.

Xavier Becerra,

Secretary, Department of Health and Human Services.

For the reasons set forth in the preamble, ACF proposes to amend 45 CFR parts 1355 and 1356 as follows:

PART 1355—GENERAL

■ 1. The authority citation for part 1355 continues to read as follows:

Authority: 42 U.S.C. 620 *et seq.,* 42 U.S.C. 670 *et seq.;* 42 U.S.C. 1302.

■ 2. In § 1355.20, amend paragraph (a) by revising the definition of ''Foster family home'' to read as follows:

§ 1355.20 Definitions.

(a) * * *

Foster family home means, for the purpose of title IV–E eligibility, the home of an individual or family licensed or approved as meeting the standards established by the licensing or approval authority(ies), that provides 24-hour out-of-home care for children. The licensing authority must be a state authority in the state in which the foster family home is located, a tribal authority with respect to a foster family home on or near an Indian Reservation, or a tribal authority of a tribal title IV–E agency with respect to a foster family home in the tribal title IV–E agency's service area. Agencies may establish one set of foster family home licensing or approval standards for all relative or kinship foster family homes that are different from the set of standards used to license or approve all non-relative foster family homes. Anything less than full licensure or approval is insufficient for meeting title IV–E eligibility requirements. Title IV–E agencies may, however, claim title IV–E reimbursement during the period of time between the date a prospective foster family home satisfies all requirements for licensure or approval and the date the actual license is issued, not to exceed 60 days.

* * * * *

PART 1356—REQUIREMENTS APPLICABLE TO TITLE IV–E

■ 3. The authority citation for part 1356 continues to read as follows:

Authority: 42 U.S.C. 620 *et seq.,* 42 U.S.C. 670 *et seq.;* 42 U.S.C. 1302.

■ 4. Amend § 1356.21 by revising paragraphs (m)(1) and (2), and adding paragraph (m)(3) to read as follows:

§ 1356.21 Foster care maintenance payments program implementation requirements.

* * * * *

(m) * * *

(1) The amount of the payments made for foster care maintenance to assure their continued appropriateness, and that the amount made to a licensed or approved relative or kinship foster family home is the same as the amount that would have been made if the child was placed in a licensed or approved non-relative foster family home;

(2) The amount of the payments made for adoption assistance to assure their continued appropriateness; and

(3) The licensing or approval standards for child care institutions and foster family homes.

* * * * *

[FR Doc. 2023–03005 Filed 2–13–23; 8:45 am]

BILLING CODE 4184–73–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 227, and 252

[Docket DARS–2020–0033]

RIN 0750–AK84

Defense Federal Acquisition Regulation Supplement: Small Business Innovation Research Program Data Rights (DFARS Case 2019–D043); Extension of Comment Period; Public Meeting

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule; extension of comment period; public meeting.

SUMMARY: DoD published a proposed rule on December 19, 2022, seeking public input on a proposed revision to the Defense Federal Acquisition Regulation Supplement (DFARS) to implement the intellectual property (*e.g.,* data rights) portions of the Small Business Administration's Small Business Innovation Research Program and Small Business Technology Transfer Program Policy Directive. The deadline for submitting comments is being extended to provide additional time for interested parties to provide inputs. In addition, DoD is hosting a second public meeting to further obtain views of experts and interested parties in Government and the private sector regarding this proposed revision of the DFARS.

DATES:

Comment date: Comments on the proposed rule should be submitted in writing to the address shown below on or before March 20, 2023, to be considered in the formation of a final rule.

Public meeting date: A virtual public meeting will be held on March 2, 2023, from 1 p.m. to 5 p.m., Eastern time. The public meeting will end at the stated time, or when the discussion ends, whichever comes first.

Registration date: Registration to attend the public meeting must be received no later than close of business on February 23, 2023. Information on how to register for the public meeting may be found under the **SUPPLEMENTARY INFORMATION** section of this notice.

ADDRESSES:

Public Meeting: A virtual public meeting will be held using Zoom video conferencing software.

Submission of Comments: Submit comments identified by DFARS Case

2019–D043, using any of the following methods:

○ *Federal eRulemaking Portal: https://www.regulations.gov.* Search for ''DFARS Case 2019–D043.'' Select ''Comment'' and follow the instructions provided to submit a comment. Please include ''DFARS Case 2019–D043'' on any attached documents.

○ *Email: osd.dfars@mail.mil.* Include DFARS Case 2019–D043 in the subject line of the message.

Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *https://www.regulations.gov,* approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Mr. David E. Johnson, telephone 202–913–5764.

SUPPLEMENTARY INFORMATION: DoD is interested in continuing a dialogue with experts and interested parties in Government and the private sector regarding amending the DFARS to implement the Small Business Administration's Small Business Innovation Research/Small Business Technology Transfer (SBIR/STTR) Program Policy Directive. DoD held a public meeting on February 2, 2023, regarding this proposed rule.

Registration: Individuals wishing to participate in the virtual meeting must register by February 23, 2023, to facilitate entry to the meeting. Interested parties may register for the meeting by sending the following information via email to *osd.dfars@mail.mil* and including ''Public Meeting, DFARS Case 2019–D043'' in the subject line of the message:

- Full name.
- Valid email address, which will be used for admittance to the meeting.
- Valid telephone number, which will serve as a secondary connection method. Registrants must provide the telephone number they plan on using to connect to the virtual meeting.
- Company or organization name.
- Whether the individual desires to make a presentation.

Preregistered individuals will receive instructions for connecting using the Zoom video conferencing software not more than one week before the meeting is scheduled to commence.

Presentations: Presentations will be limited to 5 minutes per company or organization. This limit may be subject to adjustment, depending on the number of entities requesting to present, to ensure adequate time for discussion. If you wish to make a presentation, please submit an electronic copy of your presentation via email to *osd.dfars@mail.mil* no later than the registration date for the specific meeting. Each presentation should be in PowerPoint to facilitate projection during the public meeting and should include the presenter's name, title, organization affiliation, telephone number, and email address on the cover page.

Correspondence, Comments, and Presentations: Please cite ''Public Meeting, DFARS Case 2019–D043'' in all correspondence related to the public meeting. There will be no transcription at the meeting. The submitted presentations will be the only record of the public meeting and will be posted to the following website at the conclusion of the public meeting: *https://www.acq.osd.mil/dpap/dars/technical_data_rights.html.*

The comment period for the proposed rule is extended through March 20, 2023, to provide additional time for interested parties to provide inputs.

List of Subjects in 48 CFR Parts 212, 227, and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

[FR Doc. 2023–03113 Filed 2–13–23; 8:45 am]

BILLING CODE 5001–06–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1819 and 1852

RIN 2700–AE38

NASA Federal Acquisition Regulation Supplement: NASA Mentor-Protégé Program

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: NASA is proposing to amend the NASA Federal Acquisition Regulation Supplement (NFS) to reflect updates to NASA's Mentor Protégé Program (MPP) including: the requirement of Small Business Specialists' concurrence on the signed letter of endorsement; requirements associated with credit received towards subcontracting goals; the change of the MPP reporting requirement from semi-annually to annually; identified the NASA Mentor Protégé Program Office; and clerical, semantic improvements. NASA also proposes to amend the NFS language to reflect the annual negotiation of its small business percentage goals. Lastly, the NFS will be amended to emphasize collaboration amongst representatives from the Office of Small Business Programs, Office of Procurement, and Program Offices to reduce barriers to entry and to opportunities for all small business concerns and Historically Black Colleges and Universities or Minority Institutions.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before April 17, 2023, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by NFS Case 2022–N018, Mentor Protégé Program using any of the following methods:

○ *Regulations.gov: https://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by entering ''NFS Case 2022–N018'' under the heading ''Enter keyword or ID'' and selecting ''Search.'' Select the link ''Submit a Comment'' that corresponds with ''NFS Case 2022–N018'' Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''NFS Case 2022–N018'' on your attached document.

○ *Email: R.todd.lacks@nasa.gov.* Include NFS Case 2022–N018 in the subject line of the message.

○ *Mail:* National Aeronautics and Space Administration, Headquarters, Office of Procurement Management and Policy Division, Attn: Todd Lacks, LP–011, 300 E Street SW, Washington, DC 20546–0001.

FOR FURTHER INFORMATION CONTACT: R. Todd Lacks, NASA HQ, Office of Procurement Management and Policy Division, LP–011, 300 E Street SW, Washington, DC 20456–0001. Telephone 202–358–0799 and; facsimile 202–358–3082.

SUPPLEMENTARY INFORMATION:

I. Background

NASA is proposing to revise the NFS to add new text that: requires concurrence of the Small Business Specialist on the signed letter of endorsement for the MPP; adds requirements associated with credit received towards subcontracting goals; changes the reporting requirement from semi-annually to annually; and makes clerical and other semantic improvements.

II. Discussion

NFS parts 1819, Small Business Programs, and 1852, Solicitation Provisions and Contract Clauses, are

implement updates to NASA's MPP at the request of the program's administering office, NASA's Office of Small Business Programs (OSBP).

III. Applicability to Commercial Item Acquisitions, Including Commercially Available Off-the-Shelf (COTS) Items, and Acquisitions Below the Simplified Acquisition Threshold (SAT)

The objective of this proposed rule is to implement updates to NASA's MPP. Subpart 1819.72 does not limit the application of the program requirements to non-commercial contracts or contracts above the simplified acquisition threshold. Consistent with 41 U.S.C. 1905, 1906 and 1907, the NASA Assistant Administrator for Procurement has determined that it is in the best interest of NASA to apply this policy change to the acquisition of commercial items, including COTS items, and those requirements below the SAT.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action as defined in E.O. 12866 and therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

V. Regulatory Flexibility Act

NASA does not expect this proposed rule to have a significant economic impact on small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* An initial regulatory flexibility analysis has been prepared and is summarized below.

The proposed rule will apply to all current and future participants of the MPP. While the proposed rule will apply to all classes of small business, it will not necessarily affect all those businesses because the proposed rule only applies to those that are a part of the MPP. As reported by NASA's OSBP, NASA has entered 6, 1 and 3 mentor protégé agreements in 2018, 2019 and 2020, respectively. Therefore, this policy will have minimal impact on small businesses at large.

NASA invites comments from small business concerns and other interested parties on the expected impact of this proposed rule on small entities.

VI. Paperwork Reduction Act

This proposed rule contains information collection requirements requiring the approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. chapter 35). As part of this proposed rule, NASA is also requesting comments on the reinstatement with change of a collection, OMB 2700–008, *NASA Mentor-Protégé Program Small Business and Small Disadvantaged Business Concerns Report.*

NASA, in coordination with its Office of Small Business Programs, initiated this proposed rule and is proposing to reinstate this collection to decrease the collection requirement from semi-annual to annual. NASA conducts semi-annual Mentor Protégé performance reviews, which are more effective in tracking milestones over the life of the agreement than the submission of semi-annual reports. This change will reduce the reporting requirement on small businesses from semi-annual to annual and still capture necessary information from the semi-annual performance reviews.

Methods of Collection: NASA uses electronic methods to collect information from collection respondents.

Data

Title: NASA Mentor-Protégé Program.
OMB Number: 2700–0078.
Type of Review: Reinstatement with change.
Affected Public: Small Businesses.
Estimated Annual Number of Activities: 1.
Estimated Number of Respondents per Activity: 10.
Annual Responses: 10.
Estimated Time per Response: 1.5 hrs.
Estimated Total Annual Burden Hours: 15.
Estimated Total Annual Cost: $0.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology. Comments submitted in response to this document will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

List of Subjects in 48 CFR Parts 1819 and 1852

Government procurement.

Erica Jones,
NASA FAR Supplement Manager.

Accordingly, NASA proposes to amend 48 CFR parts 1819 and 1852 as follows:

■ 1. The authority citation for parts 1819 and 1852 continue to read as follows:

Authority: 51 U.S.C. 20113(a) and 48 CFR chapter 1.

PART 1819—SMALL BUSINESS PROGRAMS

Subpart 1819.2—Policies

■ 2. Amend section 1819.201 by revising the section heading and paragraph (a)(ii) to read as follows:

1819.201 General policy.

(a) * * *

(ii) NASA annually negotiates Agency small business prime and subcontracting goals with the Small Business Administration pursuant to section 15(g) of the Small Business Act (15 U.S.C. 644). In addition, representatives from the Office of Small Business Programs, Office of Procurement, and Program Offices will collaborate to reduce barriers to entry and to opportunities for small business concerns, identified in paragraph (a)(i) of this section, and Historically Black Colleges and Universities or Minority Institutions.

Subpart 1819.72—NASA Mentor-Protégé Program

■ 3. Amend section 1819.7201 by:
■ a. Revising paragraph (a) introductory text; and
■ b. In paragraph (b), adding the acronym ''(MPA)'' after the words ''mentor-protégé agreements''.

The revision reads as follows:

1819.7201 Scope of subpart.

(a) This subpart implements the NASA Mentor-Protégé Program (hereafter referred to as the Program) as authorized by the Small Business Administration in accordance with 13

CFR 125.10. The purpose of the program is to:

* * * * *

■ 4. Amend section 1819.7202 by revising paragraphs (a) and (b) to read as follows:

1819.7202 Eligibility.

(a) To be eligible as a mentor, an entity must be—

(1) A large business prime contractor or research institution performing with at least one approved subcontracting plan (other than a commercial plan) negotiated with NASA, pursuant to FAR subpart 19.7. A contractor may apply to become a mentor if they currently are not performing under a NASA contract, as long as they are currently performing another Federal agency contract with an approved subcontracting plan. However, the NASA MPA will not be approved until the mentor company is performing under a NASA contract with an approved subcontracting plan.

(2) Eligible for receipt of Government contracts. An entity will not be approved for participation in the program if, at the time of submission of the application to the NASA Mentor Protégé Program Office (MPPO), the entity is debarred or suspended from contracting with the Federal Government pursuant to FAR subpart 9.4.

(b) To be eligible to participate as a protégé, an entity must be eligible for award of Federal contracts in accordance with FAR subpart 9.4, *i.e.,* entities cannot be suspended or debarred at the time of application for the program and must be classified as one of more of the following entities or socio-economic categories as defined by FAR part 2:

(1) Small disadvantaged business;

(2) Women-owned small or economically disadvantaged women-owned concern;

(3) Veteran-owned or service-disabled veteran-owned small business concern;

(4) Historically underutilized business zone concern;

(5) Historically Black College and University or Minority-Serving Institution;

(6) Current NASA Small Business Innovation Research (SBIR)/Small Business Technology Transfer (STTR) Phase II Company; or

(7) An entity participating in the AbilityOne Program.

* * * * *

■ 5. Revise section 1819.7203 to read as follows:

1819.7203 Mentor-protégé advanced payments.

If advance payments are contemplated, the mentor must first have the advance payments approved by the contracting officer in accordance with FAR subpart 32.4.

■ 6. Amend section 1819.7204 by:

■ a. Revising paragraph (a) introductory text and (a)(1) and (3);

■ b. Removing paragraph (a)(4);

■ c. Redesignating paragraph (a)(5) as paragraph (a)(4);

■ d. Removing paragraph (c);

■ e. Redesignating paragraph (b) as paragraph (c); and

■ e. Adding a new paragraph (b).

The revisions and addition read as follows:

1819.7204 Agreement submission and approval process.

(a) To participate in the Program, entities approved as mentors, will submit a complete agreement package to the contracting officer, contracting officer's representative (COR), and the cognizant Small Business Specialist (SBS) at the NASA Center. The submission package must include the following:

(1) A signed MPA;

* * * * *

(3) The estimated cost of the developmental assistance to be provided, broken out per year and per task, in a separate cost volume; and

* * * * *

(b) The NASA MPPO may require additional information as requested upon agreement submission.

* * * * *

■ 7. Amend section 1819.7205 by:

■ a. Revising the section heading and paragraph (a);

■ b. Removing paragraph (c)(4);

■ c. Redesignating paragraphs (c)(5) and (6) as paragraphs (c)(4) and (5); and

■ d. Revising paragraph (d).

The revisions read as follows:

1819.7205 Award Fee Program.

(a) Mentors may be eligible to earn a separate award fee associated with the provision of developmental assistance to NASA SBIR/STTR Phase II Protégés only. The award fee will be assessed at each award fee determination period.

* * * * *

(d) The Award Fee Program is an addition to the credit agreement, reference 1819.7206. Participants that are eligible for award fee may also receive credit under their individual contract's award fee plan.

■ 8. Add section 1819.7206 to read as follows:

1819.7206 Credit agreement.

In a MPA (as referenced in section 6 ''Agreements'' of the MPP Guidebook), a mentor receives credit toward its subcontracting goals. The credit agreement only applies to mentors with an Individual Subcontract Plan.

(a) Costs incurred under a credit agreement are applied on a one-to-one basis toward applicable subcontracting goals, under a Federal agency subcontracting plan (FAR subpart 19.7).

(b) The credit is reported on the mentor's individual subcontracting report (ISR) in the comments section twice a year and in the Summary Subcontract Report (SSR) once a year. The MPPO will verify the dollars contained in the annual reports.

■ 9. Amend section 1819.7212 by revising paragraphs (a), (b), (c) introductory text, and (d) through (g) to read as follows:

1819.7212 Reporting requirements.

(a) Mentors must report on the progress made under active MPA annually throughout the term of the agreement.

(b) Reports are due 30 days after the end of each 12-month period of performance commencing with the start of the agreement.

(c) Each annual report must include the following data on performance under the MPA:

* * * * *

(d) Annually the protégé must provide an independently developed progress report using the annual report template, on the progress made during the prior twelve months by the protégé in employment, revenues, and participation in NASA contracts during each year of the Program participation term. The protégé must also provide an additional post-agreement report for each of the two years following the expiration of the Program participation term.

(e) The protégé annual report required by paragraph (d) of this section must be submitted separately from the mentor's annual report submission.

(f) Reports for all agreements must be submitted to the NASA Mentor Protégé Program Manager, the mentor's cognizant administrative Contracting Officer, and their Small Business Specialist.

(g) Templates for the annual report and the Post-Agreement report and guidance for their submission are available at: *https://www.nasa.gov/osbp/mentor-protege-program.*

■ 10. Add section 1819.7213 to read as follows:

1819.7213 Reporting allowances.

The mentor may include its developmental expenditures from the annual report, reference 1819.7212, in its reported dollars in its Summary Subcontracting Report (SSR) in the Electronic Subcontracting Reporting System (eSRS).

(a) If the protégé is also the mentor's immediate next-tier subcontractor under a NASA contract that contains a subcontracting plan, the mentor may also include its developmental expenditures in its Individual Subcontracting Report (ISR) for that contract. Expenditures may be applied to each socio-economic subcategory on the SSR and ISR for which the protégé qualifies.

(b) Developmental expenditures included in SSR's and ISR's must also be separately reported and explained (including the actual dollar amount) in the ''Remarks'' section of each report.

(c) Expenditures for AbilityOne protégés cannot be included in SSR's or ISR's since there is no such reporting category for SSR's or ISR's.

■ 11. Amend section 1819.7215 by revising paragraph (a) to read as follows:

1819.7215 Solicitation provision and contract clauses.

(a) The contracting officer shall insert the clause at 1852.219–77, NASA Mentor-Protégé Program, in any contract that includes the clause at FAR 52.219–9, Small Business Subcontracting Plan.

* * * * *

PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 12. Amend section 1852.219–77 by revising the date of the clause and paragraphs (b) through (d) to read as follows:

1852.219–77 NASA Mentor-Protégé Program.

* * * * *

NASA Mentor–Protégé Program (Abbreviated Month and Year of Publication in The **Federal Register**)

* * * * *

(b) The Program consists of—

(1) Mentors, which are large business prime or research institution with at least one approved NASA subcontracting plan;

(2) Protégés, which qualify as one or more of the following:

(i) Small Business Concern, as defined in FAR part 2, Definitions of Parts and Terms, including: Women-Owned or Economically-Owned Concern; Veteran-Owned or Service-Disabled Veteran-Owned Small Business Concern; Historically Underutilized Business Zone Concern;

(ii) Historically Black College and University or Minority-Serving Institution;

(iii) Current NASA SBIR/STTR Phase II Company; or

(iv) An Entity Participating in the AbilityOne Program;

(3) MPA endorsed by the cognizant NASA centers and approved by the NASA MPPO; and

(4) In contracts with award fee incentives, potential for payment of an award fee for voluntary participation and successful performance in the Mentor-Protégé Program, in accordance with NFS 1819.7205.

(c) Mentor participation in the program, described in NFS 1819.72, means providing technical, managerial and financial assistance to aid protégés in developing requisite high-tech expertise and business systems to compete for and successfully perform NASA, as well as other Federal and commercial contracts and subcontracts.

(d) Eligible businesses and research institutions interested in participating in the program are encouraged to contact the NASA MPPO.

* * * * *

■ 13. Amend section 1852.219–79 by:

■ a. Revising the date of the clause and paragraph (a);

■ b. Removing the undesignated text following paragraph (a);

■ c. Redesignating paragraphs (b) through (f) as paragraphs (c) through (g);

■ d. Adding a new paragraph (b);

■ e. Revising newly redesignated paragraphs (c) introductory text and (c)(3) and (4);

■ f. Removing newly redesignated paragraph (c)(5); and

■ g. Revising newly redesignated paragraphs (d) through (g).

The revisions and addition read as follows:

1852.219–79 Mentor requirements and evaluation.

* * * * *

Mentor Requirements and Evaluation (Abbreviated Month and Year of Publication in the Federal Register)

(a) The purpose of the NASA Mentor-Protégé Program is for a NASA prime contractor to provide developmental assistance to:

(1) Provide incentives to NASA contractors, performing under at least one active approved subcontracting plan negotiated with NASA to assist protégés in enhancing their capabilities to perform as viable NASA, other Government, and commercial suppliers on contract and subcontract requirements;

(2) Increase the overall participation of protégés as subcontractors and suppliers under NASA contracts, other Federal agency contracts, and commercial contracts; and

(3) Foster the establishment of long-term business relationships between protégés and mentors.

(b) The Mentor shall comply with the annual reporting requirements detailed in NASA FAR Supplement 1819.7212.

(c) NASA will evaluate the Mentor's performance on the following factors in the subcontracting element of the annual Contractor Performance Assessment Report (CPAR). If this contract includes an award fee incentive, this evaluation will also be included as part of the subcontracting element in the award fee evaluation process.

* * * * *

(3) The extent to which the mentor and protégé have met the developmental milestones outlined in the agreement; and

(4) The extent to which the mentor has contributed to advancing the protégé's technical readiness level. This factor only applies if the protégé is a current NASA SBIR/STTR Phase II contractor.

(d) Annual reports shall be submitted by the Mentor and the Protégé to the MPPO, following the annual report template found on the website at *www.nasa.gov/osbp.*

(1) Except for as noted in paragraph (d)(4) of this section, the Mentor may include its developmental expenditures from the annual report, reference 1819.7212, Reporting Requirements, in its reported dollars in its Summary Subcontracting Report (SSR) in eSRS.

(2) If the protégé is also the mentor's immediate next-tier subcontractor under a NASA contract that contains a subcontracting plan, the Mentor may also include its developmental expenditures in its Individual Subcontracting Report (ISR) for that contract. Expenditures may be applied to each socio-economic subcategory on the SSR and ISR for which the protégé qualifies.

(3) Developmental expenditures included in SSR's and ISR's must also be separately reported and explained (including the actual dollar amount) in the ''Remarks'' section of each report.

(4) Expenditures for AbilityOne protégés cannot be included in SSR's or ISR's, since there is no such reporting category for SSR's or ISR's.

(e) The mentor will notify the cognizant NASA center and NASA OSBP in writing, at least 30 days in advance of the Mentor's intent to

voluntarily withdraw from the program or upon receipt of a protégé's notice to withdraw from the Program.

(f) Every six months, the Mentor and Protégé, as appropriate, will formally brief the MPPO, and the contracting officer during a formal program review regarding program accomplishments, as it pertains to the approved agreement.

(g) NASA may terminate MPA for good cause, thereby excluding mentors or protégés from participating in the program. These actions shall be approved by the MPPO. NASA shall terminate an agreement by delivering to the contractor a letter specifying the reason for termination and the effective date. Termination of an agreement does not constitute a termination of the subcontract between the mentor and the protégé. A plan for accomplishing the subcontract effort should the agreement be terminated shall be submitted with the agreement.

* * * * *

[FR Doc. 2023–02468 Filed 2–13–23; 8:45 am]

BILLING CODE 7510–13–P

Notices

Federal Register
Vol. 88, No. 30
Tuesday, February 14, 2023

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Doc. No. AMS–NOP–22–0071]

Meeting of the National Organic Standards Board

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, as amended, the Agricultural Marketing Service (AMS), U.S. Department of Agriculture (USDA), is announcing a meeting of the National Organic Standards Board (NOSB). The NOSB assists the USDA in the development of standards for substances to be used in organic production and advises the Secretary of Agriculture on any other aspects of the implementation of the Organic Foods Production Act (OFPA).

DATES: An in-person meeting will be held April 25–27, 2023, from 8:30 a.m. to approximately 6:00 p.m. Eastern Time (ET) each day and will include a virtual broadcast.

Oral Comments: The NOSB will hear oral public comments via webinars on Tuesday, April 18, 2023, and Thursday, April 20, 2023, from 12:00 p.m. to approximately 5:00 p.m. ET.

Written Comments: The deadline to submit written comments and/or sign up for oral comment is 11:59 p.m. ET, April 5, 2023.

ADDRESSES: The webinars are virtual and will be accessed via the internet and/or phone. Access information will be available on the AMS website prior to the webinars. The in-person meeting will take place at Crowne Plaza Atlanta Midtown, 590 West Peachtree Street NW, Atlanta, Georgia, United States and will be broadcast virtually. Detailed information pertaining to the webinars and in-person meeting, including virtual viewing options, can be found at *https://www.ams.usda.gov/event/national-organic-standards-board-nosb-meeting-atlanta-ga.*

FOR FURTHER INFORMATION CONTACT: Ms. Michelle Arsenault, Advisory Committee Specialist, National Organic Standards Board, USDA–AMS–NOP, 1400 Independence Avenue SW, Room 2642–S, STOP 0268, Washington, DC 20250–0268; Phone: (202) 997–0115; Email: *nosb@usda.gov.*

SUPPLEMENTARY INFORMATION: In accordance with the Federal Advisory Committee Act, 5 U.S.C. 10 and 7 U.S.C. 6518(e), as amended, AMS is announcing a meeting of the NOSB. The NOSB makes recommendations to USDA about whether substances should be allowed or prohibited in organic production and/or handling, assists in the development of standards for organic production, and advises the Secretary on other aspects of the implementation of the Organic Foods Production Act, 7 U.S.C. 6501 *et seq.* NOSB is holding a public meeting to discuss and vote on proposed recommendations to USDA, to obtain updates from the USDA National Organic Program (NOP) on issues pertaining to organic agriculture, and to receive comments from the organic community. The meeting is open to the public. Registration is only required to sign up for oral comments. All meeting documents and instructions for participating will be available on the AMS website at *https://www.ams.usda.gov/event/national-organic-standards-board-nosb-meeting-atlanta-ga.* Please check the website periodically for updates. Meeting topics will encompass a wide range of issues, including substances petitioned for addition to, or removal from, the National List of Allowed and Prohibited Substances (National List), substances on the National List that are under sunset review, and guidance on organic policies.

Public Comments: Comments should address specific topics noted on the meeting agenda.

Written comments: Written public comments will be accepted on or before 11:59 p.m. ET on April 5, 2023, via *https://www.regulations.gov* (Doc. No. AMS–NOP–22–0071). Comments submitted after this date will be added to the public comment docket, but Board members may not have adequate time to consider those comments prior to making recommendations. NOP strongly prefers comments to be submitted electronically. However, written comments may also be submitted (*i.e.,* postmarked) via mail to the person listed under **FOR FURTHER INFORMATION CONTACT** by or before the deadline.

Oral Comments: NOSB will hear oral public comments via webinars on Tuesday, April 18, 2023, and Thursday, April 20, 2023, from 12:00 p.m. to approximately 5:00 p.m. ET. Each commenter wishing to address the Board must pre-register by 11:59 p.m. ET on April 5, 2023, and can register for only one speaking slot. Instructions for registering and participating in the webinars can be found at *https://www.ams.usda.gov/event/national-organic-standards-board-nosb-meeting-atlanta-ga.*

Meeting Accommodations: The meeting hotel is compliant with the Americans with Disabilities Act, and the USDA provides reasonable accommodation to individuals with disabilities where appropriate. If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpretation, assistive listening devices, or other reasonable accommodation to the person listed under **FOR FURTHER INFORMATION CONTACT**. Determinations for reasonable accommodation will be made on a case-by-case basis.

Dated: February 8, 2023.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2023–03084 Filed 2–13–23; 8:45 am]

BILLING CODE 3410–02–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Connecticut Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Connecticut Advisory Committee (Committee) to the U.S. Commission on

Civil Rights will convene a business meeting on Thursday, March 16, 2023, 12:00 p.m. Eastern Time. The purpose of the meeting is to continue to review, edit, and vote on a draft report on the civil rights implications of algorithms.

DATES: March 16, 2023, Thursday; 12:00 p.m. (ET).

ADDRESSES: Meeting will be held via Zoom.

Meeting Link (Audio/Visual): https://tinyurl.com/2p9b2mde; password: USCCR–CT

Join by Phone (Audio Only): 1–551–285–1373; Meeting ID: 161 850 4257#

FOR FURTHER INFORMATION CONTACT: Evelyn Bohor, at *ebohor@usccr.gov* or 202–381–8915.

SUPPLEMENTARY INFORMATION: Members of the public can listen to these discussions. Committee meetings are available to the public through the above call-in number. Any interested member of the public may call this number and listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. 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 Service with the conference call number and conference ID number.

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 Evelyn Bohor at *ebohor@usccr.gov.* Persons who desire additional information may contact the Regional Programs Unit at (312) 353–8311.

Records generated from the meetings may be inspected and reproduced at the Regional Programs Unit Office, as they become available, both before and after the meeting. Records of the meeting will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Connecticut 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 Regional Programs Unit at the above email or street address.

Agenda

I. Roll Call
II. Review, Edit, Vote—Draft Report on Civil Rights Implications of Algorithms
III. Discuss Next Steps
IV. Public Comment
V. Adjournment

Dated: February 9, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–03112 Filed 2–13–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Economic Development Administration

Request for Information on Implementation of the Regional Technology and Innovation Hub Program

AGENCY: Economic Development Administration, U.S. Department of Commerce.

ACTION: Request for information.

SUMMARY: The Department of Commerce, through the Economic Development Administration (EDA), is seeking information to inform the planning and design of the Regional Technology and Innovation Hub (Tech Hubs) program. Responses to this Request for Information (RFI) will inform planning for the implementation of the Tech Hubs program.

DATES: Comments must be received by 5 p.m. Eastern Time on March 16, 2023. Submissions received after that date may not be considered. Written comments in response to this RFI should be submitted in accordance with the instructions in the Addresses and Supplementary Information sections below.

ADDRESSES: Interested persons are invited to submit written comments by email to *techhubs@eda.gov.* Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Eric Smith, Director, Office of Innovation and Entrepreneurship, via email at *techhubs@eda.gov* or via telephone at (202) 482–5081. Please reference ''Tech Hubs RFI'' in the subject line of your correspondence. You may find additional information on EDA at *www.eda.gov.*

SUPPLEMENTARY INFORMATION:

Background

Section 10621 of the Research and Development, Competition, and Innovation Act authorizes the Department of Commerce to designate geographically distributed regional technology and innovation hubs and to award strategy development grants and strategy implementation grants to eligible consortia (15 U.S.C. 3722a; Pub. L. 117–167, Division B, Title VI, Subtitle C, Sec. 10621(a)(2), 136 Stat. 1642). Tech Hubs will focus on technology development, job creation, entrepreneurial development, and expanding U.S. innovation capacity. Of the $10 billion authorized for the Tech Hubs program from Federal fiscal year 2023 through Federal fiscal year 2027, $500 million has been made available for the Tech Hubs program as of the publication of this RFI.

Section 10621 of the Research and Development, Competition, and Innovation Act provides that the Tech Hubs program shall:

(A) Encourage constructive collaborations among a wide range of new and traditional economic development stakeholders, including public and private sector entities;

(B) Support the development and implementation of regional innovation strategies;

(C) Designate regional technology and innovation hubs and facilitate the following implementation activities:

(i) Enable United States leadership in technology and innovation sectors critical to national and economic security.

(ii) Support regional economic development and resilience, including in small cities and rural areas, and promote increased geographic diversity of innovation across the United States;

(iii) Promote the benefits of technology development and innovation for all Americans, including underserved communities and vulnerable communities;

(iv) Support the modernization and expansion of United States manufacturing based on advances in technology and innovation;

(v) Support domestic job creation and broad-based economic growth; and

(vi) Improve the pace of market readiness, industry maturation, and overall commercialization and domestic production of innovative research;

(D) Ensure that the regional technology and innovation hubs address the intersection of emerging technologies and either regional challenges or national challenges; and

(E) Conduct ongoing research, evaluation, analysis, and dissemination of best practices for regional development and competitiveness in technology and innovation.

The Tech Hubs program is an economic development initiative to drive technology- and innovation-centric growth that leverages existing R&D strengths and technology demonstration and deployment capacities (public and private) within a region to catalyze the creation of good jobs for American workers at all skill levels equitably and inclusively.

EDA intends to run a rigorous, fair, and evidence-driven competition informed by the vision and experiences of all stakeholders, technology practitioners, and relevant policy research to guide program design, structure, and evaluation, and to aim for the strongest geographic and demographic diversity among hubs. This RFI seeks to encourage the field of regional innovation and economic development to provide evidence-based input that will be used to inform the design and implementation of the Tech Hubs program to maximize American competitiveness. The following sections provide specific requests for information, group into a number of categories.

Specific Request for Information: Tech Hubs Characteristics

1. What are the indicia of a successful future Tech Hub?

a. What are the defining features of a region that indicate that a Tech Hub will take hold, and how will EDA know if Tech Hubs succeed?

b. What existing assets and resources that generate, support, and enable technology innovation, demonstration, and deployment should Tech Hubs have? How does a Tech Hub leverage those assets and resources collaboratively?

c. When designating Tech Hubs, what additional geographic, demographic, or other place-specific factors or data should EDA consider?

d. Are there specific metrics that EDA should consider for designating Tech Hubs?

e. What are the technological considerations that EDA should consider?

2. How might EDA determine how the size and timing of investments will best accelerate a future Tech Hub's evolution into a global leader in an industry of the future that strengthens its region and our economic and national security? What data and information are important to that determination?

3. What are historical and existing examples of successful regional hub programs and what can be learned from these examples?

4. How might EDA determine the relative competitiveness of proposed Tech Hubs in the context of current and future global competition, in addition to domestic competition?

Specific Request for Information: Tech Hubs Program Design

Models for Program Design

5. Please share specific examples of evidence-based or evidence-informed investments, interventions, or policies, including those implemented in other countries, that would support technology-based economic development, particularly at the scale required to enable U.S. leadership in technology and innovation sectors critical to economic and national security.

a. What limitations currently prevent EDA from investing, intervening, or making policies in these ways? For example, are there statutory, regulatory, policy, design, or implementation issues with current EDA programs or operations that inhibit or prohibit EDA in some way? Are there other Federal organizations that have overcome these issues?

6. Are there specific workforce and labor development, business and entrepreneurial development, technology development and maturation, or infrastructure activities that EDA should emphasize through the program?

7. How should EDA consider worker and community input in Tech Hub design?

8. What are some of the most innovative approaches to commercialization at research institutions (*e.g.,* universities, national labs) and what evidence exists on the effectiveness of these approaches?

9. What are some of the most innovative approaches to ensuring the growth of globally competitive industries occurs in an inclusive and equitable manner? Where possible, please provide examples of evidence-based and/or evidence-informed investments, interventions, or policies that drive inclusive and equitable outcomes.

Funding and Support

10. Please share best-in-class ideas for inclusive and accessible competition processes for the Tech Hubs program, including examples of best-in-class regional competitions in the United States or internationally.

11. How should EDA evaluate the extent to which certain technology and innovation sectors are critical to national and economic security? How should EDA take into account whether a consortium would help promote increased geographic diversity of innovation?

12. How can Federal designations and Federal grants be structured to maximize the desired impacts of the Tech Hubs program?

13. What other existing Federal programs can complement Tech Hubs?

14. In addition to existing Federal programs, what types of benefits or support could be helpful for ''designated'' regional Tech Hubs?

15. What should EDA consider in designing the program for its current appropriation of $500 million given the $10 billion vision in the program's statutory authorization? How should those considerations affect EDA's design of the program now and potentially into future years?

16. How should EDA evaluate the effectiveness and return on public-private partnerships or other collaborative arrangements that may emerge from the Tech Hubs?

17. What criteria should EDA use to shift investments within or between Tech Hubs to maximize the impact of the program?

18. What else should EDA consider when building this program, including but not limited to alignment with other Federal programs?

Specific Request for Information: Tech Hubs Program Administration

19. How should EDA measure whether the Tech Hubs program has been successful in achieving these outcomes, and how might EDA capture those data?

a. What are the indicia of successful investments under the Tech Hubs program? What, if any, earlier-in-time proxies are predictive of those indicia?

b. What is a realistic time horizon over which to evaluate the economic development, national security, and global competitiveness impacts of Tech Hubs? Which measures are meaningful over which time horizons (*e.g.,* five, ten, fifteen years)?

20. What desirable organizational and institutional changes within and among tech hubs' participants, beneficiaries, and other stakeholders could the Tech Hubs program competition incentivize? How could those changes be incentivized, and how could those changes be measured?

21. How can EDA ensure input from, and engagement with, community members in the administration of the Tech Hubs program, particularly for underserved community members?

22. What are unique challenges faced by Established Program to Stimulate

Competitive Research (EPSCoR) [1] state-based consortia or rural consortia that EDA should be aware of and account for in program administration?

Dated: February 8, 2023.

Eric Smith,

Director, Office of Innovation and Entrepreneurship.

[FR Doc. 2023–03022 Filed 2–13–23; 8:45 am]

BILLING CODE 3510–24–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

In the Matter of: Arash Yousefi Jam, 24 Great Heron Court, King City, Ontario, Canada; Order Denying Export Privileges

On October 14, 2021, in the U.S. District Court for the Eastern District of Michigan, Arash Yousefi Jam (''Arash Jam'') was convicted of violating 18 U.S.C. 371. Specifically, Arash Jam was convicted of conspiring to export goods from the United States to Iran through the United Arab Emirates without having first obtained the required licenses from the Office of Foreign Assests Control. As a result of his conviction, the Court sentenced Arash Jam time served, one year of supervised release and a $100 assessment.

Pursuant to Section 1760(e) of the Export Control Reform Act (''ECRA''),[1] the export privileges of any person who has been convicted of certain offenses, including, but not limited to, 18 U.S.C. 371, may be denied for a period of up to ten (10) years from the date of his/her conviction. 50 U.S.C. 4819(e). In addition, any Bureau of Industry and Security (''BIS'') licenses or other authorizations issued under ECRA, in which the person had an interest at the time of the conviction, may be revoked. *Id.*

BIS received notice of Arash Jam's conviction for violating 18 U.S.C. 371. As provided in Section 766.25 of the Export Administration Regulations (''EAR'' or the ''Regulations''), BIS provided notice and opportunity for Arash Jam to make a written submission to BIS. 15 CFR 766.25.[2] BIS has not received a written submission from Arash Jam.

Based upon my review of the record and consultations with BIS's Office of Exporter Services, including its Director, and the facts available to BIS, I have decided to deny Arash Jam's export privileges under the Regulations for a period of seven years from the date of Arash Jam's conviction. The Office of Exporter Services has also decided to revoke any BIS-issued licenses in which Arash Jam had an interest at the time of his conviction.[3]

Accordingly, it is hereby *ordered:*

First, from the date of this Order until October 14, 2028, Arash Yousefi Jam, with a last known address of 24 Great Heron Court, King City, Ontario, Canada, and when acting for or on his behalf, his successors, assigns, employees, agents or representatives (''the Denied Person''), may not directly or indirectly participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or engaging in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or from any other activity subject to the Regulations.

Second, no person may, directly or indirectly, do any of the following:

A. Export, reexport, or transfer (in-country) to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, pursuant to Section 1760(e) of ECRA and Sections 766.23 and 766.25 of the Regulations, any other person, firm, corporation, or business organization related to Arash Jam by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order in order to prevent evasion of this Order.

Fourth, in accordance with part 756 of the Regulations, Arash Jam may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of part 756 of the Regulations.

Fifth, a copy of this Order shall be delivered to Arash Jam and shall be published in the **Federal Register**.

Sixth, this Order is effective immediately and shall remain in effect until October 14, 2028.

John Sonderman,

Director, Office of Export Enforcement.

[FR Doc. 2023–03103 Filed 2–13–23; 8:45 am]

BILLING CODE 3510–DT–P

[1] EPSCoR states are determined annually by the National Science Foundation (NSF) based on the proportion of NSF funding each state receives within certain periods of time. *See* 42 U.S.C. 13503(b)(3) (2021); Nat'l Sci. Found., EPSCoR Criteria for Eligibility, *https://beta.nsf.gov/funding/initiatives/epscor/epscor-criteria-eligibility* (last visited Jan. 26, 2023).

[1] ECRA was enacted on August 13, 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, and as amended is codified at 50 U.S.C. 4801–4852.

[2] The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2022).

[3] The Director, Office of Export Enforcement, is the authorizing official for issuance of denial orders pursuant to amendments to the Regulations (85 *FR* 73411, November 18, 2020).

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

RIN 0694–XC081

Publication of a Report on the Effect of Imports of Neodymium-Iron-Boron (NdFeB) Permanent Magnets on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Publication of a report.

SUMMARY: The Bureau of Industry and Security (BIS) in this notice is publishing a report that summarizes the findings of an investigation conducted by the U.S. Department of Commerce (the ''Department'') pursuant to section 232 of the Trade Expansion Act of 1962, as amended (''section 232''), into the effect of imports of neodymium-iron-boron (NdFeB) permanent magnets on the national security of the United States. This report was completed in June 2022 and posted on the BIS website in September 2022. BIS has not published the appendices to the report in this notification of report findings, but they are available online at the BIS website, along with the rest of the report (*see* the **ADDRESSES** section).

DATES: The report was completed in June 2022. The report was posted on the BIS website in September 2022.

ADDRESSES: The full report, including the appendices to the report, are available online at *https://bis.doc.gov/232.*

FOR FURTHER INFORMATION CONTACT: For further information about this report contact Erika Maynard, Special Projects Manager, (202) 482–5572; and Leah Vidovich, Management and Program Analyst, (202) 482–1819. For more information about the Office of Technology Evaluation and the section 232 Investigations, please visit: *http://www.bis.doc.gov/232.*

SUPPLEMENTARY INFORMATION:

The Effect of Imports of Neodymium-Iron-Boron (NdFeb) Permanent Magnets on the National Security

An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended

U.S. Department of Commerce Bureau of Industry and Security Office of Technology Evaluation

Table of Contents

1. Executive Summary

This report summarizes the findings of an investigation conducted by the U.S. Department of Commerce (the ''Department'') pursuant to section 232 of the Trade Expansion Act of 1962, as amended, into the effect of imports of neodymium-iron-boron (NdFeB) permanent magnets on the national security of the United States.[1] Secretary of Commerce Gina Raimondo initiated the investigation on September 21, 2021, in response to a recommendation in the June 2021 White House Report ''*Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth: 100 Day Reviews under Executive Order 14017.*''[2] [3]

As required by the statute, the Secretary considered all factors set forth in section 232(d). In particular, the Secretary examined the effect of imports on national security requirements, specifically:

[1] NdFeB magnets are also called NdFeB permanent magnets, neodymium-iron-boron (permanent) magnets, or neodymium (permanent) magnets. This report uses the term NdFeB magnets.

[2] Section 4 of this Report, ''Product Scope of the Investigation,'' discusses the products under investigation. Section 4 also details ancillary products the Department examined to provide traction on the investigation.

[3] *See* ''Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth: 100 Day Reviews Under Executive Order 14017,'' The White House, June 2021, *https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chain-review-report.pdf.*

i. domestic production needed for projected national defense requirements;

ii. the capacity of domestic industries to meet such requirements, including the commercial demand needed for economic viability;

iii. existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense;

iv. the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth; and

v. the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries; and the capacity of the United States to meet national security requirements.

In preparing this report, the Secretary also recognized the close relationship between the economic welfare of the United States and its national security. Factors that can compromise the nation's economic welfare include, but are not limited to, the impact of ''foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills, or any other serious effects resulting from the displacement of any domestic products by excessive imports.'' *See* 19 U.S.C. 1862(d). In particular, this report assesses whether NdFeB magnets are being imported ''in such quantities'' and ''under such circumstances'' as to ''threaten to impair the national security.'' [4]

The investigation was initiated to evaluate the effects of imports of NdFeB magnets on the national security. There are two types of NdFeB magnets—sintered and bonded. However, the investigation and this report largely focus on sintered NdFeB magnets because: (1) Sintered NdFeB magnets comprise over 93 percent of the global NdFeB magnet market and are forecast to grow to over 97 percent of the global market by 2030; (2) Sintered NdFeB magnets have a greater maximum energy product than bonded NdFeB magnets, making them essential in high-temperature applications required by the defense and critical infrastructure sectors; and (3) Sintered NdFeB magnets are less easily substituted for than their bonded counterparts.[5] [6]

NdFeB magnets are the strongest permanent magnets commercially available and improve the efficiency of electrical machines. NdFeB magnets are used in hundreds of products ranging from the ubiquitous, such as headphones and air conditioners, to the highly specialized, like industrial robots. Of particular importance for evaluating the effects of imports of NdFeB magnets on the national security are NdFeB magnets' use in defense systems, including ship propulsion systems and guided missile actuators, as well as numerous critical infrastructure applications such as electric vehicle motors and offshore wind turbine generators.[7] Although NdFeB magnets' value tends to be small relative to the cost of the end-product, they are nonetheless key to product performance.

NdFeB magnets are composed of about 69 percent iron, 30 percent rare earths, and one percent boron by weight.[8] NdFeB magnets contain a mix of rare earth elements, primarily neodymium, praseodymium, dysprosium, and terbium, depending on the end use.[9] NdFeB magnets' iron-boron component is made up of American Iron and Steel Institute 1001 steel and ferroboron.[10] [11] Small amounts of material, such as nickel and copper, dry-sprayed epoxy, or e-coat (epoxy), are also used to coat NdFeB magnets to prevent corrosion.[12] The rare earth element component constitutes the largest portion of NdFeB magnet cost.

There are five main value chain steps prior to the production of NdFeB magnets: mixed rare earth element mining, processing of rare earth elements into rare earth carbonates, separation of rare earth carbonates into individual rare earth oxides, reduction of rare earth oxides into metals, and alloying of rare earth metals.[13] [14] Magnet manufacturers then process rare earth alloys into either sintered or bonded NdFeB magnets. Sintered magnets are produced by compacting powdered alloy into a solid mass by vacuum pressure without melting it to the point of liquefaction. Bonded magnets are made of rapidly quenched NdFeB magnetic powder mixed into binder and shaped through compression, injection molding, or calendaring.

Except for rare earths mining, the United States is not presently a major participant in the NdFeB magnet value chain. The United States has extremely limited capacity to manufacture NdFeB magnets and is nearly one hundred percent dependent on imports to meet commercial and defense requirements. In 2021, the United States imported 75 percent of its sintered NdFeB magnet supply from China, with nine percent, five percent, and four percent coming from Japan, the Philippines, and Germany, respectively.[15] [16] [17] There is

[4] 19 U.S.C. 1862(b)(3)(A).

[5] Energy product refers to the magnetic energy stored in material, dependent on coercivity and magnetization. ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf.*

[6] References to NdFeB magnets indicate sintered NdFeB magnets, except where otherwise specified.

[7] The Presidential Policy Directive on Critical Infrastructure Security and Resilience (PPD–21) advances a national policy to strengthen and maintain secure, functioning, and resilient critical infrastructure. The Cybersecurity and Infrastructure Security Agency maintains a list of 16 critical infrastructure sectors ''whose assets, systems, and networks, whether physical or virtual, are considered so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof.'' Most relevant to NdFeB magnet applications are the Critical Manufacturing, Defense Industrial Base, and Energy sectors, although NdFeB magnets are used widely in other critical infrastructure sectors, including the Healthcare and Public Health and the Information Technology sectors. *See* ''Critical Infrastructure Sectors,'' Cybersecurity and Infrastructure Security Agency, October 21, 2020, *https://www.cisa.gov/critical-infrastructure-sectors.*

[8] ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.usitc.gov/publications/332/working_papers/rare_earths_and_the_electronics_sector_final_070921_2-compliant.pdf.*

[9] Toyota announced in 2018 that it had developed a NdFeB magnet that substituted cerium and lanthanum for neodymium, lowering total neodymium use by 50 percent. Although cerium substitution typically leads to reduced performance in the form of lower heat resistance and coercivity, Toyota claimed to have discovered a ratio at which deterioration is suppressed. At the time of the announcement, Toyota expected the magnets would be used in the first half of the 2020s, but more recent updates are not available. *See* ''Toyota Develops New Magnet for Electric Motors Aiming to Reduce Use of Critical Rare-Earth Element by up to 50%,'' Toyota, February 20, 2018, *https://global.toyota/en/newsroom/corporate/21139684.html.*

[10] The American Iron and Steel Institute and the Society of Automotive Engineers assign designations to types of steel. 1001 steel refers to a type of carbon steel. *See* ''Introduction to the SAE/AISI Steel Numbering System,'' The Process Piping, n.d., *https://www.theprocesspiping.com/introduction-sae-aisi-steel-numbering-system/.*

[11] ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.usitc.gov/publications/332/working_papers/rare_earths_and_the_electronics_sector_final_070921_2-compliant.pdf.*

[12] Ibid.

[13] Rare earth carbonates are also referred to as mixed intermediates, although the term mixed intermediates can cover rare earth chlorides.

[14] Some publications condense processing and separation or metallization and alloying into single value chain steps, for a total of three or four value chain steps prior to magnet production. The Department elected to divide the value chain into five steps prior to magnet production based on industry consultation.

[15] The import figures cited here corresponds to the value of magnet imports. Using data on unit

Continued

currently only one firm in the United States, Noveon (formerly Urban Mining Company), that produces sintered NdFeB magnets, albeit in small quantities.[18] [19] [20] The United States has no domestic production of rare earth oxides or metal. The United States is dependent on foreign sources, especially China, for NdFeB magnets.

China dominates all steps of the global NdFeB magnet value chain.[21] In 2020, China controlled about 92 percent of the global NdFeB magnet and magnet alloy market.[22] China also dominated the 2020 upstream value chain steps, controlling about 58 percent of the rare earth mining market, 89 percent of the oxide separation market, and 90 percent of the metallization market.[23] [24] [25] China controls an even higher percentage of the heavy rare earth mining market, including dysprosium and terbium, which are critical for high performance NdFeB magnets.[26] [27] China's dominant position in the global NdFeB magnet value chain enables it to set prices at levels that can make production unsustainable for firms operating in market economies.[28]

China is the only country with operations in all steps of the NdFeB magnet value chain, including upstream (mining, carbonates production, and separation to oxides) and downstream (metal refining, alloy production, and final magnet production) markets. All other countries maintain operations in only some steps of the upstream or downstream magnet value chain. Firms in the European Union, and especially Japan, specialize in the production of NdFeB magnets and alloys, but have no mining capacity. Japan is the second largest producer of NdFeB magnets after China, comprising about seven percent of the global market. Japanese firms also maintain magnet, alloy, and metal capacity in other countries. Firms in Germany, Finland, the Netherlands, and Slovenia produce minimal amounts of NdFeB magnets (less than one percent of global production).[29] [30] Japanese and European firms are almost completely reliant on imported feedstocks to produce metals, alloys, and ultimately NdFeB magnets.[31]

The top upstream producers of rare earth minerals in 2021 were China (60 percent), the United States (15 percent), Burma, (nine percent), and Australia (eight percent).[32] Malaysia comprises seven percent of the 2020 market for rare earth oxide separation, due entirely to the Australian firm Lynas Rare Earths.[33] Outside of China, production of metals is fragmented between Estonia, Laos, Thailand, the United Kingdom, Vietnam, and other countries, with no country having more than three percent of the market.[34]

The NdFeB magnet value chain's fragmentation means that even countries which produce NdFeB magnets remain dependent in part on Chinese inputs. Japan began diversifying its sources of rare earth elements, carbonates, and oxides away from China in the early 2010s, and the European Union has ongoing initiatives to develop a resilient non-Chinese NdFeB magnet supply chain. Despite these efforts, both economies and the United States remain reliant, to differing degrees, on Chinese inputs. China has previously appeared to leverage its market dominance to achieve foreign policy outcomes. For example, in 2010 China restricted exports of rare earth elements to Japan for two months after a collision between a Chinese fishing boat and the Japanese coast guard in disputed waters.[35] [36] Dependence on China leaves U.S. firms and U.S. allies vulnerable to similar Chinese coercion that could have a negative impact on national defense and the preservation of domestic critical infrastructure, such as transportation and energy.

Ongoing efforts by the U.S. Government and the private sector are intended to mitigate this reliance on Chinese inputs and to establish U.S. production capacity at all steps of the NdFeB magnet value chain. The Department of Defense and the Department of Energy have made limited investments in organizations with the goal of reestablishing domestic production capacity throughout the supply chain. Noveon plans to expand production over the next four years. In addition, three U.S.-headquartered firms—MP Materials, Quadrant Magnetics, and USA Rare Earth—and the German company Vacuumschmelze

imports of magnets increases China's import share to almost 85 percent.

[16] The Department's calculations using USITC data. ''USITC Dataweb,'' U.S. International Trade Commission, last modified October 25, 2021, *https://dataweb.usitc.gov/trade/search/Import/HTS*.

[17] Imports from the Philippines reflect activity by Japanese firms. *See* Appendix E, ''Global NdFeB Magnet Production: A Firm-Level Perspective,'' for more information.

[18] Noveon indicated it can produce NdFeB magnets from recycled or new or ''virgin'' material. Meeting between Noveon and the Department of Commerce, (Virtual Meeting, November 12, 2021).

[19] There are three firms, Bunting Magnetics, the Electrodyne Company, and Tengam Engineering, that produce bonded NdFeB magnets in the United States. Meeting between the Defense Logistics Agency and the Department of Commerce, (Virtual Meeting, November 23, 2021).

[20] Noveon was called Urban Mining Company until May 2022. *See* ''Urban Mining Company is now Noveon Magnetics: The Nation's Only Manufacturer of Sustainable Rare Earth Magnets Powering our Electrified Future,'' NewsDirect, May 16, 2022, *https://newsdirect.com/news/urban-mining-company-is-now-noveon-magnetics-the-nations-only-manufacturer-of-sustainable-rare-earth-magnets-powering-our-electrified-future-214013391*.

[21] *See* Section 7, ''Global NdFeB Magnet Industry,'' and especially Appendix E, ''Global NdFeB Magnet Production: A Firm-level Perspective,'' for more information on global NdFeB magnet value chains.

[22] ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.usitc.gov/publications/332/working_papers/rare_earths_and_the_electronics_sector_final_070921_2-compliant.pdf*.

[23] China produced about 60 percent of global rare earths in 2021. Daniel Cordier, ''Mineral Commodity Summaries 2022: Rare Earths,'' U.S. Geological Survey, January 31, 2022, *https://pubs.usgs.gov/periodicals/mcs2022/mcs2022.pdf*.

[24] China's share of global rare earths mining increased from 58 percent in 2020 to 60 percent in 2021. *See* Section 7.1, ''Global Demand.''

[25] ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.usitc.gov/publications/332/working_papers/rare_earths_and_the_electronics_sector_final_070921_2-compliant.pdf*.

[26] ''Hyperion Testwork Confirms High Value Heavy Rare Earths,'' Mining Stock Education, August 9, 2021, *https://www.miningstockeducation.com/2021/08/hyperion-testwork-confirms-high-value-heavy-rare-earths/*.

[27] USA Rare Earth indicated that China produces one hundred percent of the global supply of dysprosium. Meeting between USA Rare Earth and the Department of Commerce, (Virtual Meeting, December 10, 2021).

[28] For example, Molycorp, a U.S. mining firm that operated the Mountain Pass Mine in California, declared bankruptcy after China increased its export quotas and rare earth prices fell. Tom Hals, ''Creditors of bankrupt rare earths miner Molycorp reach deal,'' Reuters, February 23, 2016, *https://www.reuters.com/article/molycorp-bankruptcy-idUSL2N1621G0*.

[29] ''About Magnet e Motion,'' Magnet e Motion, n.d., *https://magnetemotion.com/about-magnet-e-motion.html*.

[30] ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf*.

[31] Neo Performance Materials produces rare earth oxides in Estonia from non-European Union feedstock. Meeting between Neo Performance Materials and the Department of Commerce, the Department of Defense, and the U.S. Geological Survey, (Virtual Meeting, November 30, 2021).

[32] Daniel Cordier, ''Rare Earths: Mineral Commodity Summaries 2022,'' U.S. Geological Survey, 2022, *https://pubs.usgs.gov/periodicals/mcs2022/mcs2022.pdf*.

[33] ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf*.

[34] Ibid.

[35] ''China resumes rare earth exports to Japan,'' BBC, November 24, 2010, *https://www.bbc.com/news/business-11826870*.

[36] More broadly, China has encouraged localized production and technology transfer in return for a steady supply of rare earths. *See* Wayne M. Morrison and Rachel Tang, ''China's Rare Earth Industry and Export Regime: Economic and Trade Implications for the United States,'' Congressional Research Service, April 30, 2012, *https://sgp.fas.org/crs/row/R42510.pdf*.

plan to establish U.S. NdFeB magnet manufacturing facilities by 2026.[37] Noveon and MP Materials have received Department of Defense funding. MP Materials and USA Rare Earth are also looking to develop U.S. capacity in pre-magnet value chain steps, including rare earths mining, rare earth carbonates processing, rare earth oxides separation, metallization, and alloying. Other non-magnet makers are considering building U.S. facilities to produce rare earth oxides and metals. These efforts, if successful, have the potential to create a complete supply chain to produce NdFeB magnets in the United States. Based on forecasted NdFeB magnet production, domestic sources could potentially satisfy up to 51 percent of total U.S. demand by 2026.[38]

If successful, these efforts to produce NdFeB magnets in the United States will be more than sufficient to satisfy U.S. defense-related demand. However, given the fact that defense demand accounts for only a small percentage of total demand, domestic firms in the NdFeB magnet value chain cannot rely solely on defense-related contracts to be viable. The nascent U.S. NdFeB magnet value chain will require substantial and consistent commercial demand and need a broad customer base to be economically sustainable. While domestic production is expected to be substantially less than total U.S. demand, direct U.S. demand for NdFeB magnets will be less than total demand because many NdFeB magnets are integrated into intermediate and final products overseas. These products—and the embedded magnets—are then imported into the United States. In addition, firms that integrate NdFeB magnets in the U.S. may be unwilling to pay a premium for domestic magnets, which are expected to cost more than their Chinese counterparts.

On a potentially positive note, global and domestic demand for NdFeB magnets is forecast to increase dramatically by 2030 and even more so by 2050. The increase in demand is largely driven by global efforts to reduce greenhouse gas emissions which boost the electric vehicle and wind turbine industries. Substantial demand growth may result in a supply crunch for NdFeB magnets but also represents a critical opportunity to establish and maintain a resilient and economically viable domestic NdFeB magnet supply chain.

1.1 Findings

In conducting the investigation, the Secretary came to the following key findings:

1. NdFeB magnets are essential to U.S. national security:

a. NdFeB magnets are required for national defense systems. NdFeB magnets are currently irreplaceable in key defense applications such as fighter aircraft and missile guidance systems.

b. NdFeB magnets are required for critical infrastructure. NdFeB magnets are used in critical infrastructure sectors including but not limited to the energy sector (*e.g.,* offshore wind turbines), the healthcare and public health sector (*e.g.,* some open MRI machines and other medical equipment), and the critical manufacturing sector (*e.g.,* electric vehicle motors).

c. NdFeB magnets are required for infrastructure that is critical for climate change mitigation, identified by the President as an essential element of U.S. national security, and the transition to a green economy.[39] In particular, NdFeB magnets are the technology of choice for electric vehicles and offshore wind turbines.

2. Total domestic demand for NdFeB magnets is expected to grow:

a. Total U.S. consumption of NdFeB magnets is forecast to more than double from 2020 to 2030, driven by increased demand from the electric vehicle and wind energy industries.

b. Total domestic demand growth provides an opportunity to develop the U.S. NdFeB magnet industry if enough end-user applications are manufactured in the United States and the price differential between U.S. and Chinese magnets is narrowed.

3. The United States and its allies are dependent on imports from China:

a. The United States is essentially one hundred percent dependent on imports of sintered NdFeB magnets and is highly dependent on imports of bonded NdFeB magnets, primarily from China. The United States also lacks domestic capacity at various earlier steps in the NdFeB magnet value chain.

b. U.S. allies are also dependent on Chinese production, which provides China political leverage.

4. The United States will continue to depend on imports:

a. There are multiple firms that intend to establish domestic capacity at different steps of the NdFeB magnet value chain. Although these plans have the potential to create a U.S. NdFeB magnet value chain from mine to magnet, they will not produce enough magnets to eliminate U.S. dependence on Chinese imports.

b. Domestic NdFeB magnet manufacturing will be constrained by capacity limitations at earlier steps in the value chain, in particular rare earth metal refining and NdFeB alloy production. Some U.S. NdFeB magnet manufacturers will have to rely on imported metal and alloy feedstocks to produce NdFeB magnets.

c. The U.S. NdFeB magnet industry will struggle to fulfill total critical infrastructure demand.

5. The U.S. NdFeB magnet industry faces significant challenges:

a. The nascent U.S. NdFeB magnet industry faces significant barriers to reaching its production targets. These include but are not limited to Chinese competition, financial and human capital constraints, and consistent demand for more expensive domestic magnets.

1.2 Determination

Based on the findings in this report, the Secretary concludes that the present quantities and circumstances of NdFeB magnet imports threaten to impair the national security as defined in section 232 of Trade Expansion Act of 1962, as amended.

1.3 Recommendations

The Department has identified several non-exhaustive actions that would facilitate the development of a domestic

[37] On MP Materials, *see* ''MP Materials to Build U.S. Magnet Factory, Enters Long-Term Supply Agreemenwt with General Motors,'' MP Materials, December 9, 2021, *https://mpmaterials.com/articles/mp-materials-to-build-us-magnet-factory-enters-long-term-supply-agreement-with-general-motors/*; On Quadrant Magnetics, *see* ''Quadrant's NeoGrass to Become New Magnet Plant in US,'' Magnetics Business and Technology, April 5, 2022, *https://magneticsmag.com/quadrants-neograss-to-become-new-magnet-plant-in-us/*; On USA Rare Earth, *see* Trish Saywell, ''USA Rare Earth outlines mine-to-magnet strategy,'' Mining.com, January 8, 2021, *https://www.mining.com/usa-rare-earth-outlines-mine-to-magnet-strategy/*; On Vacuumschmelze, *see* ''General Motors and Vacuumschmelze (VAC) Announce Plans to Build a New Magnet Factory in the U.S. to Support EV Growth,'' General Motors, December 9, 2021, *https://investor.gm.com/news-releases/news-release-details/general-motors-and-vacuumschmelze-vac-announce-plans-build-new.*

[38] This is a very optimistic figure with several strong assumptions and should be taken as the maximum potential contribution of the U.S. NdFeB magnet industry. The Department used data from its survey of the U.S. NdFeB magnet industry to forecast U.S. NdFeB magnet production through 2026. This does not consider domestic production of NdFeB magnet inputs such as alloy or metal, which may constrain the ability of U.S.-based firms to use domestic feedstock to produce NdFeB magnets. [TEXT REDACTED], the demand estimate includes NdFeB magnets that are and may continue to be incorporated into intermediate and final products overseas. The 2030 total demand estimate is a high-growth scenario. *See* Section 8.1.4, ''Estimated NdFeB Magnet Import Penetration, 2017 to 2026,'' for more details.

[39] *See* ''Executive Order on Tackling the Climate Crisis at Home and Abroad,'' The White House, January 27, 2021, *https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/.*

NdFeB magnet industry, support a reliable supply of NdFeB magnets, and lessen the risk that NdFeB magnet imports threaten the national security. The Secretary recommends pursuing all proposed actions.

1. The U.S. Government should engage with allies through existing fora to efficiently develop production from diverse sources, promote research on NdFeB magnet-related technologies, encourage intellectual property licensing, and cooperate on foreign investment review mechanisms.

2. To bolster the U.S. NdFeB magnet industry by targeting domestic supply the U.S. Government should:

a. Establish a tax credit for domestic manufacturing of rare earth elements, NdFeB magnets, and NdFeB magnet substitutes.

b. Continue to direct Defense Production Act (DPA) Title III funding to firms in the U.S. NdFeB magnet industry, in particular to establish metal refining and alloy production facilities.

c. Encourage eligible NdFeB magnet industry participants to use Export-Import Bank financing through the Make More in America Initiative and the China and Transformational Exports Program.

d. Allocate additional funding to NdFeB magnet industry participants through other applicable instruments, such as the Bipartisan Infrastructure Law.

e. Use the Defense Priorities and Allocations System to facilitate NdFeB magnet industry participants' acquisition of critical equipment and feedstock.

f. Evaluate the use of export controls for domestic producers who face difficulties acquiring feedstocks from domestic sources due to competition with foreign consumers.

g. Increase the National Defense Stockpile inventories of rare earth elements and other strategic and critical materials related to NdFeB magnets.

3. To promote the development of a domestic industry by enhancing domestic demand the U.S. Government should:

a. Establish a forum under a lead U.S. Government agency to facilitate cooperation and share information about industry-wide issues between producers and consumers of NdFeB magnets, alloys, rare earth metals, and rare earth oxides. In particular, the U.S. Government should use DPA Title VII to promote offtake agreements using voluntary agreements.

b. Promote the recycling and reprocessing of NdFeB magnets by developing labeling requirements for end-of-life products using NdFeB magnets, leveraging the Defense Logistics Agency's Strategic Material Recovery and Reuse Program, U.S. Government-owned data centers, and other U.S. Government-owned products like electric vehicles to establish a source of recyclable feedstock, and exploring reuse of other potential feedstocks such as heavy mineral sands and coal tailings.

c. Mandate minimum domestic and ally content requirements for NdFeB magnets used in U.S. Government-owned electric vehicles and offshore wind turbines that power U.S. Government-owned buildings. NdFeB magnets used in these products should be produced domestically or by allies and contain feedstock sourced domestically or from allies. To minimize disruption, content requirements can be phased-in and waived if there are insufficient eligible sources.

d. Establish a consumer rebate for products, such as electric vehicles, that use U.S. or ally produced NdFeB magnets.

4. To support the medium- to long-term development of the U.S. NdFeB magnet industry and enhance the resiliency of the U.S. NdFeB magnet supply chain, the U.S. Government should:

a. Continue to fund research to reduce the use of rare earth elements in NdFeB magnets, develop magnets that can substitute for NdFeB magnets, and develop technologies that avoid the use of magnets—including NdFeB magnets—in electric vehicle motors and wind turbine generators.

b. Support the development of the human capital required by the nascent NdFeB magnet industry, including materials scientists and production line workers, through applicable funding sources.

5. The U.S. Government should continue to monitor the NdFeB magnet value chain to ensure that U.S. and ally firms are not adversely impacted by non-market factors or unfair trade actions, such as intellectual property violations or dumping.

2. Legal Framework

2.1 Section 232 Requirements

Section 232 of the Trade Expansion Act of 1962, as amended, provides the Secretary with the authority to conduct investigations to determine the effect on the national security of the United States of imports of any article. It authorizes the Secretary to conduct an investigation if requested by the head of any department or agency, upon application of an interested party, or upon their own motion. *See* 19 U.S.C. 1862(b)(1)(A).

Section 232 directs the Secretary to submit to the President a report with recommendations for ''action or inaction under this section'' and requires the Secretary to advise the President if any article ''is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.'' *See* 19 U.S.C. 1862(b)(3)(A).

Section 232(d) directs the Secretary and the President to, in light of the requirements of national security and without excluding other relevant factors, give consideration to the domestic production needed for projected national defense requirements and the capacity of the United States to meet national security requirements. *See* 19 U.S.C. 1862(d).

Section 232(d) also directs the Secretary and the President to ''recognize the close relation of the economic welfare of the Nation to our national security, and . . . take into consideration the impact of foreign competition on the economic welfare of individual domestic industries'' by examining whether any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports, or other factors, results in a ''weakening of our internal economy'' that may impair the national security.[40] *See* 19 U.S.C. 1862(d).

Once an investigation has been initiated, section 232 mandates that the Secretary provide notice to the Secretary of Defense that such an investigation has been initiated. section 232 also requires the Secretary to do the following:

1. ''Consult with the Secretary of Defense regarding the methodological and policy questions raised in [the] investigation;''

2. ''Seek information and advice from, and consult with, appropriate officers of the United States;'' and

3. ''If it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation.''[41] *See* 19 U.S.C. 1862(b)(2)(A)(i)–(iii).

[40] An investigation under Section 232 looks at excessive imports for their threat to the national security, rather than looking at unfair trade practices as in an antidumping investigation.

[41] Department regulations (i) set forth additional authority and specific procedures for such input from interested parties, *see* 15 CFR 705.7 and 705.8, and (ii) provide that the Secretary may vary or

As detailed in the report, all of the requirements set forth above have been satisfied.

In conducting the investigation, section 232 permits the Secretary to request that the Secretary of Defense provide an assessment of the defense requirements of the article that is the subject of the investigation. *See* 19 U.S.C. 1862(b)(2)(B).

Upon completion of a section 232 investigation, the Secretary is required to submit a report to the President no later than 270 days after the date on which the investigation was initiated. *See* 19 U.S.C. 1862(b)(3)(A). The report must:

1. Set forth ''the findings of such investigation with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security;''

2. Set forth, ''based on such findings, the recommendations of the Secretary for action or inaction under this section;'' and

3. ''If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security . . . so advise the President.'' *See* 19 U.S.C. 1862(b)(3)(A).

All unclassified and non-proprietary portions of the report submitted by the Secretary to the President must be published.

Within 90 days after receiving a report in which the Secretary finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the President shall:

1. ''Determine whether the President concurs with the finding of the Secretary'' and

2. ''If the President concurs, determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.'' *See* 19 U.S.C. 1862(c)(1)(A).

2.2 Discussion

Although section 232 does not specifically define ''national security,'' both section 232, and the implementing regulations at 15 CFR part 705, contain non-exclusive lists of factors that the Secretary must consider in evaluating the effect of imports on the national security. Congress in section 232 explicitly determined that ''national security'' includes, but is not limited to, ''national defense'' requirements. *See* 19 U.S.C. 1862(d).

In a 2001 report, the Department determined that ''national defense'' includes both the defense of the United States directly, and the ''ability to project military capabilities globally.'' [42] The Department also concluded in 2001 that, ''in addition to the satisfaction of national defense requirements, the term ''national security'' can be interpreted more broadly to include the general security and welfare of certain industries, beyond those necessary to satisfy national defense requirements, which are critical to the minimum operations of the economy and government.'' The Department called these ''critical industries.'' [43] Although this report applies these reasonable interpretations of ''national defense'' and ''national security,'' it relies on the more recent 16 critical infrastructure sectors identified in Presidential Policy Directive 21 instead of the 28 industry sectors identified in the 2001 Report.[44] [45]

Section 232 directs the Secretary to determine whether imports of any article are being made ''in such quantities'' or ''under such circumstances'' that those imports ''threaten to impair the national security.'' *See* 19 U.S.C. 1862(b)(3)(A). The statutory construction makes clear that either the quantities or the circumstances, standing alone, may be sufficient to support an affirmative finding. The two may also be considered together, particularly when the circumstances act to prolong or magnify the impact of the quantities being imported.

The statute does not define a threshold for when ''such quantities'' of imports are sufficient to threaten to impair the national security, nor does it define the ''circumstances'' that might qualify.

Similarly, the statute does not require a finding that the quantities or circumstances are impairing the national security. Instead, the threshold question under section 232 is whether the quantities or circumstances ''threaten to impair the national security.'' *See* 19 U.S.C. 1862(b)(3)(A). This makes evident that Congress expects an affirmative finding under section 232 before an actual impairment of the national security.[46]

Section 232(d) contains a list of factors for the Secretary to consider in determining if imports ''threaten to impair the national security'' [47] of the United States, and this list is mirrored in the implementing regulations. *See* 19 U.S.C. 1862(d) and 15 CFR 705.4. Congress was careful to note twice in section 232(d) that the list provided, though mandatory, is not exclusive.[48] Congress' illustrative list is focused on the ability of the United States to maintain the domestic capacity to provide the articles in question as needed to maintain the national security of the United States.[49] Congress broke

dispense with those procedures ''in emergency situations, or when in the judgment of the Department, national security interests require it.'' Id., § 705.9.

[42] ''The Effects of Imports of Iron Ore and Semi-Finished Steel on the National Security,'' Department of Commerce, Bureau of Export Administration, October 2001 (''2001 Iron and Steel Report''), at 5, *https://www.bis.doc.gov/index.php/documents/steel/2224-the-effect-of-imports-of-steel-on-the-national-security-with-redactions-20180111/file*.

[43] Ibid.

[44] Presidential Policy Directive 21, ''Critical Infrastructure Security and Resilience,'' February 12, 2013 (''PPD–21'').

[45] ''The Effects of Imports of Iron Ore and Semi-Finished Steel on the National Security,'' Department of Commerce, Bureau of Export Administration, October 2001 (''2001 Iron and Steel Report''), *https://www.bis.doc.gov/index.php/documents/steel/2224-the-effect-of-imports-of-steel-on-the-national-security-with-redactions-20180111/file*.

[46] The 2001 Iron and Steel Report used the phrase ''fundamentally threaten to impair'' when discussing how imports may threaten to impair national security. *See* 2001 Iron and Steel Report at 7 and 37. Because the term ''fundamentally'' is not included in the statutory text and could be perceived as establishing a higher threshold, the Secretary expressly does not use the qualifier in this report. The statutory threshold in Section 232(b)(3)(A) is unambiguously ''threaten to impair'' and the Secretary adopts that threshold without qualification. 19 U.S.C. 1862(b)(3)(A).

[47] 19 U.S.C. 1862(b)(3)(A).

[48] *See* 19 U.S.C. 1862(d) (''the Secretary and the President shall, in light of the requirements of national security and without excluding other relevant factors . . . '' and ''serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors . . . '').

[49] This reading is supported by Congressional findings in other statutes. *See, e.g.,* 15 U.S.C. 271(a)(1) (''The future well-being of the United States economy depends on a strong manufacturing base . . .'') and 50 U.S.C. 4502(a) (''Congress finds that—(1) the security of the United States is dependent on the ability of the domestic industrial base to supply materials and services . . . (2)(C) to provide for the protection and restoration of domestic critical infrastructure operations under emergency conditions . . . (3) . . . the national defense preparedness effort of the United States government requires—(C) the development of domestic productive capacity to meet—(ii) unique technological requirements . . . (7) much of the industrial capacity that is relied upon by the United States Government for military production and other national defense purposes is deeply and directly influenced by—(A) the overall competitiveness of the industrial economy of the United States; and (B) the ability of industries in the United States, in general, to produce internationally competitive products and operate profitably while maintaining adequate research and development to preserve competitiveness with respect to military

Continued

the list of factors into two equal parts using two separate sentences. The first sentence focuses directly on ''national defense'' requirements, thus making clear that ''national defense'' is a subset of the broader term ''national security.'' The second sentence focuses on the broader economy and expressly directs that the Secretary and the President ''shall recognize the close relation of the economic welfare of the Nation to our national security.'' [50] *See* 19 U.S.C. 1862(d).

In addition to ''national defense'' requirements, two of the factors listed in the second sentence of section 232(d) are particularly relevant in this investigation. Both are directed at how ''such quantities'' of imports threaten to impair national security *See* 19 U.S.C. 1862(b)(3)(A). In administering section 232, the Secretary and the President are required to ''take into consideration the impact of foreign competition on the economic welfare of individual domestic industries'' and any ''serious effects resulting from the displacement of any domestic products by excessive imports'' in ''determining whether such weakening of our internal economy may impair the national security.'' *See* 19 U.S.C. 1862(d).

After careful examination of the facts in this investigation, the Secretary has determined that the present quantities and circumstance of NdFeB magnets imports threaten to impair the national security, as defined in section 232.

3. Investigative Process

3.1 Initiation of Investigation

On September 21, 2021, Secretary of Commerce Gina Raimondo initiated the investigation to determine the effects of imports of NdFeB magnets on the national security based on a recommendation in the June 2021 White House Report ''*Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth: 100 Day Reviews under Executive Order 14017*'' (''White House Report'').[51] The White House Report noted that the United States is heavily dependent on imports of NdFeB magnets, which are important components of defense and civil industrial systems, and therefore recommended that the Department evaluate whether to initiate an investigation under section 232 of the Trade Expansion Act of 1962, as amended. Pursuant to section 232(b)(1)(b), the Department notified the U.S. Department of Defense of its intent to conduct an investigation in a letter of September 21, 2021, from Secretary Raimondo to Secretary of Defense, Lloyd Austin III (*see* Appendix A).

3.2 Public Comments

On September 27, 2021, the Department published a **Federal Register** Notice announcing the initiation of an investigation to determine the effect of imports of NdFeB magnets on the national security (*see* Appendix B).[52] The notice also announced the opening of the public comment period. In the notice, the Department invited interested parties to submit written comments, opinions, data, information, or advice relevant to the criteria listed in section 705.4 of the National Security Industrial Base Regulations (15 CFR 705.4) as they affect the requirements of national security, including the following:

(a) Quantity of the articles subject to the investigation and other circumstances related to the importation of such articles;

(b) Domestic production capacity needed for these articles to meet projected national defense requirements;

(c) The capacity of domestic industries to meet projected national defense requirements;

(d) Existing and anticipated availability of human resources, products, raw materials, production equipment, facilities, and other supplies and services essential to the national defense;

(e) Growth requirements of domestic industries needed to meet national defense requirements and the supplies and services including the investment, exploration and development necessary to assure such growth;

(f) The impact of foreign competition on the economic welfare of any domestic industry essential to our national security;

(g) The displacement of any domestic products causing substantial unemployment, decrease in the revenues of government, loss of investment or specialized skills and productive capacity, or other serious effects;

(h) Relevant factors that are causing or will cause a weakening of our national economy; and

(i) Any other relevant factors.

The public comment period closed on November 12, 2021. The Department received 41 submissions. Parties who submitted comments included representatives of the domestic NdFeB magnet industry, including firms at different stages of the NdFeB magnet value chain, representatives of the foreign NdFeB magnet industry, representatives of consumers of NdFeB magnets such as the automobiles and electronics industries, representatives of the governments of Australia, Canada, the European Union, and Japan, and other concerned parties.

The Department carefully reviewed the public comments and factored all arguments and data into the investigative process. Public comments from representatives of consumers of NdFeB magnets tended to oppose the implementation of tariffs, citing the negative impact of tariffs for domestic industries that incorporate NdFeB magnets into end products. Representatives of foreign governments echoed concern for the imposition of tariffs and urged the investigation to recognize the strong ties between the United States and its allies. Representatives of the domestic NdFeB magnet industry discussed their future production plans, enumerated the difficulties firms faced in establishing a domestic value chain for the production of NdFeB magnets, and proposed recommendations to alleviate challenges. Two of the most cited challenges were Chinese competition, aided by favorable tax policies, lower environmental and labor costs, and domestic subsidies, and the difficulty of acquiring key intellectual property for sintered NdFeB magnets owned by Hitachi. A number of NdFeB magnet industry stakeholders indicated support for tax credit legislation for domestically produced NdFeB magnets. The public comments of key stakeholders are summarized in Appendix C, ''Public Comment Summaries,'' which also includes a link to the docket number

and civilian production; and (8) the inability of industries in the United States, especially smaller subcontractors and suppliers, to provide vital parts and components and other materials would impair the ability to sustain the Armed Forces of the United States in combat for longer than a short period.'').

[50] *Accord* 50 U.S.C. 4502(a).

[51] ''Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth: 100 Day Reviews Under Executive Order 14017,'' The White House, June 2021, *https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chain-review-report.pdf*.

[52] *See* also ''Notice of Request for Public Comments on Section 232 National Security Investigation of Imports of Neodymium-Iron-Boron (NdFeB) Permanent Magnets,'' **Federal Register**, September 27, 2021, *https://www.federalregister.gov/documents/2021/09/27/2021-20903/notice-of-request-for-public-comments-on-section-232-national-security-investigation-of-imports-of*.

(BIS–2021–0035) under which all public comments can be viewed in full on *Regulations.gov*.[53]

3.3 Information Gathering and Data Collection Activities

Due to the limited number of firms engaged in the U.S. NdFeB magnet industry, it was determined that a public hearing was not necessary to conduct a comprehensive investigation. In lieu of holding a public hearing on this investigation, the Department fielded a mandatory U.S. NdFeB Permanent Magnet Industry Survey (the ''survey'') (*see* Appendix D, ''U.S. NdFeB Permanent Magnet Industry Survey'') to participants in the U.S. NdFeB magnet industry using statutory authority pursuant to section 705 of the Defense Production Act of 1950, as amended (50 U.S.C. 4555) (DPA). The Department deployed the survey on January 31, 2022, to 60 firms that it identified as current or prospective manufacturers and/or distributors of NdFeB magnets, producers of components used in the production of NdFeB magnets, and significant consumers of NdFeB magnets in critical end-use sectors, with one or more facilities in the United States. Although participants represented all steps of the NdFeB value chain, the Department made a particular effort to identify and deploy the survey to all current or near-commercialization producers of NdFeB magnets and/or components used in the production of NdFeB magnets, and only sampled a small number of distributors and end-users. Seven NdFeB magnet value chain producers headquartered outside of the United States were invited to submit responses reflecting their foreign operations on a voluntary basis. The Department received 51 complete responses.

The survey provided a mechanism for respondents to disclose confidential and non-public information. The survey collected detailed information concerning factors such as current and planned facilities, production, capacity utilization, purchases/sales, employment, capital expenditure, critical machinery, research and development, and challenges and competition. The resulting data provided the Department with detailed industry information that was otherwise not publicly available and was needed to effectively conduct analysis for this investigation.

The Department deems the information furnished in the survey responses business confidential and will not publish or disclose it except in accordance with section 705 of the DPA, which prohibits the publication or disclosure of this information unless the President determines that the withholding of such information is contrary to the interest of the national defense. Therefore, the information submitted to the Department in response to the survey will not be shared with any non-government entity other than in aggregate form.

The Department also held 17 meetings with 19 unique U.S. NdFeB magnet industry stakeholders to gather information on firms' perspectives on the industry. Table 1 displays the firms the Department held meetings with, along with their place in the value chain and the domicile of their parent firm.

TABLE 1—INDUSTRY STAKEHOLDER MEETING PARTICIPANTS

Firm name	Parent location	Current market segment participation	Description of current and planned market segment participation
American Resources.	United States	N/A	Planned producer of rare earth oxides from rare earth element waste from a variety of feedstocks, including battery metals and end of life products.
Arnold Magnetics	United States	N/A	Current producer of samarium-cobalt magnets that indicates it could produce NdFeB magnets if it had access to relevant intellectual property.
Energy Fuels	United States	Rare Earth Carbonates Processing.	Current producer of mixed rare earth carbonates from monazite. Prospective producer of rare earth oxides and rare earth metals.
General Motors	United States	NdFeB Magnet Consumer.	Current consumer of NdFeB magnets. Has a binding agreement with MP Materials and a non-binding agreement with Vacuumschmelze to purchase NdFeB magnets.
IperionX	Australia	N/A	Planned domestic producer of heavy mineral sands and monazite, which can be processed into rare earth carbonates.
Lynas Rare Earths	Australia	Rare Earth Element Mining; Rare Earth Oxide Separation.	Current rare earth element miner and producer of mixed and separated rare earth oxides. Current production is outside of the United States but planned rare earth oxide production in the United States.
MP Materials	United States	Rare Earth Element Mining.	Current producer of rare earth elements. Planned producer of rare earth oxides, rare earth metals, rare earth alloys, and NdFeB magnets.
National Electrical Manufacturers Association.	United States	NdFeB Magnet Consumer.	An industry association that includes current consumers of NdFeB magnets. Representatives of Danfoss (products include heat pumps and motors), NIDEC (products include motors), and ABB (products include robotics) participated.
Neo Performance Materials.	Canada	Rare Earth Oxide Separation; Metal Refining; Rare Earth Alloy Production; NdFeB Magnet Production.	Current producer of rare earth oxides, rare earth metals, rare earth alloys, and NdFeB magnets. Production is entirely outside of the United States.
Niron Magnetics	United States	N/A	Planned producer of iron-nitride magnets, a NdFeB magnet substitute.
Quadrant Magnetics.	United States	N/A	Planned producer of NdFeB magnets.

[53] *See* also ''86 FR 53277 NdFeB Permanent Magnets 232 investigation_published 9–27–21_comments due 11–12–21,'' *Regulations.gov*, September 27, 2021, *https://www.regulations.gov/document/BIS-2021-0035-0001*.

TABLE 1—INDUSTRY STAKEHOLDER MEETING PARTICIPANTS—Continued

Firm name	Parent location	Current market segment participation	Description of current and planned market segment participation
Shin-Etsu	Japan	Metal Refining; Rare Earth Alloy Production; NdFeB Magnet Production.	Current producer of rare earth metals, rare earth alloys, and NdFeB magnets. Production is entirely outside of the United States.
Turntide Technologies.	United States	NdFeB Magnet Substitute Production.	Current producer of a NdFeB magnet-free motor.
Noveon	United States	NdFeB Magnet Production; NdFeB Magnet Recycling.	Current recycler and remanufacturer of NdFeB magnets. [TEXT REDACTED].
USA Rare Earth	United States	N/A	Planned rare earth element miner and planned producer of rare earth carbonates, rare earth oxides, and NdFeB magnets.
Vacuumschmelze	Germany	NdFeB Magnet Production.	Current producer of NdFeB magnets. Planned NdFeB magnet production in the United States.

3.4 Interagency Consultation

The Department consulted with the Department of Defense's Office of Industrial Base Policy and the Defense Logistics Agency regarding estimates of defense-related demand, as well as methodological and policy questions that arose during the investigation. The Department also consulted with other U.S. Government agencies with expertise and information regarding the NdFeB magnet industry including the Department of Energy, the Department of State, and the Environmental Protection Agency.

4. Product Scope of the Investigation

The directive of the investigation is to assess the effects of imports of NdFeB magnets on the national security of the United States. NdFeB magnets can be produced through bonding or sintering processes. Sintered magnets currently comprise approximately 93 percent of the global NdFeB magnet market, can be used in more demanding applications, and are not easily substitutable with alternative materials.[54] [55] Harmonized Tariff Schedule (HTS) 8505.11.0070 covers the imports of ''Permanent magnets and articles intended to become magnets after magnetization: Of metal: Sintered neodymium-iron-boron.'' Bonded NdFeB magnets do not have their own HTS code but fall under HTS 8505.11.0090 (''Permanent magnets and articles intended to become magnets after magnetization: Of metal: Other'').

In order to ensure that the full NdFeB magnet value chain was covered, the Department also examined the supply chains of feedstocks and primary and intermediate products essential to the production of NdFeB magnets. These include rare earths, rare earth carbonates, rare earth oxides, rare earth metals, and rare earth alloys. NdFeB magnets generally use four rare earth elements with supply chain vulnerabilities: neodymium, praseodymium, dysprosium, and terbium.[56] Although iron in the form of 1001 steel, boron, and coating materials such as copper are also components of NdFeB magnets, their supply chains are not expected to pose major issues for magnet production and were not a focus of this investigation.[57]

As of 2020, consumer electronics constituted the largest source of total U.S. demand for NdFeB magnets (45 percent), followed by industrial motors (30 percent).[58] However, this investigation and report focuses on NdFeB magnets' use in electric vehicles and wind turbines, in addition to defense systems, for several reasons. The U.S. Government has recognized the electric vehicle and wind turbine industries as critical infrastructure.[59] These industries are forecast to be the main drivers of total demand growth for NdFeB magnets, reaching 55 percent of total U.S. demand by 2030 and 61 percent of total U.S. demand by 2050 (*see* section 6.2, ''U.S Demand'').[60] In addition, U.S. leadership in and adoption of these technologies are key to the U.S. Government's efforts to address the existential threat caused by climate change. The investigation therefore also considered industries that depend on NdFeB magnets, focusing on the electric vehicle and wind turbine industries. Understanding and considering the effects of any determinations and recommendations on these and other NdFeB magnet-consuming sectors is necessary to ensure a complete analysis of the effect of NdFeB magnet imports on the national security.

5. NdFeB Magnet Production

5.1 Production Process and Value Chain Steps

NdFeB magnets are an intermediate product composed of rare earths and other elements and are necessary for incorporation into a variety of consumer, infrastructure, and defense end-uses.[61] By weight, NdFeB magnets are typically composed of about 30 percent rare earth elements, 69 percent

[54] ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf.*

[55] Meeting between the Critical Materials Institute and the Department of Commerce, (Virtual Meeting October 6, 2021).

[56] Cerium is sometimes used in NdFeB magnets but is an overproduced rare earth element and as such does not pose a supply chain vulnerability.

[57] ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf.*

[58] Ibid.

[59] *See* ''Critical Infrastructure Sectors,'' Cybersecurity and Infrastructure Security Agency, October 21, 2020, *https://www.cisa.gov/critical-infrastructure-sectors.*

[60] ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf.*

[61] Except where otherwise noted, this section summarizes information on the NdFeB magnet value chain found in the DoE's ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report.'' *See* ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf.*

iron, and one percent boron. NdFeB magnets primarily use neodymium and praseodymium, with various amounts of dysprosium or terbium added to increase coercivity at elevated temperatures (*i.e.,* heat resistance). As mentioned earlier, this investigation focuses on the rare earths value chain and current and prospective U.S. production and does not consider iron and boron. There are six main steps in the NdFeB magnet value chain inclusive of magnet production: mining, mixed rare earths processing to carbonates, separation of carbonates into oxides, refinement of oxides into metal, alloy production, and magnet production.

Rare earth elements can be extracted from mining, unconventional sources, and recycled materials. There are two groups of rare earths—light rare earths and heavy rare earths—defined by their atomic weights. In the United States, rare earths are mined from bastnaesite, a light rare earth-rich ore, or monazite, generally as a byproduct of heavy mineral sands.[62] Outside of the United States, ion adsorption clays, sometimes called ionic clays, are also a source of rare earths, especially heavy rare earths.[63] [64] Mining projects are often referred to by their grade, which indicates the percentage of rare earths contained in the mined ore. For reference, the Mountain Pass Mine in California, owned and operated by MP Materials, is considered one of the world's highest-grade deposits of bastnaesite, containing on average about seven percent rare earths content.[65] Lynas Rare Earths' Mt. Weld deposit in Western Australia, the other major non-Chinese deposit currently in operation, has a designated grade of about eight percent.[66] Once mined, rare earths are beneficiated using one of several techniques to increase the concentration of rare earths. Research has also been done on extracting rare earths from unconventional sources, such as coal ash and mine tailings, although these techniques have not been commercialized.

Once mined and concentrated, rare earths are separated into individual rare earth oxides. The primary method used to separate rare earth oxides is solvent extraction. The first step in the process is usually to remove cerium, since it is a low-value rare earth element. The cerium-free rare earth oxide mixture is then placed in mixer settlers composed of acidic reagents to separate rare earth elements based on their atomic weight. As a result, solvent extraction consumes significant quantities of acid and water and generates environmentally unfriendly waste. Solvent extraction processes are also tailored to feedstocks. Although facilities can be reorganized to accommodate new sources of rare earth concentrate, it takes time and resources to do so.[67] [TEXT REDACTED].[68] Rare earths can also be extracted from end-of-life products.

Rare earth oxides are then refined into metals, most often through electrowinning and calcium reduction.[69] Electrowinning uses a cell made of anodes and cathodes and an electrolyte, while calcium reduction relies on sodium metal to reduce anhydrous rare earth salts. Industry participants indicate that metallization is an energy intensive and potentially hazardous process.[70]

Finally, alloys are made by combining selected rare earth metals with iron and boron. There are two types of alloying approaches depending on whether they are meant to produce bonded or sintered NdFeB magnets. Although both sintered and bonded NdFeB magnets use neodymium and praseodymium, sintered NdFeB magnet alloy includes between 0.5 and 11 percent dysprosium or terbium by weight to improve high-temperature resistance to demagnetization, while the absence of these elements in bonded magnets precludes their use in elevated temperature applications.

Sintered NdFeB magnets are manufactured using powder metallurgy. For sintered magnets, specific alloys are first produced and melted. The molten alloy is then poured on the outer surface of a rotating metal cylinder in a process known as strip casting. After strip casting, the as-cast strips are jet milled into a powder with small grains that can be used for magnet production. Jet milling shapes the grains that define the magnet microstructure and affects the magnet's performance parameters. The powder is next aligned and pressed in a magnetic field before being sintered in a high temperature furnace to form the anisotropic magnets. The magnets are then machined to specified shapes depending on their end-use and coated with a metal film to protect the magnet from corrosion. The most common coating is a nickel-copper-nickel layer, although other coatings use gold, chrome, copper, and dry-sprayed epoxy or e-coat epoxy. Finally, magnets are magnetized using a high magnetic field to align the magnetization of the grains.

Bonded NdFeB magnets follow a similar process to sintered NdFeB magnets through the production of magnetic powder. Bonded NdFeB magnets are often made from rapidly solidified material turned into ribbons through melt-spinning or jet casting, which is subsequently milled, or from spherical powders through gas or centrifugal atomization.[71] Bonded NdFeB magnets can also be made from strip cast material after hydrogen decrepitation.[72] The rapidly solidified powder feedstock is then mixed with a binder to form a final shape using compression bonding, injection molding, or calendaring.[73] In compression bonding a liquid coating of thermoset epoxy is applied to the powder, which is then added to a press cavity and compacted under heat to

[62] Heavy mineral sands are mainly mined for titanium and zircon. *See* ''Heavy Mineral Sand,'' Science Direct, n.d., *https://www.sciencedirect.com/topics/engineering/heavy-mineral-sand.*

[63] Although there may be deposits of ionic clays in the United States, they are not currently a source of rare earth elements. *See* ''Rare Earth Element Accumulation Processes Resulting in High-Value Metal Enrichments in Regolith,'' U.S. Geological Survey, August 3, 2018, *https://www.usgs.gov/centers/geology%2C-energy-%26amp%3Bamp%3B-minerals-science-center/science/rare-earth-element-accumulation#overview.*

[64] Ionic clays are an important source of heavy rare earths in China. *See* Daniel J. Packey and Dudley Kingsnorth, ''The impact of unregulated ionic clay rare earth mining in China,'' Resources Policy 48: 112–116, *https://doi.org/10.1016/j.resourpol.2016.03.003.*

[65] Comments of MP Materials to Request for Public Comments, ''Section 232 National Security Investigation of Imports of Neodymium-Iron-Boron (NdFeB) Permanent Magnets,'' 86 FR 53277, November 12, 2021.

[66] ''2021 Annual Report,'' Lynas Rare Earths, Ltd., 2021, *https://wcsecure.weblink.com.au/pdf/LYC/02434182.pdf.*

[67] Meeting between Lynas Rare Earths and the Department of Commerce, (Virtual Meeting, March 30, 2022); Meeting between USA Rare Earth and the Department of Commerce, (Virtual Meeting, December 10, 2021).

[68] Meeting between USA Rare Earth and the Department of Commerce, (Virtual Meeting, December 10, 2021).

[69] Thomas Lograsso, Critical Materials Institute, written communication, May 8, 2022.

[70] Meeting between Energy Fuels and the Department of Commerce, (Virtual Meeting, March 1, 2022).

[71] John J. Croat, ''4—Production of rapidly solidified NdFeB magnetic powder,'' Rapidly Solidified Neodymium-Iron-Boron Permanent Magnets, 2018, *https://doi.org/10.1016/B978-0-08-102225-2.00004-1*; B.M Ma et al., ''Recent development in bonded NdFeB magnets,'' Journal of Magnetism and Magnetic Materials 239 (1–3): 418–423, February 2002, *https://doi.org/10.1016/S0304-8853(01)00609-6.*

[72] John J. Croat, ''Chapter 6—Compression bonded NdFeB permanent magnets,'' Modern Permanent Magnets, 2022, *https://doi.org/10.1016/B978-0-323-88658-1.00007-8.*

[73] Steve Constantinides and John de Leon, ''Permanent Magnet Materials and Current Challenges, Arnold Magnetic Technologies, n.d., *http://www.arnoldmagnetics.com/wp-content/uploads/2017/10/Permanent-Magnet-Materials-and-Current-Challenges-Constantinides-and-DeLeon-PowderMet-2011-ppr.pdf*; Jun Cui et al., ''Manufacturing Processes for Permanent Magnets: Part II—Bonding and Emerging Methods,'' JOM 74: 2492–2506, June 2022, *https://doi.org/10.1007/s11837-022-05188-1.*

produce a rigid magnet.[74] Injection molding entails blending powder with a thermoplastic compound and injecting it into a mold cavity to form a rigid or flexible magnet.[75] Calendaring uses a roll press to form flexible magnet sheets.[76] Rigid magnets require binders such as nylon, Teflon, vinyl, and thermoset epoxy, while flexible magnets rely on binders like nitrile rubber and vinyl.[77]

5.2 Rare Earth Element Losses in Magnet Production

It is difficult to estimate rare earth element losses from the mining to metallization value chain steps. Rare earth recovery from ore is complex since there are a variety of different rare earth minerals including bastnaesite, monazite, and ionic clays.[78] Additionally, the process of concentrating rare earth bearing ore is tailored to specific ore deposits.[79] Once the rare earth elements are concentrated, they are generally chemically leached into solution. Depending on the specific leaching technology utilized and the technological optimization of the process stream, recovery of rare earth elements in bastnaesite ranges from 85 to 90 percent, in monazite from 89 to 98 percent, and in ionic clays from 80 to 90 percent.[80] As discussed in the previous section, various approaches, including solvent extraction, are employed to separate individual rare earth elements from mixed carbonates or mixed oxides. Total recovery of rare earth elements during solvent extraction is typically 90 to 95 percent depending on the specific process and strategy utilized.[81] Individual rare earth oxides are turned into metal using electrowinning and calcium reduction.[82] [83] Although specific data on the efficiency of electrowinning of individual rare earth elements could not be identified, the electrowinning process generally exhibits a 90 to 95 percent metal recovery rate.[84]

There is more information on material losses from alloying to magnet production.[85] Metal recovery from strip casting, used to produce NdFeB alloy, is estimated at 97 percent. Hydrogen decrepitation and jet milling, which are used to make NdFeB powder, have estimated recovery rates of 99 percent. Pressing in a magnetic field, which is used to produce the sintered magnet, has a 99 percent recovery rate, while the subsequent sintering and heat-treating steps have 98 percent recovery rates. The greatest material loss occurs when machining the sintered magnet block into a usable magnet according to end-use-determined specifications. Depending on the size and complexity of the final magnet machining has a recovery rate of 60 to 90 percent. Although considerable material is lost during the magnet machining step, the resulting waste, also known as magnet swarf, is often recycled and returns to the process flow stream.[86] Indeed, some industry participants question the viability of magnet manufacturing that does not recycle swarf.[87] The final steps in NdFeB magnet manufacturing are plating for corrosion and final magnetization, both of which have a yield of 99 percent. As a result, total recovery from alloy to magnet production can range from about 54 to 81 percent.[88]

6. U.S. NdFeB Magnet Industry

6.1 Historical Overview

The United States is essentially one hundred percent dependent on imports of NdFeB magnets to satisfy demand. However, the United States did not always have negligible capacity in the NdFeB magnet value chain. Rare earths were first discovered at Mountain Pass in California in 1949 and extracted by the mining firm Molycorp beginning in 1951.[89] In the 1950s, research by the Ames Laboratory advanced rare earths processing technology.[90] The combination of favorable factor endowments and research and development caused the U.S. rare earths industry to flourish. By the 1980s, Mountain Pass supplied over 70 percent of the world's rare earth elements.[91] Meanwhile, commercialized processing technologies facilitated rare earth oxide production and consumption by a growing array of end-users.[92] NdFeB magnet manufacturers were one such consumer: in 1983, General Motors and Sumitomo of Japan independently announced the development of NdFeB magnets.[93] In 1986 General Motors established a subsidiary called Magnequench to commercialize production.[94] Magnequench began production of rapidly solidified powders for isotropic bonded magnets, full dense hot pressed isotropic magnets, and fully dense anisotropic magnets in 1987.[95] [96]

However, the 1980s were marked by growing foreign competition that presaged the end of the U.S. rare earths industry. By 1985 Japan had already exceeded the United States in NdFeB magnet production and by 1987 produced over half the world's magnets.[97] Starting in the second half of

[74] Ibid.

[75] Ibid.

[76] Ibid.

[77] John Ormerod, ''Bonded Magnets: A Versatile Class of Permanent Magnets,'' Magnetics Business and Technology, 2015, *https://bunting-dubois.com/wp-content/uploads/2021/04/Magnetics-Business-Technology-Summer-2015-8-9.pdf.*

[78] On sources of rare earth elements, *see* ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf.*

[79] Meeting between Lynas Rare Earths and the Department of Commerce, (Virtual Meeting, March 30, 2022); Meeting between USA Rare Earth and the Department of Commerce, (Virtual Meeting, December 10, 2021).

[80] Sebastiaan Peelman et al., ''Leaching of Rare Earth Elements: Past and Present,'' ERES2014: 1st European Rare Earth Resources Conference, September 4 to 7, 2014, *http://www.eurare.org/docs/eres2014/seventhSession/SebastiaanPeelman.pdf*; Sebastiaan Peelman et al., ''Chapter 21: Leaching of Rare Earth Elements: Review of Past and Present Technologies,'' Rare Earths Industry: Technological, Economic, and Environmental Implications: 319–334, 2016, *https://doi.org/10.1016/B978-0-12-802328-0.00021-8.*

[81] Laura Talens Peiro and Gara Villalba Mendez, ''Material and Energy Requirement for Rare Earth Production,'' JOM 65: 1327–1340, 2013, *https://doi.org/10.1007/s11837-013-0719-8.*

[82] ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf.*

[83] Thomas Lograsso, Critical Materials Institute, written communication, May 8, 2022.

[84] Danielle Miousse, ''A New Spin on Electrowinning,'' PF Products Finishing, May 1, 2007, *https://www.pfonline.com/articles/a-new-spin-on-electrowinning.*

[85] Unless otherwise noted, this paragraph summarizes information in a Department of Energy report on the NdFeB magnet supply chain. *See* ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf.*

[86] Meeting between Lynas Rare Earths and the Department of Commerce, (Virtual Meeting, March 30, 2022).

[87] Ibid.

[88] The Department reached this calculation using the information on material loss from alloy to magnet production discussed in earlier in the paragraph.

[89] Joanne Abel Goldman, ''The U.S. Rare Earth Industry: Its Growth and Decline,'' Journal of Policy History 26 (2): 139–166, 2014, *https://doi.org/10.1017/S0898030614000013.*

[90] Ibid.

[91] Ibid.

[92] Ibid.

[93] Ibid.

[94] Jeffrey St. Clair, ''The Saga of Magnequench,'' Counterpunch, April 7, 2006, *https://www.counterpunch.org/2006/04/07/the-saga-of-magnequench/.*

[95] Ibid.

[96] V. Panchanathan, ''Magnequench Magnets Status Overview,'' Journal of Materials Engineering and Performance, 4 (4) 423–429, 1995, *https://doi.org/10.1007/BF02649302.*

[97] Joanne Abel Goldman, ''The U.S. Rare Earth Industry: Its Growth and Decline,'' Journal of Policy

the 1980s, several U.S. magnet companies licensed Sumitomo patents to produce and sell sintered NdFeB magnets.[98] In the 1980s, China also began to develop its rare earth and NdFeB magnet industries. A combination of low labor costs, less stringent environmental regulations, and tax rebates and subsidies made it difficult for U.S. firms to compete.[99] In response to imports of unlicensed Chinese magnets, in 1995 U.S. magnet manufacturer Crucible Materials filed a complaint with the U.S. International Trade Commission (U.S. ITC) requesting a section 337 investigation.[100] Although the U.S. ITC found a violation and issued a cease-and-desist order to a domestic respondent as well as a general exclusion order, these actions did not prevent the offshoring of domestic industry.[101] In 1998, Molycorp suspended operation at Mountain Pass Mine, ending U.S. involvement in the upstream steps of the NdFeB magnet value chain.[102] The downstream steps of the value chain followed. For example, after being sold to Chinese owners Magnequench's U.S. factories were closed and offshored starting in 1998, and it eventually ceased U.S. production in 2006.[103] Similarly, in 2005, Hitachi closed its sintered NdFeB magnet manufacturing facility in Edmore, MI, which it had previously acquired from General Electric.[104]

The U.S. NdFeB magnet value chain experienced a brief revival in the late 2000s and early 2010s, in part due to rising rare earths prices.[105] In 2008, Molycorp sought to restart production at Mountain Pass Mine.[106] When China dramatically restricted exports of rare earths in 2010 and prices increased, Molycorp appeared poised to benefit.[107] [108] In 2012 it acquired Magnequench, which at the time had NdFeB magnet powder facilities in China and Thailand, in order to create a vertically integrated mine to magnet firm.[109] [110] By 2013 it had achieved domestic production of 5,500 tons of rare earth oxides and had established a joint venture with Mitsubishi and Daido Steel to produce magnets in Japan.[111] [112] [113] However, Molycorp struggled to remain solvent and suffered from the decline in rare earths prices that occurred in part due to China's reversal of its export restrictions, ultimately declaring bankruptcy in 2015.[114] [115] The United States has in recent years been highly reliant (well above 80 percent) on imports of bonded NdFeB magnets and essentially one hundred percent dependent on imports of sintered NdFeB magnets.

6.2 U.S. Demand

As one of the strongest types of permanent magnets, NdFeB magnets, in particular sintered NdFeB magnets, are used in an extensive range of products. Example applications include actuators for machine tools, robots, and water pumps, refrigerator and air conditioner compressors, speakers in phones and laptops (as well as more advanced applications in computing and telecommunications), and traction motors in electric vehicles.

The Department of Energy's (DoE) ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report'' estimates total domestic demand for selected NdFeB magnet applications in aggregate and by broad application area, as detailed in Table 2.[116] [117] It estimated total consumption at about 16,100 tons in 2020. Based on DoE estimates, total U.S. demand for NdFeB magnets for these applications is projected to increase under a high growth scenario to 37,000 tons in 2030, with the bulk of increasing demand accounted for by offshore wind turbines and electric vehicles.

History 26 (2): 139–166, 2014, *https://doi.org/10.1017/S0898030614000013.*

[98] John Ormerod, ''NdFeB Magnet Patents: Updated 2021,'' Bunting, n.d., *https://bunting-dubois.com/tech-briefs/ndfeb-magnet-patents-update-2021/.*

[99] Joanne Abel Goldman, ''The U.S. Rare Earth Industry: Its Growth and Decline,'' Journal of Policy History 26 (2): 139–166, 2014, *https://doi.org/10.1017/S0898030614000013.*

[100] John Ormerod, ''NdFeB Magnet Patents: Updated 2021,'' Bunting, n.d., *https://bunting-dubois.com/tech-briefs/ndfeb-magnet-patents-update-2021/*; ''Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Articles Containing Same: Investigation No. 337–TA–372,'' U.S. International Trade Commission, May 1996, *https://usitc.gov/publications/337/pub2964.pdf.*

[101] Ibid.

[102] Joanne Abel Goldman, ''The U.S. Rare Earth Industry: Its Growth and Decline,'' Journal of Policy History 26 (2): 139–166, 2014, *https://doi.org/10.1017/S0898030614000013.*

[103] Jeffrey St. Clair, ''The Saga of Magnequench,'' Counterpunch, April 7, 2006, *https://www.counterpunch.org/2006/04/07/the-saga-of-magnequench/.*

[104] Walter Benecki, ''Magnetics Industry Overview,'' 2005, *http://www.waltbenecki.com/uploads/Another_Year_of_Significant_Change_in_the_Magnetics_Industry.pdf.*

[105] *See* Section 8.3.4, ''Prices and Price Volatility,'' for more details on neodymium oxide and metal prices.

[106] Jeffrey A. Green, ''The collapse of American rare earth mining—and lessons learned,'' Defense News, November 12, 2019, *https://www.defensenews.com/opinion/commentary/2019/11/12/the-collapse-of-american-rare-earth-mining-and-lessons-learned/.*

[107] China implemented export quotas starting in 2005, but dramatically decreased the export quota by almost 40 percent in 2010. China's export quotas are broadly seen as part of a strategy of economic resource nationalism, wherein economic advantage can be transferred from foreign to local firms, although some argue they reflect an effort to gain a geopolitical advantage. China itself contended quotas were meant to decrease environmental costs, but this argument was rejected by the WTO in 2014. *See* Kristen Vekasi, ''Politics, markets, and rare commodities: Responses to Chinese rare earth policy,'' Japanese Journal of Political Science 20 (1): 2–20, 2019, *https://doi.org/10.1017/S1468109918000385.*

[108] Neodymium oxide prices rose by over 1,200 percent from $27.95 per kg at the end of January 2010 to a peak of $369.75 at per kg at the end of July 2011. The Department's calculations from Bloomberg data. *See* Section 8.3.4, ''Prices and Price Volatility,'' for more details.

[109] Artem Golev et al., ''Rare earths supply chains: Current status, constraints, and opportunities,'' Resources Policy 41: 52–59, 2014, *http://dx.doi.org/10.1016/j.resourpol.2014.03.004.*

[110] Magnequench was later acquired by Neo Performance Materials after Molycorp's bankruptcy.

[111] Eugene Gholz, ''Rare Earth Elements and National Security,'' Council on Foreign Relations, October 2014, *https://cdn.cfr.org/sites/default/files/pdf/2014/10/Energy%20Report_Gholz.pdf.*

[112] Joseph Gambogi, ''Mineral Commodity Summaries: Rare Earths,'' U.S. Geological Survey, January 2017, *https://d9-wret.s3.us-west-2.amazonaws.com/assets/palladium/production/mineral-pubs/rare-earth/mcs-2017-raree.pdf.*

[113] All quantities specified as tons in this report refer to metric tons, unless otherwise noted.

[114] Tiffany Hsu, ''Molycorp—sole U.S. rare earth producer—files for bankruptcy,'' Los Angeles Times, June 25, 2015, *https://www.latimes.com/business/la-fi-molycorp-rare-earth-bankruptcy-20150625-story.html.*

[115] When Molycorp declared bankruptcy in June 2015, neodymium oxide prices were down by over 88 percent to $43.00 per kg from a peak of $369.75 per kg in July 2011. The Department's calculations from Bloomberg data. *See* Section 8.3.4, ''Prices and Price Volatility,'' for more details.

[116] The Department notes that the global NdFeB magnet supply chain is opaque and as a result valid and reliable estimates of total as well as direct and embedded demand are difficult to generate, both in aggregate and at the end-use-level. [TEXT REDACTED]. Estimates of total, direct, and embedded demand in aggregate and by end-use category should be approached with caution.

[117] The DoE report and the figures provided in this report reflect total demand, in other words the sum of direct and indirect or embedded demand, for selected NdFeB magnet applications.

TABLE 2—TOTAL U.S. DEMAND FOR SELECTED NdFeB MAGNET APPLICATIONS, THOUSANDS OF TONS *

Application	Total demand in 2020		Projected total demand in 2030 (high growth)		Projected total demand in 2050 (high growth)	
	Amount (kt)	Share (percent)	Amount (kt)	Share (percent)	Amount (kt)	Share (percent)
Offshore wind turbines	0	0.0	10.1	27.3	19	27.7
Electric vehicles	1.8	11.2	10.2	27.6	23.1	33.7
Consumer electronics (hard disk drives, cell phones, loudspeakers, other)	7.2	44.7	7.4	20.0	11.8	17.2
Industrial motors	4.9	30.4	5.9	15.9	9.5	13.8
Non-drivetrain motors in vehicles	1.5	9.3	2.4	6.5	3.9	5.7
Other sintered magnets (Power tools, electric bikes)	0.1	0.6	0.1	0.3	0.2	0.3
Bonded magnets	0.6	3.7	0.8	2.2	1.3	1.9
Total	16.1	100.0	37	100.0	68.6	100.0

* The figures presented represent total—or the sum of direct and embedded—demand.
Source: ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf.*

Since U.S. production of NdFeB magnets is minimal almost all the United States' direct and indirect NdFeB magnet consumption is met through imports.[118] The United States directly imported about 7,500 tons of sintered NdFeB magnets in 2021.[119] However, direct imports of NdFeB magnets represent only a portion of U.S. consumption and the majority of U.S. demand is in the form of imported products with the magnets embedded in them. As the list of imported goods containing NdFeB magnets is extensive, and their magnet content (weight and type) unknown, it is difficult to precisely estimate indirect consumption by application. The Defense Logistics Agency Strategic Materials estimates 60 percent of essential civilian demand for NdFeB magnets was fulfilled through embedded imports, [TEXT REDACTED].[120] [121]

6.3 NdFeB Magnets in Defense and Critical Infrastructure Applications

Presidential Policy Directive 21 (Critical Infrastructure Security and Resilience) designates 16 critical infrastructure sectors as vital to national security, national economic security, and/or national public health and safety.[122] NdFeB magnets are used so extensively across industries that they support virtually all 16 sectors, including the critical manufacturing, defense industrial base, energy, healthcare and public health, transportation systems, and water and wastewater systems sectors. The following sections will discuss the use of NdFeB magnets in defense applications and two key critical infrastructure applications: electric vehicles and offshore wind turbines. Defense-related uses and demand are central to the investigation's directive to assess the effects of NdFeB magnet imports on national security. Electric vehicles and offshore wind turbines are important to the Biden Administration's Clean Energy Plan and efforts to combat climate change. They will also drive demand for NdFeB magnets and are key sales targets for NdFeB magnet manufacturers.

6.3.1 Defense Applications

Consistent with their broad commercial applications, NdFeB magnets are used in a variety of defense end-uses.[123] Defense usage is not limited to specific magnet characteristics such as high coercivity. Instead, each defense application requires a specially designed magnet, of varying sizes, grades, and performance characteristics. [TEXT REDACTED]. Aircraft, missiles, and munitions use small high-powered rare earth magnet actuators that control the various surfaces during operation. NdFeB magnets can also be used as fasteners. Although substitutes can be used in some applications, they are usually not as effective.[124]

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[118] U.S. imports and exports of NdFeB magnets are further discussed in Section 6.4, ''U.S. Trade in NdFeB Magnets.''

[119] ''USITC Dataweb,'' U.S. International Trade Commission, last modified October 25, 2021, *https://dataweb.usitc.gov/trade/search/Import/HTS.*

[120] ''Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth,'' The White House, June 2021, *https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chain-review-report.pdf.*

[121] Meeting between the Defense Logistics Agency and the Department of Commerce (Virtual Meeting, November 23, 2021).

[122] ''Critical Infrastructure Sectors,'' Department of Homeland Security, last modified October 21, 2020, *https://www.cisa.gov/critical-infrastructure-sectors.*

[123] [TEXT REDACTED].

[124] ''Defense Federal Acquisition Regulation Supplement: Restriction on the Acquisition of Certain Magnets and Tungsten,'' **Federal Register**, April 30, 2019. *https://www.federalregister.gov/documents/2019/04/30/2019-08485/defense-federal-acquisition-regulation-supplement-restriction-on-the-acquisition-of-certain-magnets?msclkid=9f790985ac5011eca53be28a54128eac.*

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As with total domestic consumption of NdFeB magnets, a precise total for defense-related demand is not possible. [TEXT REDACTED].[126] Thus, despite their importance to national security, defense demand for NdFeB magnets is only a small portion of overall demand and insufficient to support an economically viable domestic industry.

6.3.2 U.S. Government Actions To Reduce Defense Dependencies

Given NdFeB magnets' usage in and importance to the performance of myriad military systems, and the United States' near one hundred percent reliance on imports of NdFeB magnets, the U.S. Government has taken several steps in recent years to mitigate this reliance and address potential supply disruptions. One such measure is legislation implemented through a Defense Federal Acquisition Regulation Supplement (DFARS) that restricts the use of foreign NdFeB magnets in the military supply chain from 2019.[127] Specifically, section 871 of the National Defense Authorization Act for 2019 (Pub. L. 115–232) prohibits the acquisition of samarium-cobalt and NdFeB magnets melted or produced in North Korea, China, Russia, or Iran because these materials play an essential role in national defense. This requirement was originally codified in 10 U.S.C. 2533c but is now 10 U.S.C. 4872. There are exceptions for ''some commercially available off-the-shelf magnets incorporated into end items and for electronic devices,'' as well as for recycled magnets where the first melt may have taken place in China but subsequent recycling and milling takes place in the United States.[128]

The Department of Defense's (DoD) Office of Industrial Base Policy has fostered domestic production capacity across the NdFeB magnet value chain from mining to magnet manufacturing through the allocation of funding under DPA Title III and the Industrial Base Analysis and Sustainment (IBAS) programs. Other important DoD funding sources for rare earth supply chain research and scale-up include the National Defense Stockpile Program, the Rapid Innovation Fund, and the Small Business Innovation Research (SBIR) program.

Upstream in the NdFeB magnet value chain, DoD has funded the development of oxide separation capacity. In February 2021, Lynas USA LLC, a subsidiary of Australian mining firm Lynas Rare Earths, received $30.4 million to establish a facility to produce light rare earth oxides, including neodymium.[129] [130] [TEXT REDACTED]. This facility is also expected to produce heavy rare earth oxides such as dysprosium.[131] [TEXT REDACTED].[132] In February 2022, DoD awarded MP Materials $35 million under the IBAS program for a heavy rare earth oxide separation facility, on top of a previous $9.6 million commitment in December 2020 to develop light rare earth oxide separation capabilities.[133] MP Materials expects to commence production by the end of 2022.[134] DoD has also provided

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[125] [TEXT REDACTED].

[126] [TEXT REDACTED], Noveon's **Federal Register** Notice submission estimated defense-related demand at two to ten percent. Comments of Noveon to Request for Public Comments, ''Section 232 National Security Investigation of Imports of Neodymium-Iron-Boron (NdFeB) Permanent Magnets,'' 86 FR 53277, November 12, 2021.

[127] For more information, please refer to the **Federal Register** Notice of the rule. ''Defense Federal Acquisition Regulation Supplement: Restriction on the Acquisition of Certain Magnets and Tungsten,'' **Federal Register**, April 30, 2019, *https://www.federalregister.gov/documents/2019/04/30/2019-08485/defense-federal-acquisition-regulation-supplement-restriction-on-the-acquisition-of-certain-magnets.*

[128] Ibid.

[129] ''DoD Announces Rare Earth Element Award to Strengthen Domestic Industrial Base,'' Department of Defense, February 1, 2021, *https://www.defense.gov/News/Releases/Release/Article/2488672/dod-announces-rare-earth-element-award-to-strengthen-domestic-industrial-base/.*

[130] Unless otherwise stated, all values cited in this report are U.S. dollars.

[131] ''2021 Annual Report,'' Lynas Rare Earths, Ltd., 2021, *https://wcsecure.weblink.com.au/pdf/LYC/02434182.pdf.*

[132] Meeting between Lynas Rare Earths and the Department of Commerce, (Virtual Meeting, March 30, 2022).

[133] ''MP Materials Awarded Department of Defense Heavy Rare Earth Processing Contract,'' MP Materials, February 2, 2022, *https://investors.mpmaterials.com/investor-news/news-details/2022/MP-Materials-Awarded-Department-of-Defense-Heavy-Rare-Earth-Processing-Contract/default.aspx.*

[134] ''Form 10–K,'' MP Materials, February 28, 2022, *https://d18rn0p25nwr6d.cloudfront.net/CIK-*

Continued

funding for NdFeB magnet production. In July 2020, under DPA Title III, Noveon was provided $28.8 million to develop NdFeB magnet manufacturing, which will begin in 2022 and ramp up thereafter.[135] Noveon later received $0.86 million for an inventory demonstration.[136] In November 2020, DoD also provided $2.3 million in DPA Title III funding to TDA Magnetics for a rare earth element supply chain study.[137]

The U.S. Government also funded projects related to the NdFeB magnet value chain through the SBIR program.[138] SBIR provides funding on a competitive basis to encourage high technology innovation by small businesses with less than 500 employees. In general, funding of up to $275,000 over a six month to one year period is granted for Phase I projects (*i.e.,* projects at the technical assessment and feasibility stage), and up to $1.8 million over a two-year period for Phase II projects (to allow for continued research and development after a successful Phase I). Like other federal awards, SBIR contracts allocate intellectual property rights between the U.S. Government and the awardee according to a detailed regulatory regime. A typical SBIR patent rights clause generally permits the SBIR awardee to retain ownership of inventions, but grants the U.S. Government a ''non-exclusive, nontransferable, irrevocable paid-up license to practice the subject invention throughout the world.'' [139]

In 2020 and 2021, SBIR awards directly related to neodymium were made to ten organizations—DoD units funded three of these, and DoE units funded seven. Projects included novel separation and metal reduction technologies, as well as recycling/reclaiming rare earths and magnets from end-of-life products and waste feedstocks. Additional projects focused on the development of electric motors that are free of rare earth elements or have reduced rare earth element content. If expanded to include SBIR awards related more broadly to rare earth elements, the total number of projects funded increases to 52 in 2020 and 2021 alone, and over 300 over the history of the SBIR program.

In one example, the Defense Logistics Agency—Strategic Materials is leveraging SBIR funding and Rapid Innovation Funding to accelerate the development of new rare earth processing technologies through a grant to Rare Earth Salts.[140] Rare Earth Salts will use this money to scale production of separate rare earth oxides to 20 tons of neodymium-praseodymium at its facility in Beatrice, NE. Using a unique separations process, Rare Earth Salts claims it can separate and refine all seventeen rare earth elements, providing DoD with a viable alternative to foreign sources.[141]

DoE has also provided funding related to the NdFeB magnet value chain. For example, DoE has advanced research on recovering rare earths from unconventional sources, including coal, coal byproducts, and other waste materials.[142] Through basic and applied research conducted in DoE labs, small businesses, and universities, DoE was able to establish pilot scale facilities capable of producing small quantities of high purity, mixed rare earth oxides. DoE expanded this program in 2020 in response to Executive Order 13817 to include upstream beneficiation yielding mixed rare earth oxides, midstream processing, separation, recovery of rare earth elements and critical minerals, and ultimately onshore downstream manufacturing that incorporates these materials into consumer and national defense products. In 2021, efforts were initiated that address the development of innovative, cost-reduced processing for the separation of mixed rare earth elements into individual, high purity oxides, and reduction of these materials to metals for use in alloy production, advanced technology development, and component manufacturing. The final goal is to produce one to three tons a day of mixed rare earth oxides and metals in prototype separation facilities by 2026.

In April 2021, DoE, through the National Energy Technology Laboratory, announced $19 million in grants to support production of rare earth elements and critical minerals vital to manufacturing batteries, magnets, and other products important to the clean energy economy.[143] The grants, of up to $1.5 million each, were allocated to 13 projects across the country to assess resources and extract and process rare earth elements and critical minerals in traditionally fossil-fuel producing communities. Not only will these initiatives help alleviate shortages in domestic supply and place the United States at the forefront of the clean energy economy, but they support regional economic growth and job creation in economically distressed communities. Many of these projects relate to reclaiming and processing rare earth elements from coal mine-derived waste.

6.3.3 NdFeB Magnets, Climate Change, and the National Security

The Department of Defense, the Department of Homeland Security, the National Security Council, and the Director of National Intelligence have identified climate change as a threat to national security. Climate-fueled events and scarce resources create instability, heightened military tensions, and financial hazards which can lead to worsening conflicts between countries.[144] Climate change and extreme weather events may also significantly increase the dislocation and migration of people.[145] Climate

0001801368/77b2894e-b746-43c5-938a-a3f524823baa.pdf.

[135] ''DoD Announces $77.3 Million in Defense Production Act Title III COVID–19 Actions,'' Department of Defense, July 24, 2020, *https://www.defense.gov/News/Releases/Release/Article/2287490/dod-announces-773-million-in-defense-production-act-title-iii-covid-19-actions/.*

[136] ''DoD Announces Rare Earth Element Awards to Strengthen Domestic Industrial Base,'' Department of Defense, November 17, 2020, *https://www.defense.gov/News/Releases/Release/Article/2418542/dod-announces-rare-earth-element-awards-to-strengthen-domestic-industrial-base/.*

[137] Ibid.

[138] Information in this paragraph is drawn from the SBIR website. *See* ''SBIR,'' Small Business Administration, n.d., *https://www.sbir.gov/?msclkid=fddb897aac5011ec87c1465b3f85f68e.*

[139] ''37 CFR 401.14—Standard patent rights clauses,'' Cornell Law School Legal Information Institute, n.d., *https://www.law.cornell.edu/cfr/text/37/401.14.*

[140] ''DOD Announces Rare Earth Element Awards to Strengthen Domestic Industrial Base,'' Department of Defense, November 17, 2020, *https://www.defense.gov/News/Releases/Release/Article/2418542/dod-announces-rare-earth-element-awards-to-strengthen-domestic-industrial-base/msclkid/dod-announces-rare-earth-element-awards-to-strengthen-domestic-industrial-base/.*

[141] ''Defense Logistics Agency Research and Development: Small Business Innovation Programs,'' Defense Logistics Agency, n.d. 2022, *https://www.dla.mil/Portals/104/Documents/SmallBusiness/Always%20Accountable%20Program%20Sheet_10%20NOV%202020.pdf?ver=2A6BDQejXejBr5xDhoLDyQ%3D%3D.*

[142] Information in this paragraph is drawn from a DoE document describing the program. *See* ''Rare Earth Elements and Critical Minerals,'' National Energy Technology Laboratory, February 2022, *https://www.netl.doe.gov/sites/default/files/2022-02/Program-141.pdf.*

[143] The information in this paragraph is drawn from a DoE press announcement. *See* ''DOE Awards $19 Million for Initiatives to Produce Rare Earth Elements and Critical Minerals,'' Department of Energy, April 29, 2021, *https://www.energy.gov/articles/doe-awards-19-million-initiatives-produce-rare-earth-elements-and-critical-minerals.*

[144] Christopher Flavelle et al., ''Climate Change Poses a Widening Threat to National Security,'' The New York Times, October 21, 2021, *https://www.nytimes.com/2021/10/21/climate/climate-change-national-security.html.*

[145] Renee Cho, ''Climate Migration: An Impending Global Challenge,'' Columbia Climate School, May 13, 2021, *https://news.climate.columbia.edu/2021/05/13/climate-migration-an-impending-global-challenge/*; David J. Kazcan and Jennifer Orgill-Meyer, ''The impact of climate change on migration: a synthesis of recent empirical insights,'' Climatic Change 158: 281–300, 2020, *https://doi.org/*

change is an existential crisis that poses a grave threat to the United States and the international community. To address this crisis, President Biden established a national goal to achieve net-zero carbon emissions by 2050.[146] Transitioning away from gas powered to electric vehicles is an important part of U.S. and global efforts to address climate change by slashing greenhouse gas emissions, and NdFeB magnets are key to electric vehicle performance. In addition, NdFeB magnets power offshore wind turbine generators, which are another key element in achieving clean energy goals.

6.3.4 Electric Vehicles

Although the United States currently lags many other countries in the percentage of vehicles sold that are electric, President Biden has set a goal that by 2030 half of all new vehicles sold will be electric.[147] This will reduce greenhouse gas emissions by more than 60 percent over 2020 levels and positions the country to be a leader in the automobile manufacturing of the future. Funds have already been dedicated to advancing the domestic electric vehicle industry and key components such as batteries.

The global transition to electric vehicles is expected to lead to a rapid increase in demand for NdFeB magnets. Although automobile manufacturers can use non-NdFeB magnet motors, up to 95 percent of electric vehicles use rare earth magnets in their traction drive motors.[148] NdFeB magnets are highly desirable in traction drive motors because they provide high energy efficiency which allows for increased driving range. Electric vehicle drive train motors typically require higher grade NdFeB magnets (using six percent or more of dysprosium) due to the high temperature environment.

In addition to traction drive motors, NdFeB magnets, often of lesser grades, are used in various other automotive systems in both electric and conventional vehicles, including motors for door locks, mirrors, seat positioning, power steering, alternators, suspension control, anti-lock brakes, water pumps, and loudspeakers. Most sources estimate that electric vehicle drive trains use between one and two kilograms (kgs) of NdFeB magnets, with other applications using smaller amounts of NdFeB magnets.[149] [150] NdFeB magnets are a small percentage of the cost of production. The European Raw Materials Alliance (ERMA) forecasts that rare earth magnets used in electric vehicles will account for $2.3 to $3.5 billion out of a global electric vehicle market of $725 to $1,160 billion, or less than 0.5 percent of the value of the market.[151] NdFeB magnets are nonetheless key to enhancing vehicle performance over non-magnet alternatives.

The developing electric vehicle industry in the United States, in addition to the global electric vehicle market, represents a valuable opportunity for current and potential NdFeB magnet manufacturers. In one extreme example, if all new vehicle sales in 2040 were electric vehicles—an estimated 125 million vehicles globally—the global electric vehicle industry alone would consume at least 156,000 tons of NdFeB magnets and 342,000 tons of total rare earth oxides.[152] By comparison, in 2020 about three million electric vehicles were sold globally (4.6 percent of total) and electric vehicles consumed 7,300 tons of NdFeB magnets.[153] [154] [155] Consumer preferences, coupled with government actions to achieve the goal of having half of vehicles sold in the United States be electric by 2030, constitute a key opportunity for the nascent U.S. NdFeB magnet industry. If enough electric vehicle drive trains are manufactured in the United States, electric vehicles are a potential source of consistent demand that could sustain a domestic NdFeB magnet industry.[156] General Motors' plan to manufacture electric vehicles in the United States and use U.S. NdFeB magnets is important step in this direction, and similar actions should be encouraged to ensure the viability of U.S. NdFeB magnet manufacturers.[157]

10.1007/s10584-019-02560-0; ''Groundswell Part 2: Acting on International Climate Migration,'' World Bank, September 13, 2021, *https://openknowledge.worldbank.org/handle/10986/36248*.

[146] *See* ''Fact Sheet: President Biden Signs Executive Order Catalyzing America's Clean Energy Economy Through Federal Sustainability,'' The White House, December 8, 2021, *https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/08/fact-sheet-president-biden-signs-executive-order-catalyzing-americas-clean-energy-economy-through-federal-sustainability/*.

[147] *See* ''Executive Order on Strengthening American Leadership in Clean Cars and Trucks,'' The White House, August 5, 2021, *https://www.whitehouse.gov/briefing-room/presidential-actions/2021/08/05/executive-order-on-strengthening-american-leadership-in-clean-cars-and-trucks/*; ''Fact Sheet: President Biden Announces Steps to Drive American Leadership Forward on Clean Cars and Trucks,'' The White House, August 5, 2021, *https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/05/fact-sheet-president-biden-announces-steps-to-drive-american-leadership-forward-on-clean-cars-and-trucks/*.

[148] Roland Gaus et al., ''Rare Earth Magnets and Motors: A European Call for Action,'' European Raw Materials Alliance, September 2021, *https://erma.eu/app/uploads/2021/09/01227816.pdf*.

[149] Roland Gaus et al., ''Rare Earth Magnets and Motors: A European Call for Action,'' European Raw Materials Alliance, September 2021, *https://erma.eu/app/uploads/2021/09/01227816.pdf*; ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf*; Steve Constantinides, ''The Big Picture: Putting the Magnet Market Trends Together,'' Presentation at Magnetics 2018 at Orlando, FL, February 8, 2018.

[150] Conventional vehicles also use small amounts of NdFeB magnets. Estimates of total NdFeB magnet rare earths content ranges from 4 grams to 356 grams per vehicle. *See* Ruby T. Nguyen et al., ''NdFeB content in ancillary motors of U.S. conventional passenger cars and light trucks: Results from the field,'' Waste Management 83: 209–217, 2019, *https://doi.org/10.1016/j.wasman.2018.11.017*.

[151] The original figures were quoted in euros: two to three billion euros for the value of rare earth magnets used in electric vehicles and 625 to 1000 billion euros for the value of the global electric vehicle market. These figures were converted into dollars at an exchange rate of 1.16 euro to the dollar, at the lower end of the exchange rate in September 2021 when the ERMA forecast was published, which fluctuated between 1.16 and 1.19 euro to the dollar. Roland Gaus et al., ''Rare Earth Magnets and Motors: A European Call for Action,'' European Raw Materials Alliance, September 2021, *https://erma.eu/app/uploads/2021/09/01227816.pdf*.

[152] This figure assumes each electric vehicle consumes 1.25 kgs of NdFeB magnets. This calculation relies on electric vehicle drive trains only to calculate demand. Actual demand will be higher because of NdFeB magnet use in ancillary products, such as door locks and speakers. *See* Steve Constantinides, ''The Big Picture: Putting the Magnet Market Trends Together,'' Presentation at Magnetics 2018 at Orlando, FL, February 8, 2018.

[153] ''Global EV Outlook 2021,'' International Energy Agency, April 2021. *https://www.iea.org/reports/global-ev-outlook-2021*.

[154] ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf*.

[155] The differences in magnet weight per vehicle is likely attributable to the opacity of NdFeB magnet usage across the sector. The Department of Energy estimates each electric vehicle drive train uses between one and two kgs of NdFeB magnets, while Constantinides (2018) estimates each electric vehicle drive train uses 1.25 kgs of NdFeB magnets. In addition, as mentioned earlier electric vehicles also use NdFeB magnets in non-drive train applications. *See* Steve Constantinides, ''The Big Picture: Putting the Magnet Market Trends Together,'' Presentation at Magnetics 2018 at Orlando, FL, February 8, 2018; ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf*.

[156] Indeed, electric vehicles appear to be the key market for prospective NdFeB magnet manufacturers. For example, potential market entrants cite the industry as a sales target in public documents. ''Form 10-k,'' MP Materials, February 28, 2022, *https://d18rn0p25nwr6d.cloudfront.net/CIK-0001801368/77b2894e-b746-43c5-938a-a3f524823baa.pdf*.

[157] ''Paul A. Eisenstein,'' General Motors to source rare earth metals domestically for its electric vehicles,'' NBC, December 9, 2021, *https://www.nbcnews.com/business/autos/general-motors-announces-deal-source-rare-earth-metals-electric-vehicl-rcna8265*.

6.3.5 Wind Energy

Wind turbines, particularly offshore wind turbines, also represent a large growth market for NdFeB magnets. NdFeB magnets are used in wind turbines' permanent magnet synchronous generators, also referred to as direct drive generators. Although not all wind turbine systems require rare earth magnets, they are the preferred choice for offshore wind turbines due to reduced maintenance costs, generator efficiency, and generator weight (which allows for the construction of larger, higher capacity wind turbines).[158] Each wind turbine can use a ton or more of NdFeB magnets.[159] As with electric vehicles, NdFeB magnets are a negligible percentage of total wind turbine costs but are critical to performance.[160] Chinese and European firms dominate wind turbine manufacturing with 23 percent and 58 percent market share, respectively.[161] GE Renewable, the only major U.S. manufacturer, had an estimated market share of just under 12 percent in 2020.[162] However, offshore wind turbine generators that constitute the largest source of demand for NdFeB magnets are not currently produced in the United States.

At present, the United States has just seven offshore wind turbines in two operating projects.[163] The Block Island Wind Farm off the coast of Rhode Island comprises five turbines, with a generating capacity of 30 megawatts, and the Coastal Virginia Offshore Wind pilot project operates an additional two turbines, with a capacity of 12 megawatts. In contrast, Europe has 25,000 megawatts of offshore wind capacity installed. To support the President's clean energy objectives, DoE has established a goal of deploying 30 gigawatts (30,000 megawatts) of offshore wind power by 2030. To fulfill this goal, in February 2022 the U.S. Government opened bidding for offshore wind leases to developers for the New York Bight off the Atlantic coast that could generate up to seven gigawatts of energy and require 600 to 700 wind turbines. Beyond the national-level goal, eight states—Connecticut, Maryland, Massachusetts, New Jersey, New York, North Carolina, Rhode Island, and Virginia—are aiming to procure at least 39,298 megawatts of offshore wind capacity by 2040.

The goal to expand offshore wind capacity is tied to the Biden Administration's broader efforts to transition to a clean energy economy. To meet DoE's target of 30 gigawatts of offshore wind power by 2030, the industry is projected to generate over 31,000 construction period and 13,400 operating period jobs.[164] This represents a promising demand stream for emerging domestic NdFeB magnet production and may encourage further investment in domestic capacity, especially if wind turbine generators are manufactured in the United States. Already, one of the leading wind turbine manufacturers, Siemens Gamesa, announced plans to build a wind turbine blade facility in Virginia.[165] Although NdFeB magnets are primarily used in generators, this indicates some willingness on the part of the wind turbine industry to establish domestic component manufacturing. Encouraging additional domestic manufacturing of wind turbine generators would promote U.S.-based demand for NdFeB magnets and aid in the development of the U.S. NdFeB magnet industry.

6.4 U.S. Trade in NdFeB Magnets

As noted earlier in this report, the U.S. is highly dependent on imports for nearly all its direct demand for NdFeB magnets.[166] However, using direct imports underestimates U.S. import dependence because NdFeB magnets are often embedded in imported intermediate and final goods, such as computers and headphones.

To analyze U.S. reliance on imports of NdFeB magnets, the Department examined imports of sintered NdFeB magnets (HTS 8505.11.0070) for the years 2016 to 2021 from the United States' top five import sources (as of 2021) by value, in raw numbers and by share of imports (*see* Figure 1).[167] [168] Figure 2 show the same series but using quantity (units). China is the predominant source of imports to the United States, having increased its share of magnet imports to the United States in quantity from about 70 percent in 2016 to almost 85 percent in 2021 and in value from almost 60 percent in 2016 to about 75 percent in 2021. Germany and Japan are the next largest source of imports. Japan is particularly important in terms of magnet value, representing almost nine percent of imports by value compared to under five percent of imports by quantity. This substantiates a commonly held view that Japanese magnets tend to be of higher quality or used in more specialized end products than their Chinese counterparts.[169] These data may underestimate the contribution of Japanese firms, given that exports from the Philippines and Malaysia likely reflect Japanese production facilities in these locations.[170] The share of German magnet imports to the United States has fallen substantially from about 14 percent in 2016 to under two percent in 2021 in terms of quantity and almost 11 percent in 2016 to under four percent in 2021 in terms of value.

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[158] ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf.*

[159] Roland Gaus et al., ''Rare Earth Magnets and Motors: A European Call for Action,'' European Raw Materials Alliance, September 2021, *https://erma.eu/app/uploads/2021/09/01227816.pdf.*

[160] [TEXT REDACTED].

[161] Roland Gaus et al., ''Rare Earth Magnets and Motors: A European Call for Action,'' European Raw Materials Alliance, September 2021, *https://erma.eu/app/uploads/2021/09/01227816.pdf.*

[162] Shashi Barla, ''Global wind turbine market: state of play,'' Wood Mackenzie, April 14, 2021, *https://www.woodmac.com/news/opinion/global-wind-turbine-market-state-of-play/.*

[163] This paragraph uses data from the Department of Energy's Offshore Wind Market Report 2021. Walter Musial et al., ''Offshore Wind Market Report: 2021 Edition,'' Department of Energy, August 30, 2021, *https://www.energy.gov/sites/default/files/2021-08/Offshore%20Wind%20Market%20Report%202021%20Edition_Final.pdf.*

[164] Ibid.

[165] ''Global leadership grows: Siemens Gamesa solidifies offshore presence in U.S. with Virginia blade facility,'' Siemens Gamesa, October 25, 2021, *https://www.siemensgamesa.com/newsroom/2021/10/offshore-blade-facility-virginia-usa.*

[166] Unless otherwise noted, all data in this section are from the U.S. International Trade Commission. *See* ''USITC Dataweb,'' U.S. International Trade Commission, last modified October 25, 2021, *https://dataweb.usitc.gov/trade/search/Import/HTS.*

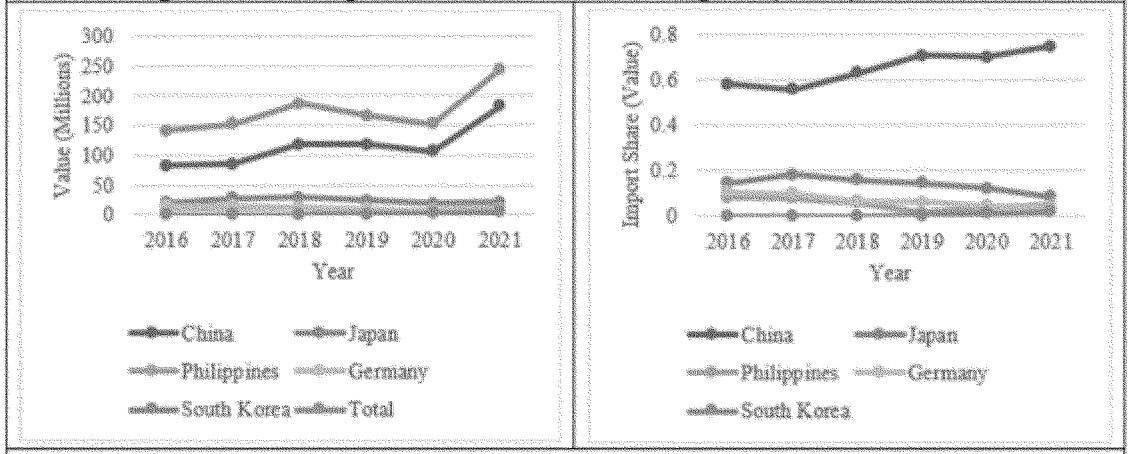
[167] Bonded NdFeB magnets do not have their own HTS code and instead fall into HTS 8505.11.0090 (''Permanent magnets and articles intended to become permanent magnets after magnetization: Of metal: Other''). Bonded NdFeB magnets comprise about seven percent of the global market, are of lower grade, and are substitutable with other magnets. Meeting between the Critical Materials Institute and the Department of Commerce, (Virtual Meeting October 6, 2021); ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf.*

[168] The Department also examined imports of neodymium metal (HTS 2805.30.0020). Neodymium and praseodymium metal are the only NdFeB magnet components that have their own HTS codes. Imports of neodymium metal are minimal (about $371,000 in 2021) and come almost entirely from China (about 94 percent in 2021) with the remainder imported from the United Kingdom. ''USITC Dataweb,'' U.S. International Trade Commission, last modified October 25, 2021, *https://dataweb.usitc.gov/trade/search/Import/HTS.*

[169] Damien Ma and Joshua Henderson, ''The Impermanence of Permanent Magnets: A Case Study on Industry, Chinese Production, and Supply Constraints,'' Paulson Institute, November 16, 2021. *https://macropolo.org/analysis/permanent-magnets-case-study-industry-chinese-production-supply/.*

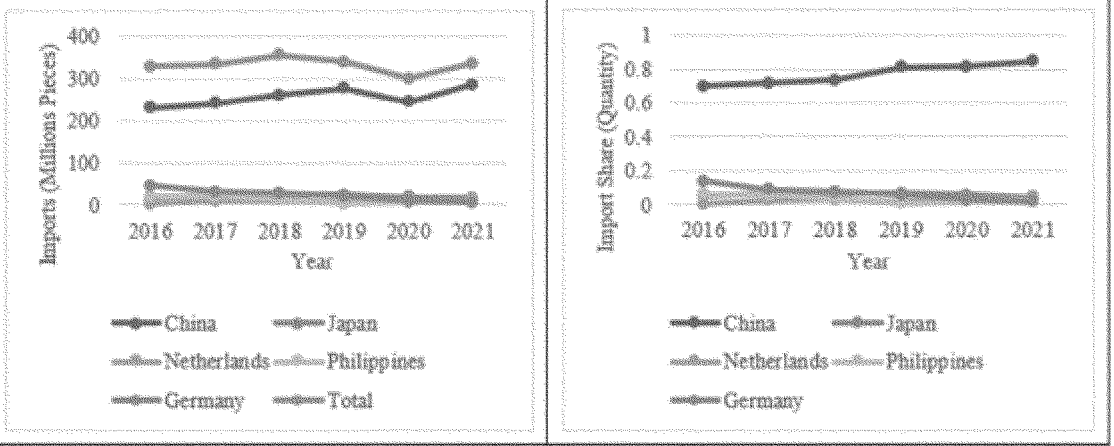
[170] ''Annual Report 2021'', Shin-Etsu Chemical Co., Ltd., 2021, *https://www.shinetsu.co.jp/wp-content/uploads/2021/07/Annual-Report-2021-for-viewing.pdf.*

Figure 1: U.S. Imports of Sintered NdFeB Magnets (Value), 2016-2021



Source: The Department's calculations, from "USITC Dataweb," U.S. International Trade Commission, last modified October 25, 2021, https://dataweb.usitc.gov/trade/search/Import/HTS.

Figure 2: U.S. Imports of Sintered NdFeB Magnets (Quantity), 2016-2021

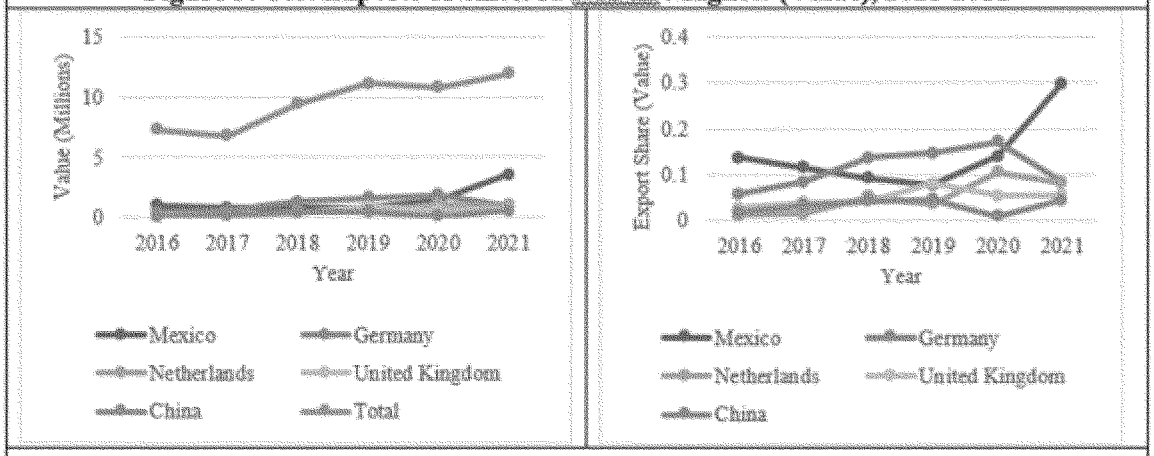


Source: The Department's calculations, from "USITC Dataweb," U.S. International Trade Commission, last modified October 25, 2021, https://dataweb.usitc.gov/trade/search/Import/HTS.

The Department also examined U.S. exports of sintered NdFeB magnets in total and to the top five destinations (as of 2021) for the same 2016 to 2021 period (*see* Figure 3).[171] Domestic exports of sintered NdFeB magnets ranged from a little over $7 million in 2016 to about $12 million in 2021. Mexico was the top destination for U.S. exports in 2021, although it still only accounted for about 30 percent of domestic sintered NdFeB magnet exports. Germany, the second most popular destination, accounted for less than nine percent of domestic sintered NdFeB magnet exports. U.S. magnet export destinations have also seen considerable turnover. In 2016, Singapore and Malaysia were the top destinations for U.S. sintered NdFeB magnet exports, accounting for about 28 percent of domestic exports ($2 million) and 15 percent of domestic exports ($1.1 million), respectively. By 2021, they were seventh at four percent ($488,000) and sixteenth at less than two percent ($185,000), respectively. Using 2021 figures, the United States imported more than 20 times the value of its domestic NdFeB magnet exports. Although there is only one active domestic producer of sintered NdFeB magnets, the United States does have an active ecosystem of magnet finishers and fabricators. These firms' activities almost certainly drive the modest value of U.S. NdFeB magnet domestic exports.

[171] These data reflect domestic exports rather than total exports. Domestic exports measure goods that are grown, produced, or manufactured in the United States or which may have been changed, enhanced in value, or improved in condition in the United States. It therefore excludes unimproved reexports. *See* ''USITC Dataweb,'' U.S. International Trade Commission, last modified October 25, 2021, *https://dataweb.usitc.gov/trade/search/Export/HTS.*

Figure 3: U.S. Exports of Sintered NdFeB Magnets (Value), 2016-2021



Source: The Department's calculations, from "USITC Dataweb," U.S. International Trade Commission, last modified October 25, 2021, https://dataweb.usitc.gov/trade/search/Export/HTS.

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6.5 Duties on NdFeB Magnet Imports

NdFeB magnets and constituent products, including rare earth elements, rare earth carbonates, rare earth oxides, metals, and alloys, are subject to general tariff rates and the special tariff rate (*see* Table 5). The core product in this investigation, sintered NdFeB magnets (HTS 8505.11.0070) are subject to a general rate of 2.1 percent or a preferential rate of zero percent.[172] The overall effect of these duties on end-users is small, although not nonexistent. Some NdFeB magnet distributors/finishers/consumers note reducing tariffs on sintered NdFeB magnets would reduce their input costs, [TEXT REDACTED].[173]

TABLE 5—TARIFF RATES FOR NdFeB MAGNETS AND MAGNET COMPONENTS

HTS code	Product description	General rate (percent)	Preferential rate	Japan general rate	EU general rate [174]
8505.11.0070	Sintered NdFeB magnets	2.1	Free	Free	2.2 percent.
8505.11.0090	Other permanent magnets and articles intended to become permanent magnets after magnetization of metal.	2.1	Free	Free	2.2 percent.
2805.30.0020	Neodymium metal	5	Free	Free	2.7 to 5.5 percent.[175]
2805.30.0015	Praseodymium metal	5	Free	Free	2.7 to 5.5 percent.
2805.30.0050	Other rare earth metals, not intermixed or interalloyed.	5	Free	Free	2.7 to 5.5 percent.
2805.30.0090	Other rare earth metals, intermixed or interalloyed	5	Free	Free	2.7 to 5.5 percent.
2846.90.20 ..	Mixtures of rare earth oxides or rare earth chlorides	Free	Free	Free	Free to 3.2 percent.[176]
2846.90.80 ..	Mixtures of rare earth carbonates other than cerium carbonate.	3.7	Free	Free	Free to 3.2 percent.

Sources: "HTS Search," U.S. International Trade Commission, last accessed April 19, 2022, *https://hts.usitc.gov/*; "Access2Markets," European Commission, last accessed April 19, 2022, *https://trade.ec.europa.eu/access-to-markets/en/home*; "Japan's Tariff Schedule as of April 1 2022," Japan Customs, last accessed April 19, 2022, *https://www.customs.go.jp/english/tariff/2022_04_01/index.htm.*

The hundreds of products containing embedded NdFeB magnets, such as electric motors, MRI machines, and consumer electronics like headphones and printers are also tracked by HTS code. Some end-use categories, including electric motors and MRI machines, are not subject to general tariff rates, while others, such as generators for wind turbines, are subject to tariffs—2.5 percent in the case of generators.[177] As discussed earlier, the NdFeB magnet contained within final goods is generally a small percentage of the overall cost of the product.

[172] The general rate for all 10-digit HTS codes under HTS 8505.11.00 ("Permanent magnets and articles intended to become permanent magnets after magnetization: Of metal") is the same at 2.1 percent. Bonded NdFeB magnets, which fall under 8505.11.0090 ("Permanent magnets and articles intended to become permanent magnets after magnetization: Of metal: Other"), are therefore subject to the same rates as their sintered counterparts. The preferential tariff rate applies to qualifying imports under U.S. free trade agreements and other preference programs.

[173] U.S. Department of Commerce, Bureau of Industry and Security, NdFeB Survey.

[174] These figures reflect the stated third country duty. Autonomous tariff suspension rates may be lower—zero percent in the case of 8505.11.0070, sintered NdFeB magnets.

[175] Exact concordance for HTS 2805 not available.

[176] Exact concordance for HTS 2846.90 not available. The relevant products for NdFeB magnets face third country duties of 3.2 percent (neodymium and praseodymium compounds, as well as compounds of mixtures of metals) or zero percent (terbium and dysprosium compounds).

[177] "HTS Search," U.S. International Trade Commission, last accessed April 19, 2022, *https://hts.usitc.gov/.*

7. Global NdFeB Magnet Industry

7.1 Global Demand

Total global demand for NdFeB magnets was estimated at about 119,000 tons in 2020, of which sintered magnets account for over 93 percent of total demand and bonded magnets the remaining seven percent.[178] [179] As of 2020, consumer electronics and industrial motors are the primary consumers of NdFeB magnets, with about 30 percent of the market each. Offshore wind turbines account for another 14 percent of total NdFeB magnet demand, with smaller shares for electric vehicles, motors for other types of vehicles, and other applications (*see* Table 6). The magnet content in these products varies but in general accounts for a small portion of the material costs of production. Wind turbines and MRI machines use large amounts of magnets but are produced and consumed in relatively small numbers, while consumer electronic devices contain very small amounts of magnets but are produced in the millions of units. The automotive sector lies somewhere in between, with each electric vehicle drive train consuming between one and two kg of NdFeB magnets.[180] Regardless of the weight of the magnet, the strong magnetic properties provided by NdFeB magnets are key to effective and efficient product performance.

TABLE 6—EXPECTED MAGNETS CONTAINED IN TOTAL GLOBAL DEMAND FOR SELECTED NdFeB MAGNET APPLICATIONS, THOUSANDS OF TONS *

Application	Total demand in 2020		Total projected demand in 2030 (high growth)		Total projected demand in 2050 (high growth)	
	Amount (kt)	Share (%)	Amount (kt)	Share (%)	Amount (kt)	Share (%)
Offshore wind turbines	16.9	14.2	139.2	36.0	273.7	36.3
Electric vehicles	7.3	6.1	114.1	29.5	266	35.3
Consumer electronics (hard disk drives, cell phones, loudspeakers, other)	35.1	29.4	41	10.6	65.4	8.7
Industrial motors	36.0	30.2	53.7	13.9	85.7	11.4
Non-drivetrain motors in vehicles	9.4	7.9	18.3	4.7	29.3	3.9
Other sintered magnets (Power tools, electric bikes)	6.5	5.5	9.6	2.5	15.3	2.0
Bonded magnets	8.0	6.7	11.1	2.9	17.7	2.3
Total	119.2	100.0	387	100.0	753.2	100.0

* The figures presented represent total—or the sum of direct and embedded—demand.
Source: ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf.*

Total global demand for NdFeB magnets is expected to grow dramatically over the next decade, increasing from 119,000 tons in 2020 to 387,000 tons by 2030 and over 750,000 tons by 2050 in a net zero carbon emission scenario. This equates to an average annual growth rate of 12.5 percent through 2030 and 6.3 percent through 2050. Electric vehicles and offshore wind turbines will drive this growth and are projected to account for almost 30 percent and about 36 percent of NdFeB magnet demand, respectively, by 2030 as a result of the world's evolving clean energy goals. The push for energy efficiency in other sectors, including traditional NdFeB magnet applications such as consumer electronics and industrial motors, will also contribute to increased demand for NdFeB magnets. However, growth in these areas is expected to be more modest, with their share of total demand shrinking from almost 60 percent of total demand in 2020 to less than 25 percent of total demand in 2030.

The rapid growth in demand for NdFeB magnets is expected to strain the current global value chain. One market research firm forecasts that combined neodymium, praseodymium, and neodymium-praseodymium oxide shortages will rise to 21,000 tons by 2030 and 68,000 tons by 2035, while NdFeB alloy and powder shortages will reach 66,000 tons by 2030 and 206,000 tons by 2035.[181] For reference, the Department's survey of the U.S. NdFeB magnet industry indicates that by 2026 the U.S. may produce a little under [TEXT REDACTED] of rare earth oxides and about [TEXT REDACTED] of NdFeB alloys.

7.2 Global NdFeB Magnet Value Chain

The Department synthesized primary and secondary data on the global NdFeB magnet value chain's market conditions (*see* Appendix E, ''Global NdFeB Magnet Production: A Firm-Level Perspective''). The Department focused on five important current and potential industry producers outside of the United States: Australia, Canada, China, the European Union, and Japan. For each country or region, participation in the main market segments (mining, processing of carbonates/separation of oxides, metallization/alloying, magnet production) plus recycling and substitution is described. The major firms involved in production, often multinationals with global operations, are also discussed.

Table 7 provides a review of market share by country for the consolidated market segments of mining, separation, metallization, and alloying/magnet manufacture. As noted earlier, China has the largest share of global production, by a large margin, at every step of the NdFeB magnet value chain.

[178] Except where otherwise noted this section draws on the DoE's ''Rare Earth Permanent Magnets'' report. *See* ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf.*

[179] As noted earlier, valid and reliable estimates of demand are difficult to generate because of the opacity of the global NdFeB magnet supply chain and these estimates of global demand, both in aggregate and by end-use application, should be approached with caution.

[180] ''Critical Materials Strategy,'' Department of Energy, December 2011, *https://www.energy.gov/sites/default/files/DOE_CMS2011_FINAL_Full.pdf.*

[181] ''Adamas Intelligence forecasts global demand for NdFeB magnets to increase at CAGR of 8.6% through 2035; shortages of alloys, powders, REE expected,'' Green Car Congress, April 20, 2022, *https://www.greencarcongress.com/2022/04/20220420-adamas.html.*

[TEXT REDACTED].[182] Australia is the third largest miner after China and the United States, and the Australian firm Lynas Rare Earths is responsible for Malaysia's seven percent share of the refined oxide market. Japan is the second largest alloy and magnet producer (seven percent in 2020), and its firms produce metals, alloys, and magnets in Japan, Southeast Asia, and China. [TEXT REDACTED].[183] The European Union has plans for significant growth in rare earth mining and magnet production, and seeks to grow its relatively small share of the oxide separation, alloying, and magnet production markets. [TEXT REDACTED].[184] Finally, Canada also plans to establish rare earth mining and separation capacity, in addition to Canadian firms such as Neo Performance Materials who maintain global capacity in multiple steps of the magnet value chain.

TABLE 7—MARKET SHARE BY COUNTRY, 2021 FOR MINING AND 2020 FOR OTHER STEPS

Country	Mining [185] (%)	Separation [186] (%)	Metal refining [187] (%)	Magnet alloy manufacturing [188] (%)
China	60	89	90	92
U.S	15			<1
Myanmar (Burma)	9			
Australia	8			
Madagascar	1			
India	1	1		
Russia	1			
Thailand	3		~3	([189])
Malaysia		7		
Estonia		1	~2	
Japan				7
Vietnam	>1		~3	1
Laos			~2	
Germany				<1
Slovenia				<1
Finland				<1
U.K			<1	
Other countries	1	2	<1	<1

Source: ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf*; Daniel Cordier, ''Rare Earths: Mineral Commodity Summaries 2022,'' U.S. Geological Survey, 2022, *https://pubs.usgs.gov/periodicals/mcs2022/mcs2022.pdf.*

7.3 Russia and the NdFeB Magnet Industry

Russia is not a major direct participant in the NdFeB magnet value chain. In 2021 Russian production of rare earth elements was estimated at 2,700 tons, equal to about one percent of the global market.[190] However, Russia has significant reserves of rare earths, estimated at 21 million tons or about 17.5 percent of the global total.[191] Canadian firm Neo Performance Materials states it uses Russian feedstocks in its Estonian separation facility, along with feedstocks from Australia, China, and the United States.[192] Russia does not participate in any downstream segments of the value chain.[193] In addition, the United States imports 1001 steel from Germany and sometimes Brazil, and ferroboron is produced in China, India, and Turkey.[194] Finally, based on market research and industry meetings, Russia does not appear to be a source of critical equipment for NdFeB magnet production.

[TEXT REDACTED]

One method to evaluate the exposure of the NdFeB magnet industry to Russia is to examine the effects of Russia's invasion of Ukraine on investor expectations using an event study.[195] If investors think that the NdFeB magnet industry will be negatively affected by Russia's invasion of Ukraine, an abnormal negative market return for

[182] Adamas Intelligence, ''Rare Earth Magnet Market Outlook to 2030,'' 2020.

[183] Ibid.

[184] Ibid.

[185] For 2021 estimates of rare earth mine output by country, *see* Daniel Cordier, ''Rare Earths: Mineral Commodity Summaries 2022,'' U.S. Geological Survey, 2022, *https://pubs.usgs.gov/periodicals/mcs2022/mcs2022.pdf.*

[186] Calculated based on current understanding of where concentrate from specific producers is separated (for example, output from Lynas' Mount Weld Mine in Australia is separated at its LAMP facility in Malaysia and HREs mined in Myanmar are transported to China for further processing). ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf.*

[187] Current hypothesis based on expert consultation. ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf.*

[188] ''Rare earth magnet market outlook to 2030,'' Adamas Intelligence, August 2020.

[189] In 2019, Thailand accounted for about eight percent of bonded NdFeB powders. Neo Magnequench (a subsidiary of Neo Performance Materials) manufactures bonded magnetic powders at its facility in Korat, Thailand. ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf.*

[190] Daniel Cordier, ''Rare Earths: Mineral Commodity Summaries 2022,'' U.S. Geological Survey, 2022, *https://pubs.usgs.gov/periodicals/mcs2022/mcs2022.pdf.*

[191] Ibid.

[192] ''Neo Performance Materials MD&A,'' Neo Performance Materials, 2021, *https://www.neomaterials.com/wp-content/uploads/2021/03/NPM_12-31-2020_MDA.pdf.*

[193] ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf.*

[194] Ibid.

[195] For an overview of event studies, *see e.g.,* John Binder, ''The Event Study Methodology Since 1969,'' Review of Quantitative Finance and Accounting 11: 111–137, 1998, *https://link.springer.com/article/10.1023/A:1008295500105*; S.P. Kothari and Jerold B. Warner, ''Chapter 1—Econometrics of Event Studies,'' Handbook of Empirical Corporate Finance, Volume 1, 2007, *https://doi.org/10.1016/B978-0-444-53265-7.50015-9*; Abigail McWilliams and Donald Siegel, ''Event Studies in Management Research: Theoretical and Empirical Issues,'' Academy of Management Journal 40 (3): 626–657, 1997, *https://doi.org/10.5465/257056.*

publicly traded firms in the NdFeB magnet industry should be observed around that event. The Department therefore estimated the abnormal market return around the time of Russia's invasion of Ukraine for four NdFeB magnet industry firms: MP Materials, a rare earths miner who plans to create a vertically integrated mine to magnet firm in the United States; Energy Fuels, a U.S. rare earths processor who is considering separating oxides; Neo Performance Materials, a Canadian firm that produces rare earth oxides in Estonia, metals and alloys in Thailand and China, and NdFeB magnets in China; and Lynas Rare Earths, an Australian rare earths miner that produces oxides in Malaysia. Other public companies involved in the NdFeB magnet value chain were excluded because they are conglomerates with significant non-NdFeB magnet operations (*e.g.,* Shin-Etsu, TDK, Hitachi), tangentially involved in the NdFeB magnet industry (*e.g.,* Chemours), or at a more nascent stage of production (*e.g.,* IperionX, Peak Rare Earths). The Department downloaded stock price data for each of these firms and the S&P 500 index from January 1, 2021, through February 24, 2022, from Yahoo Finance. The Department then calculated the daily return of each firm and the S&P 500 index. In line with a simple market model event study, the Department estimated each firm's abnormal return in two steps. For each firm, the Department first regressed the firm's daily return on the S&P 500 index's daily return in a trading window of 250 days to 30 days prior to Russia's invasion of Ukraine (February 24, 2022). The Department then used the estimated coefficients from this regression and the S&P 500 index's daily return to predict the firm's return in a trading window one day prior to one day after the invasion. Finally, the Department subtracted the firm's predicted daily return from the firm's observed daily return to generate an estimate of the firm's abnormal return in a trading window one day prior to one day after the invasion.

This event study analysis supports market research that suggests the NdFeB magnet industry is not highly exposed to Russia.[196] Using a one sample t-test, the average abnormal return is positive at $p<.05$ with a sample mean of 0.026 and a 95 percent confidence interval of 0.001 to 0.051.[197] A positive abnormal return indicates that firms' stock prices increased more than they would have in the absence of an invasion, suggesting that investors did not expect the invasion to negatively affect the NdFeB magnet industry. Not only is the sign of the abnormal return different than what would be expected if investors believed the invasion would negatively affect the NdFeB magnet industry, but it is statistically significant. This analysis provides additional evidence corroborating the NdFeB magnet industry's lack of exposure to Russia.

To assess whether one firm was driving this result, the Department iteratively dropped each observation, resulting in a sample mean of .018 without Energy Fuels (not significant at $p<.05$), 0.025 without Lynas Rare Earths (not significant at $p<.05$), 0.024 without MP Materials (not significant at $p<.05$), and 0.037 without Neo Performance Materials (significant at $p<.05$). Neo Performance Materials' stock price did not experience as positive an abnormal return as the other three firms', suggesting that investors were relatively less optimistic about the effects of the invasion on Neo Performance Materials. This is consonant with market research expectations, because Neo Performance Materials sources some rare earths from Russia (along with Australia, China, and the United States) and therefore has more direct exposure to Russia than the other three firms.[198]

8. Status and Forecast of the U.S. NdFeB Magnet Industry

8.1 U.S. Production of NdFeB Magnets and Components, 2017 to 2026

This section covers U.S. production of NdFeB magnets and magnet components, including mixed rare earth oxides, rare earth carbonates, individual rare earth oxides, rare earth metals, and rare earth alloys, from 2017 to 2026.[199] It focuses on identifying current and planned producers, their participation in the NdFeB magnet value chain, and the current and anticipated quantity of U.S. production at each value chain step. Later sections will elucidate the challenges the industry faces in meeting its production forecasts.

8.1.1 Firm Participation in the U.S. NdFeB Magnet Value Chain

Except for rare earths mining, the United States was not a major participant in the NdFeB magnet value chain from 2017 to 2021 and only seven firms participated in any step of the NdFeB magnet value chain over this period (*see* Figure 4). [TEXT REDACTED].

The Department forecasts U.S. industry growth starting in 2022, due to a combination of expected demand growth, U.S. Government and private sector interest in supply chain resiliency, and rising rare earths prices. Between 2022 and 2026, ten additional firms indicate they will enter the market while the seven original firms noted in the 2017 to 2021 period plan to continue, and in some cases expand, their operations. A total of 17 firms are expected to participate in the NdFeB magnet value chain by 2026 (*see* Figure 5). [TEXT REDACTED]

[TEXT REDACTED]

[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]
[TEXT REDACTED]							[TEXT REDACTED]	
[TEXT REDACTED]	[TEXT REDACTED]							
[TEXT REDACTED]							[TEXT REDACTED]	
[TEXT REDACTED]		[TEXT REDACTED]					[TEXT REDACTED]	
[TEXT REDACTED]	[TEXT REDACTED]							

[196] The Department strongly cautions against overinterpreting the results of this analysis because Russia's invasion was not wholly unanticipated and investors should therefore have partially priced in the costs of conflict, and the sample size is very small. Nevertheless, this analysis provides suggestive evidence of the NdFeB magnet industry's minimal exposure to Russia.

[197] Using a two-day trading window—the day of the event and the day after—results in an average abnormal return of 0.018, not significant at $p<.05$.

[198] ''Neo Performance Materials MD&A,'' Neo Performance Materials, 2021, *https://www.neomaterials.com/wp-content/uploads/2021/03/NPM_12-31-2020_MDA.pdf.*

[199] [TEXT REDACTED]

[TEXT REDACTED]—Continued

[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]
[TEXT REDACTED] [TEXT REDACTED]						[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]

[TEXT REDACTED]

[TEXT REDACTED]

[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]
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[TEXT REDACTED]

8.1.2 Production of NdFeB Magnets and Magnet Components, 2017 to 2026

Rare Earth Element Production (Mining and Recycling)

Between 2018 and 2021, U.S. production of NdFeB magnet-related rare earths increased by [TEXT REDACTED] (*see* Figure 6).[200] Between 2022 and 2026, U.S. rare earths production is expected to increase [TEXT REDACTED]. For the full 2018 to 2026 period, U.S. rare earths production is expected to increase by [TEXT REDACTED]. Mining is expected to remain the predominant source of rare earths feedstock, occupying roughly [TEXT REDACTED] of production for the period. Recycling is expected to account for the remaining [TEXT REDACTED].

[TEXT REDACTED]

[TEXT REDACTED]

[TEXT REDACTED] [TEXT REDACTED]

Of the rare earths used in NdFeB magnets, neodymium and praseodymium account for [TEXT REDACTED] of the 2017 to 2026 market, with neodymium making up around [TEXT REDACTED] and praseodymium around [TEXT REDACTED]. Dysprosium production is slated to increase starting in [TEXT REDACTED] and will bring neodymium and praseodymium's combined market share down to [TEXT REDACTED] by 2026.

[200] No production was recorded for 2017.

An increase in dysprosium production to over [TEXT REDACTED] in 2026 is significant due to previously cited concerns about single source concentrations in China.[201] Should dysprosium production develop, the United States may become a feasible alternative to China for some dysprosium sourcing.

[TEXT REDACTED]

Rare Earth Carbonates

Between 2023 and 2026, U.S. rare earth carbonates production is expected to increase [TEXT REDACTED] (*see* Figure 7).[202] Of these carbonates, those containing [TEXT REDACTED] are anticipated to be the main driver for this growth, accounting for [TEXT REDACTED] of total carbonates growth. Carbonates containing [TEXT REDACTED] make up most of the remaining production with small amounts of carbonates containing [TEXT REDACTED] expected to be produced starting in [TEXT REDACTED].

[TEXT REDACTED]

[TEXT REDACTED]

[TEXT REDACTED] [TEXT REDACTED]

[TEXT REDACTED]

Separated Rare Earth Oxides

Between 2023 and 2026, U.S. separated rare earth oxides production is expected to increase [TEXT REDACTED] (*see* Figure 8).[203] Of these oxides, [TEXT REDACTED] are the main driver of growth, accounting for on average [TEXT REDACTED] of total growth. [TEXT REDACTED], most of the remaining growth is due to [TEXT REDACTED] production, with a small [TEXT REDACTED] due to [TEXT REDACTED] and a negligible amount to [TEXT REDACTED].

[TEXT REDACTED]

[TEXT REDACTED]

[TEXT REDACTED]

[TEXT REDACTED] [TEXT REDACTED]

Rare Earth Metals

Between 2023 and 2026, U.S. rare earth metals production is expected to increase by [TEXT REDACTED] (*see* Figure 9).[204] At this production rate, the United States could produce between about [TEXT REDACTED] of NdFeB magnets.[205] Of these metals, [TEXT REDACTED] rare earth metal is the main driver for growth, accounting for on average [TEXT REDACTED] of total rare earth metals growth. [TEXT REDACTED] will make up much of the remaining growth. The Department expects U.S. firms will refine negligible amounts of [TEXT REDACTED].

[TEXT REDACTED]

[TEXT REDACTED]

[TEXT REDACTED]

[TEXT REDACTED] [TEXT REDACTED]

Rare Earth Alloys

Between 2023 and 2026, U.S. rare earth alloys production is expected to increase by [TEXT REDACTED] (*see* Figure 10).[206] At this production rate, the United States would produce enough alloy for between [TEXT REDACTED] of NdFeB magnets.[207] Of these alloys, [TEXT REDACTED] is anticipated to be the main driver of growth, representing on average [TEXT REDACTED] of total alloy growth. Production of [TEXT REDACTED] are expected to represent [TEXT REDACTED] of growth, respectively. NdFeB alloys containing heavy rare earths including dysprosium and terbium are critical for high heat tolerant NdFeB magnets used in products like electric vehicle drive trains.

[TEXT REDACTED]

[201] Comments of USA Rare Earth to Request for Public Comments, ''Section 232 National Security Investigation of Imports of Neodymium-Iron-Boron (NdFeB) Permanent Magnets,'' 86 FR 53277, November 12, 2021.

[202] [TEXT REDACTED]

[203] No production was recorded for 2017 to 2021 [TEXT REDACTED].

[204] No production was recorded for 2017 to 2021 [TEXT REDACTED].

[205] The Department reached this estimate by first calculating the amount of NdFeB alloy [TEXT REDACTED] of rare earth metal could produce based on 30 percent rare earths content in NdFeB magnets, then estimating the range of potential material loss from alloy production to magnet production (*see* Section 5.2, ''Rare Earth Element Losses in Magnet Production,'' for estimates of material loss from alloy production to magnet production).

[206] No production was recorded for 2017 to 2021 [TEXT REDACTED].

[207] *See* Section 5.2, ''Rare Earth Element Losses in Magnet Production,'' for estimates of material loss from alloy production to magnet production.

[TEXT REDACTED]

[TEXT REDACTED]

[TEXT REDACTED] [TEXT REDACTED]

NdFeB Magnet Production

Between 2017 and 2022, no sintered NdFeB magnet production was recorded in the United States. [TEXT REDACTED], commercial-scale production is not expected until 2023. Between 2023 and 2026, U.S. sintered NdFeB magnet production is expected to increase [TEXT REDACTED] to over 14,000 tons (*see* Figure 11).

[TEXT REDACTED].[208]

[TEXT REDACTED]

[TEXT REDACTED]

[TEXT REDACTED]

[TEXT REDACTED]

On average, sintered NdFeB magnet production is expected to account for roughly 97 percent of aggregate U.S. NdFeB magnet production. Although occupying a small portion of the market, it is important to note that domestic bonded NdFeB magnet production existed during the 2017 to 2021 period. Between 2017 and 2021, bonded NdFeB magnet production increased [TEXT REDACTED] (*see* Figure 11). Between 2022 and 2026 production is expected to increase by a further [TEXT REDACTED] from about [TEXT REDACTED], with total production increasing by [TEXT REDACTED] between 2017 and 2026.

[TEXT REDACTED]

8.1.3 Company Profiles

To better illuminate the plans, requirements, and challenges U.S. firms face in establishing production, the Department developed profiles of those firms that are expected to be major participants in the U.S. NdFeB magnet industry (*see* Appendix F, ''U.S. NdFeB Magnet Industry: Company Profiles''). [TEXT REDACTED].[209] These profiles emphasize information on current and planned facilities, including location, initial dates of production, and capacity, planned facilities' fixed costs, future production volumes, employment, and challenges.

8.1.4 Estimated NdFeB Magnet Import Penetration, 2017 to 2026

The Department used the data from its survey of the U.S. NdFeB magnet industry and estimates of U.S. NdFeB magnet demand to estimate import penetration for sintered and bonded NdFeB magnets from 2017 to 2026 (*see* Figures 12 and 13).[210] Based on these data and the assumptions detailed in footnote 210, the Department estimates sintered NdFeB magnet import penetration from 2017 to 2021 at one hundred percent. There was no domestic production of NdFeB magnets during this period. From 2022 to 2026 import penetration could fall to as low as 49 percent as domestic production ramps up. The Department estimates bonded NdFeB magnet import penetration from 2017 to 2021 at between 85 and 87 percent. This figure is expected to fall to about 79 percent due to expanded U.S. production. The Department emphasizes that, because of the optimistic production estimates and the modelling assumptions detailed in footnote 210, these import penetration estimates should be taken as a floor and actual import penetration is expected to be higher.

[208] ''General Motors and MP Materials Enter Long-Term Supply Agreement to Scale Rare Earth Magnet Sourcing and Production in the U.S.,'' General Motors, December 9, 2021, *https://investors.gm.com/news-releases/news-release-details/general-motors-and-mp-materials-enter-long-term-supply-agreement.*

[209] [TEXT REDACTED]

[210] The Department's figures rely on several demand and export assumptions and should be taken as lower bound for import penetration. U.S. production estimates are taken from the Department's survey and reflect firms' production forecasts as of February and March 2022. The quantity of domestic production in Figures 20 and 21 will require significant capital expenditure and faces additional constraints in the form of workforce issues and other challenges, discussed in more detail below. In addition, by relying on production of NdFeB magnets this analysis reflects direct imports only and does not take into account trade in value added. There are several domestic magnet integrators and finishers who purchase magnets or magnet blocks and shape and integrate them into intermediate and final products, some of which are exported. The Department's analysis does not account for these value-add activities. Further, the Department asked firms to only provide sales data if contracts or memorandums of understanding were in place. No prospective U.S. sintered NdFeB magnet producer indicated sales to foreign customers [TEXT REDACTED]. The Department therefore assumed no foreign sales of sintered NdFeB magnets [TEXT REDACTED]. Any foreign sales (*i.e.,* domestic exports) will increase import penetration. The Department used estimates of total U.S. demand provided by the Department of Energy (DoE). DoE estimated total 2020 and 2030 U.S. demand for NdFeB magnets, with the 2030 figure representing a high growth scenario. DoE's demand estimates reflect both direct and embedded demand. [TEXT REDACTED]

FIGURE 12—ESTIMATED U.S. SINTERED NdFeB MAGNET IMPORT PENETRATION, 2017 TO 2026, TONS

Figure/year	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026
U.S. Production	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]
U.S. Imports for Consumption*	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]
U.S. Domestic Exports**	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
U.S. Apparent Consumption***	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]
Import Penetration (No Exports)****	100%	100%	100%	100%	100%	99.7%	91%	74%	56%	49%

Source: U.S. Department of Commerce, Bureau of Industry and Security, NdFeB Survey, 3a, Section G.
Source: "Rare Earth Permanent Magnets: Supply Chain Deep Dive Report," Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf.*
*Imports for consumption are calculated as U.S. Apparent Consumption (*i.e.,* total demand) less U.S. production and therefore differs from direct imports.
**No exports recorded (measured in tons) over the period.
***[TEXT REDACTED]
****Import penetration estimates shown are minimums. Actual figures are expected to be higher due to modelling assumptions and optimistic production estimates.

FIGURE 13—ESTIMATED U.S. BONDED NdFeB MAGNET IMPORT PENETRATION, 2017 TO 2026, TONS

Figure/year	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026
U.S. Production	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]
U.S. Imports for Consumption*	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]
U.S. Domestic Exports**	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]
U.S. Apparent Consumption***	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]	[TEXT REDACTED]
Import Penetration (No Exports)****	87%	87%	87%	85%	87%	86%	86%	85%	79%	79%

Source: U.S. Department of Commerce, Bureau of Industry and Security, NdFeB Survey, 3a, Section G.
Source: "Rare Earth Permanent Magnets: Supply Chain Deep Dive Report," Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf.*
*Imports for consumption are calculated as U.S. Apparent Consumption (*i.e.,* total demand) less U.S. production and therefore differs from direct imports.
**[TEXT REDACTED]
***[TEXT REDACTED]
****Import penetration estimates shown are minimums. Actual figures are expected to be higher due to modelling assumptions and optimistic production estimates.

8.2 Requirements To Establish the U.S. NdFeB Magnet Industry

8.2.1 Facility Costs and Capital Expenditures

As indicated in the earlier section on firm-level profiles, the facilities required to produce NdFeB magnets and components of NdFeB magnets are costly to establish. In meetings with industry stakeholders, company representatives emphasized the substantial investment requirements to establish U.S. capacity. MP Materials announced in 2019 that it was spending $200 million to establish a domestic processing and separation facility and announced in February 2022 plans to spend $700 million to establish a vertically integrated NdFeB magnet supply chain in the United States.[211] [212] [TEXT REDACTED].[213] On the lower end of the spectrum, Quadrant Magnetics announced that it plans to invest $95 million to construct a U.S. NdFeB magnet manufacturing facility, with anticipated capacity of [TEXT REDACTED].[214] Other industry stakeholders, while not reporting specific costs, indicated that expenditures made it difficult to construct facilities without demand from anticipated customers. These figures emphasize the need for increased certainty of demand, ideally through definitive offtake agreements, and the limitations of current U.S. Government funding mechanisms, such as the Title III program, to provide sufficient capital.

The Department's survey provides further evidence on the costs to establish U.S. production facilities. Respondents were asked to list all future facilities that would start production between 2022 and 2026.[215] For each facility, respondents were asked to estimate the total cost it would take to reach full production capacity. There is considerable variation in facility costs between value chain steps (*see* Figure 14). The upstream steps of the value chain are generally the most expensive to establish, with the median mining facility estimated to cost [TEXT REDACTED], and the median oxide facility estimated to cost about [TEXT REDACTED]. In comparison to mining facilities, plants that reclaim/recycle rare earth elements from waste feedstocks are relatively inexpensive at [TEXT REDACTED]. Facility costs are generally lower in the downstream steps of the value chain. Respondents estimate that the median metal facility costs [TEXT REDACTED], the median alloy facility [TEXT REDACTED], and the median sintered NdFeB magnet facility around [TEXT REDACTED].

[TEXT REDACTED]

[TEXT REDACTED]

[TEXT REDACTED]

Firms face considerable financial shortfalls when it comes to new facilities. Figure 15 shows the median and mean difference at the facility-level between the amount needed to reach full production and amount firms have allocated to reach full production, as well as the sum of differences over facilities, grouped by facility value chain step. The similarity between the median and mean differences between funds need and funds allocated suggest that there are few well-funded outliers. In addition, the differences between funds needed and funds allocated are similar to the facility costs in Figure 14, indicating that most firms have allocated little to no money for the construction of new facilities. The total funding needed to bring all planned facilities online is considerable but varies widely between value chain steps. The seven new sintered NdFeB magnet facilities, which are critical to achieving the ambitious production estimates discussed earlier, are expected to require over [TEXT REDACTED].[216] This is not even the largest shortfall in the NdFeB magnet value chain: [TEXT REDACTED]. Metal and alloy plants have the smallest shortfall, requiring a further [TEXT REDACTED], respectively. As relatively low levels of domestic metal and alloy production are expected to constrain the use of domestic metals and alloys in NdFeB magnets, the comparatively small gap between allocated and required funds for metal and alloy plants is of particular interest. Without substantial new funding, U.S. producers will not meet the production estimates described earlier.

[TEXT REDACTED]

[TEXT REDACTED]

[TEXT REDACTED] [TEXT REDACTED]

Data on firms' capital expenditures from 2017 to 2026 corroborate the significant financing needed to achieve production forecasts. From 2017 to 2020 annual capital expenditures were well under [TEXT REDACTED] annually, reflecting the fact that prior to 2021 the only active domestic value chain steps were mining and bonded NdFeB magnet

[211] Ernest Scheyder, ''California rare earths miner races to refine amid U.S.-China trade row,'' Reuters, August 23, 2019, *https://www.reuters.com/article/us-usa-rareearths-mpmaterials-idUSKCN1VD2D3.*

[212] John Wagner and Amy B. Wang, ''Biden announces new spending on mineral production to address supply chain challenges,'' Washington Post, February 22, 2022, *https://www.washingtonpost.com/politics/2022/02/22/biden-minerals-supply-chain-announcement/.*

[213] Meeting between USA Rare Earth and the Department of Commerce, (Virtual Meeting, December 10, 2021).

[214] Eleanor Tolbert, ''Global Manufacturer Plans $95 million facility in Louisville,'' Louisville Business First, January 28, 2022, *https://www.bizjournals.com/louisville/news/2022/01/28/manufacturer-plans-95-million-facility.html.*

[215] Although respondents were asked to provide information on any future facilities regardless of location, respondents only indicated future facilities in the United States or in undecided locations.

[216] [TEXT REDACTED]

production (*see* Figure 16). In 2021, capital expenditures increased to just under [TEXT REDACTED] and are forecasted to jump in 2022 to over [TEXT REDACTED]. The massive increase in capital expenditure to around [TEXT REDACTED] annually for 2022 to 2024 is further evidence of the considerable funding needed to establish a U.S. NdFeB magnet value chain.

[TEXT REDACTED]

[TEXT REDACTED]

[TEXT REDACTED] [TEXT REDACTED]

The sources of capital expenditure funding in 2021 indicate the potential need for additional sources of financing to cover anticipated outlays. Even in 2021, when aggregate industry capital expenditure is a comparatively low [TEXT REDACTED], over [TEXT REDACTED] of recorded spending was self-funded (*see* Figure 17). Department of Defense funds covered less than [TEXT REDACTED] of total expenditure. Given Title III funding constraints, it is unlikely that current Department of Defense funding mechanisms will be able to scale support for the U.S. NdFeB magnet industry when annual capital expenditures increase to over [TEXT REDACTED] in 2022. Additional private sector financing that can bolster internal sources of capital expenditure funding will be critical to achieving production estimates.

[TEXT REDACTED]

[TEXT REDACTED]

[TEXT REDACTED] [TEXT REDACTED]

8.2.2 Critical Equipment

In addition to costly facilities, the production of NdFeB magnets and components of NdFeB magnets requires expensive critical equipment. 22 firms indicated 130 pieces of equipment that are critical to production in the Department's survey. Firms identified the most pieces of equipment for NdFeB magnet production [TEXT REDACTED] followed by alloy production [TEXT REDACTED]. Firms identified the fewest pieces of equipment for recycling rare earths [TEXT REDACTED] and mining [TEXT REDACTED].[217]

The most cited source of equipment was the United States, followed by Japan, China, and Germany. The high degree of machinery sourcing from the United States may reflect the location of assembly rather than where machine components were produced. Industry participants indicated that the most sophisticated machinery relevant to NdFeB magnets come from Japan and Germany, with additional equipment sourced from China.[218] Japan was the top source for equipment needed to produce magnets. Respondents indicated equipment also came from [TEXT REDACTED].

Mining equipment was on average the most expensive critical machinery, with a mean of over [TEXT REDACTED] (*see* Figure 18). Machinery to produce magnets was the second most expensive at an average of [TEXT REDACTED], closely followed by oxide production equipment at over [TEXT REDACTED]. Metal production equipment was on average the least expensive at [TEXT REDACTED]. The relative cost of equipment across value chain steps partially reflects the costs of facilities: mining is the most expensive, oxides and magnets are less so, and metals and alloys the least costly.

[TEXT REDACTED]

[TEXT REDACTED]

[TEXT REDACTED]

[TEXT REDACTED]

In addition to cost, some industry representatives have indicated the potential for supply chain issues in the acquisition of necessary capital equipment.[219] The NdFeB magnet industry has, like other industries, seen long lead times, which industry participants tend to attribute to COVID–19-related supply chain issues. Across all pieces of equipment, the average lead time is 238 days, and the median lead time is 240 days. When disaggregating by value chain step, equipment needed to produce carbonates faces somewhat shorter lead times, while equipment needed to produce magnets and oxides faces somewhat longer lead times (*see* Figure 19). There do not appear to be strong patterns when disaggregating by equipment criticality. Equipment that is critical to production tends to face longer lead times across value chain steps, but this is not the case for equipment to produce magnets and the

[217] The distribution of equipment may reflect the composition of our sample.

[218] [TEXT REDACTED]

[219] [TEXT REDACTED].

differences are sometimes small. The Department also examined average lead times by source country and value chain step. At the country-level lead times for the United States were somewhat lower than for other countries, although not across all value chain steps. No other strong patterns emerged, in part reflecting the small sample size when cross tabulating the survey data in this way.

[TEXT REDACTED]

[TEXT REDACTED]

[TEXT REDACTED].

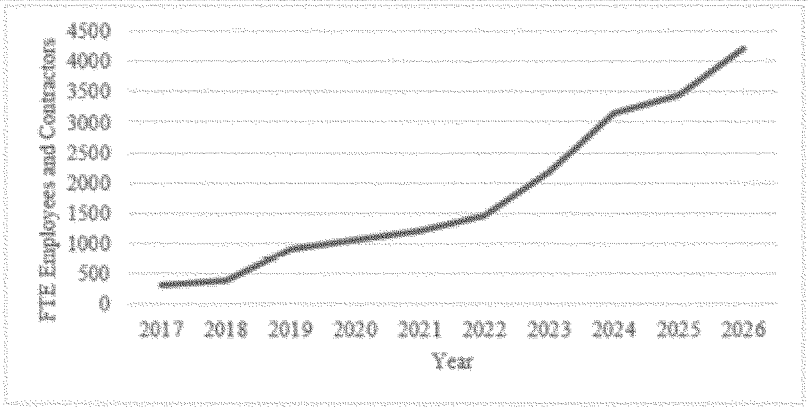
[TEXT REDACTED]

Even within pieces of equipment there is considerable heterogeneity. [TEXT REDACTED]

8.2.3 Employment

The U.S. NdFeB magnet industry directly employs a relatively small number of individuals.[220] Mine to magnet production has increased total full time equivalent (FTE) employment from 314 in 2017 to 1,214 in 2021 and is expected to increase to 4,226 by 2026 as facilities at different steps of the value chain start production (*see* Figure 20). By comparison, employment in the North American Industry Classification System (NAICS) corresponding to NdFeB magnets (''All Other Miscellaneous Fabricated Metal Product Manufacturing''—332999) was 76,918 in 2020 and employment in the NAICS corresponding to carbonates, oxides, and metals (''Other Basic Inorganic Chemical Manufacturing''—325180) was 39,700 in 2020. Even assuming no growth in non-NdFeB magnet employment in these NAICS the U.S. NdFeB magnet industry would contribute less than four percent to direct employment in 2026.

Figure 20: U.S. Workforce, NdFeB Magnet Value Chain, 2017-2026



Source: U.S. Department of Commerce, Bureau of Industry and Security, NdFeB Survey, 6, Part A.
[TEXT REDACTED].

Respondents: 17

As mentioned earlier, the U.S. NdFeB magnet industry is emerging and many of the firms involved plan to expand production and enter other value chain steps. To better understand which occupations will likely be in demand, the Department compared employment by occupation between mature magnet firms and the current U.S. industry. Three mature magnet firms provided employment data in their responses to the Department's survey.[221] These firms are established NdFeB magnet producers with significant output and provide insight into the employment makeup of a typical magnet firm. Figure 21 compares the mean proportion employed in each of five broad occupational categories between these two samples. Mature magnet firms employ relatively similar proportions across occupational categories: [TEXT REDACTED] are manufacturing engineers, scientists, and research and development (R&D); approximately [TEXT REDACTED] are in production line operations; around [TEXT REDACTED] in sales, administrative, and management; about [TEXT REDACTED] in testing and quality control; and [TEXT REDACTED] in information technology. By contrast, as indicated by the wide standard deviations, current U.S. producers are very heterogeneous in the proportion employed across occupational categories. They also employ a far smaller percentage of production line operations employees (about [TEXT REDACTED]). Based on occupational data from current mature magnet producers, U.S. firms are likely to employ a greater percentage of production line operations employees as they develop capacity.

[220] The Department notes that this does not consider employment in the many sectors that rely on NdFeB magnets, such as electric vehicles and wind turbines.

[221] [TEXT REDACTED]

[TEXT REDACTED]

[TEXT REDACTED]

[TEXT REDACTED].

[TEXT REDACTED]

Industry stakeholders indicated to the Department a range of perspectives on employment challenges. For example, MP Materials stated that the United States ''has limited skilled labor and human resources needed for the production of this high-technology product.'' [222] In contrast, the United States Magnetic Materials Association said that ''the knowledge of how to produce the magnets does exist'' and cited the inability to obtain licenses for critical intellectual property and return on investment as more significant barriers to domestic production.[223] This is consistent with Arnold Magnetics' public comments, in which it indicated it could shift production from Samarium-Cobalt magnets to NdFeB magnets.[224] [TEXT REDACTED].

Survey respondents were requested to indicate what labor market issues they faced, including the timeframe and the primary affected occupation. For U.S. producers, the primary workforce issues faced were finding qualified and experienced workers, followed by attracting workers to their location and finding U.S. citizens (*see* Figure 22). U.S. producers were likely to select high wage occupations as the primary occupation affected and were much more likely to do so when compared to non-producers, although production line operations were also frequently cited. The U.S. NdFeB magnet industry may face human capital challenges, in particular finding engineers and scientists.

[TEXT REDACTED]

[TEXT REDACTED]

[TEXT REDACTED].

[TEXT REDACTED].

Qualitative survey responses provide further evidence of the NdFeB magnet industry's potential difficulties in attracting human capital. The lack of available and experienced high wage labor was a particularly common refrain. [TEXT REDACTED]

Firms that can find workers face competition and difficulties attracting them. [TEXT REDACTED] Many NdFeB magnet firms are located outside major urban centers, which can cause issues attracting talent. [TEXT REDACTED]

8.3 Additional Challenges to Domestic Production

8.3.1 Import Competition, Production Costs, and General Challenges

The Department's survey of the U.S. NdFeB magnet industry asked firms about whether they struggled to compete against imports. 29 firms—57 percent of the sample and 67 percent of current or planned U.S. NdFeB magnet value chain producers—responded affirmatively. The Department then asked the percentage of operating costs attributable to eight input conditions. Figure 23 shows the median cost for each input condition for all respondents, non-producers, current or planned U.S. producers, and foreign producers.[225] Producers indicated that feedstock purchases are the single largest contributor to operating costs. [TEXT REDACTED]. By contrast, non-producers indicated sourcing feedstock is a distant second to labor costs. This is consonant with the high cost of rare earths in NdFeB magnets. The cost of sourcing feedstock is one vector of Chinese competition. [TEXT REDACTED]. Labor is the second largest contributor to U.S. producer operating costs, representing about [TEXT REDACTED], followed by electricity at [TEXT REDACTED].

[TEXT REDACTED]

[TEXT REDACTED]

[TEXT REDACTED].

[TEXT REDACTED].

The Department also asked survey respondents to indicate which of 30 challenges affected their competitive position and to rank the top five challenges (*see* Figure 24). Foreign competition is the most important challenge for U.S. NdFeB magnet industry participants. [TEXT REDACTED] current and future U.S.

[222] Comments of MP Materials to Request for Public Comments, ''Section 232 National Security Investigation of Imports of Neodymium-Iron-Boron (NdFeB) Permanent Magnets,'' 86 FR 53277, November 12, 2021.

[223] Comments of the United States Magnetic Materials Association to Request for Public Comments, ''Section 232 National Security Investigation of Imports of Neodymium-Iron-Boron (NdFeB) Permanent Magnets,'' 86 FR 53277, November 12, 2021.

[224] Comments of Arnold Magnetics to Request for Public Comments, ''Section 232 National Security Investigation of Imports of Neodymium-Iron-Boron (NdFeB) Permanent Magnets,'' 86 FR 53277, November 12, 2021.

[225] Proportions do not sum to one for each category because firms were not compelled to complete this section. In addition, there is an ''Other'' category that is mainly described as miscellaneous or overhead costs.

producers ranked foreign competition in their top five challenges, and [TEXT REDACTED] current and future U.S. producers ranked it as their number one challenge. [TEXT REDACTED] of current and future U.S. producers ranked input availability as their number one challenge, making it the second most frequently cited number one challenge. [TEXT REDACTED] current and future U.S. producers included labor availability in their top five challenges, making it the second most frequently cited challenge overall. Current and future U.S. producers also indicated financing/credit availability is an issue, with [TEXT REDACTED] of respondents ranking it in their top five challenges. [TEXT REDACTED] U.S. producers also indicated financing/credit availability is a minor issue, with only [TEXT REDACTED] including it in their top five challenges.

[TEXT REDACTED]

[TEXT REDACTED] [TEXT REDACTED]

[TEXT REDACTED].

[TEXT REDACTED]

Qualitative explanations underscore foreign competition, in particular with China, as a major challenge for domestic production. Many respondents who cited foreign competition directly compete with Chinese firms, which they claim are unfairly advantaged through government policies, subsidies, and market manipulation. Several respondents noted that the lack of environmental regulations and enforcement in China allows Chinese magnet producers to undercut prices for NdFeB magnets. Others noted the near total domination that Chinese firms had throughout the NdFeB magnet supply chain, which enables China to set market prices. China is also mentioned in terms of input availability. Some firms indicate that there are few sources of feedstocks outside of China [TEXT REDACTED]. Chinese firms also compete with U.S. producers for inputs. [TEXT REDACTED]

Respondents were also likely to cite Chinese competition as the primary challenge to increasing their market share. One U.S. magnet integrator noted that China is a low-cost producer of NdFeB magnets and end-users often purchase from the cheapest source regardless of country of origin. Other respondents reiterated that Chinese suppliers are unfairly subsidized and because of their dominant position can set prices. A related factor cited by one U.S. producer is the higher cost of labor in the United States compared to foreign competitors. Another often-mentioned challenge to expanding operations and market share is accessing the necessary financing for capital investments. Finally, several respondents experienced challenges in developing a resilient supply chain for their operations, such as securing diverse sources for necessary feedstocks. Domestic sources are a particular challenge given the lack of U.S. production capacity in all stages of the NdFeB magnet value chain. Reflecting the more general challenges discussed earlier, Chinese competition, feedstocks, and capital are major barriers to expanding production.

8.3.2 Environmental Factors

Rare earths mining and processing can cause damage to the environment because it produces large amounts of hazardous and radioactive waste.[226] Mining waste, also known as tailings, is typically stored in impoundments engineered to minimize waste seepage.[227] [228] Further downstream the value chain, the disposal and recycling of electronic waste can release heavy metals into the environment, with negative consequences for natural ecosystems.[229] In countries with less-stringent environmental regulations such as China, heavy metals can reach and contaminate groundwater during the mining process.[230] By contrast, environmental regulation in more highly-regulated economies pose additional costs and risks to market participants.[231] [232] For example, a Government Accountability Office report found that between 2010 and 2014 it took the Department of the Interior's Bureau of Land Management and the Department of Agriculture's Forest Service between one month and 11 years to approve mine plans, with an average approval time of two years.[233] Of the 68 mine plans reviewed, 13 had not begun operations in November 2015, partially attributed to the need to obtain other required federal and state permits.[234] Environmental studies are a time-intensive part of the permitting process.[235] Meanwhile, regulation requirements for depolluting infrastructure increase U.S. production costs.[236] Table 8 displays a non-

[226] Gwenolyn Bailey, Nabeel Mancheri, and Karel Van Acker, ''Sustainability of Permanent Rare Earth Magnet Motors in (H)EV Industry,'' Journal of Sustainable Metallurgy 3: 611–626, 2017, *https://link.springer.com/article/10.1007/s40831-017-0118-4*.

[227] ''What are Tailings,'' Society for Mining, Metallurgy, and Exploration, n.d., *https://www.smenet.org/What-We-Do/Technical-Briefings/What-are-Tailings*.

[228] Mining waste, such as coal tailings and heavy mineral sands, can be processed and recycled to extract contained rare earth elements. [TEXT REDACTED] Austyn Gaffney and Dane Rhys, ''In coal country, a new chance to clean up a toxic legacy,'' Washington Post, May 19, 2022, *https://www.washingtonpost.com/climate-solutions/2022/05/19/coal-mining-waste-recycling/*.

[229] Duc Huy Dang et al., ''Toward the Circular Economy of Rare Earth Elements: A Review of Abundance, Extraction, Applications, and Environmental Impacts,'' Archives of Environmental Contamination and Toxicology 81: 521–530, 2021, *https://link.springer.com/article/10.1007/s00244-021-00867-7*.

[230] Gwenolyn Bailey, Nabeel Mancheri, and Karel Van Acker, ''Sustainability of Permanent Rare Earth Magnet Motors in (H)EV Industry,'' Journal of Sustainable Metallurgy 3: 611–626, 2017, *https://link.springer.com/article/10.1007/s40831-017-0118-4*.

[231] Environmental regulations are critical for public health and safety. Noting that highly regulated jurisdictions are associated with higher production costs is a strictly factual observation and is not an endorsement of deregulation.

[232] Another example of risk is Lynas Rare Earths' Malaysian separation facility, which has brought the company into conflict with the Malaysian government over waste disposal. Currently, Lynas plans to establish a disposal facility as a condition of their license. Interview with Kristin Vekasi, ''China's Control of Rare Earth Metals,'' The National Bureau of Asian Research, August 13, 2019, *https://www.nbr.org/publication/chinas-control-of-rare-earth-metals/*; ''2021 Annual Report,'' Lynas Rare Earths, Ltd., 2021, *https://wcsecure.weblink.com.au/pdf/LYC/02434182.pdf*.

[233] ''Hardrock Mining: BLM and Forest Service Have Taken Some Actions to Expedite the Mine Plan Review Process but Could Do More,'' United States Government Accountability Office, January 2016, *https://www.gao.gov/assets/gao-16-165.pdf*.

[234] Ibid.

[235] Duc Huy Dang et al., ''Toward the Circular Economy of Rare Earth Elements: A Review of Abundance, Extraction, Applications, and Environmental Impacts,'' Archives of Environmental Contamination and Toxicology 81: 521–530, 2021, *https://link.springer.com/article/10.1007/s00244-021-00867-7*.

[236] Gwenolyn Bailey, Nabeel Mancheri, and Karel Van Acker, ''Sustainability of Permanent Rare Earth Magnet Motors in (H)EV Industry,'' Journal of

exhaustive list of relevant statutes and treaties.[237]

TABLE 8—PARTIAL LIST OF RELEVANT FEDERAL AND INTERNATIONAL ENVIRONMENTAL REGULATIONS

Name	Scope	Relevant body	Brief summary
Atomic Energy Act of 1954.	Waste	Federal	The Nuclear Regulatory Commission (''NRC'') oversees the regulatory framework governing the control of radioactive materials, including beneficiation and processing of rare earths that contain radioactive source materials.
Basel Convention	Waste	International	The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes is an international treaty signed in 1989 and entered into force in 1992. It currently has 188 signatories and establishes a ''notice and consent'' regime for the export of hazardous waste to other countries. The United States is not currently a party to the Basel Convention.
Clean Air Act	Air	Federal and State	Authorizes the Environmental Protection Agency (EPA) to establish national ambient air quality standards and maximum achievable control technology emission standards for hazardous and toxic pollutants. Establishes an air quality control permitting program implemented by EPA and authorized states.
Clean Water Act	Water	Federal and State	Authorizes EPA to establish national water quality criteria and establishes two permitting programs. The National Pollutant Discharge Elimination System (NPDES) Program prohibits the discharge of pollutants through a point source into a water of the United States without a NPDES permit. NPDES permits are issued by EPA or authorized states. The NPDES permit program also includes ''Effluent Guidelines,'' including the Mineral Mining and Processing Effluent Guidelines and Standards, the Ferroalloy Manufacturing Effluent Guidelines and Standards, and the Metal Finishing Effluent Guidelines. Clean Water Act section 404 permits, issued by the U.S. Army Corps of Engineers or authorized states, are required for the discharge of dredge and fill material in waters of the United States.
Comprehensive Environmental, Response, Compensation and Liability Act.	Waste	Federal	Provides Federal authority for responding to releases or threatened releases of hazardous substances that may endanger public health or the environment.
The Endangered Species Act.	General ...	Federal	Regulates activities that could have an adverse effect on threatened and endangered species, including the habitat and ecosystems upon which they depend.
Federal Mine Safety and Health Act of 1977, as amended by the Mine Improvement and New Emergency Response Act of 2006.	Mining	Federal	Imposes health and safety standards on mining operations, including training of mine personnel, mining procedures, blasting, the equipment used in mining operations and other matters. In 2006, the Mine Safety and Health Administration promulgated new emergency mine safety rules addressing mine safety equipment, training, and emergency reporting requirements.
Mobile Phone Partnership Initiative (MPPI).	Waste	International	Launched in 2002 to promote awareness raising—design considerations, collection of used and end-of-life mobile phones, transboundary movement of collected mobile phones, refurbishment of used mobile phones, and material recovery/recycling of end-of-life mobile phones. Has not met since 2011.
The National Environmental Policy Act.	General ...	Federal	Requires Federal agencies to integrate environmental considerations into certain decision-making processes by evaluating the environmental impacts of their proposed actions, including issuance of permits to mining facilities, and assessing alternatives to those actions.
Partnership for Action on Computing Equipment (PACE).	Waste	International	Developed as a multi-stakeholder public-private partnership that provides a forum for representatives of personal computer manufacturers, recyclers, international organizations, associations, academia, environmental groups, and governments to tackle environmentally sound refurbishment, repair, material recovery, recycling, and disposal of used and end-of-life computing equipment.
Resource Conservation and Recovery Act (RCRA).	Waste	Federal and State	Gives the EPA and authorized states the authority to regulate hazardous from cradle to grave under Subtitle C. RCRA establishes the framework for a national system of solid waste control where EPA sets minimum national technical standards for how disposal facilities should be designed and operate. States play the lead role under Subtitle D. Most extraction and beneficiation wastes from hardrock mining are excluded from federal hazardous waste regulations under Subtitle C.
The Safe Drinking Water Act.	Water	Federal and State	Authorizes EPA to establish standards to protect underground sources of drinking water and establishes the underground injection control program that regulates the drilling and operation of subsurface injection wells. Permits are issued by EPA or authorized states.

Sustainable Metallurgy 3: 611–626, 2017, *https://link.springer.com/article/10.1007/s40831-017-0118-4*.

[237] In addition to the listed statutes and treaties, firms face state and local as well as further federal regulations. For example. MP Materials notes their activities are subject to federal, state, and local laws and regulations covering a wide range of issues, such as air emissions, water usage, and waste management. The Mountain Pass Mine, for instance, has 16 environmental permits from 11 entities with various expiration dates. *See* ''Form 10–K,'' MP Materials, February 28, 2022, *https://d18rn0p25nwr6d.cloudfront.net/CIK-0001801368/77b2894e-b746-43c5-938a-a3f524823baa.pdf*.

The Department used data from its survey of the U.S. NdFeB magnet industry, a previous industrial base assessment on rare earth elements, meetings with NdFeB magnet industry participants, and market research to assess the relationship between the NdFeB magnet value chain and environmental regulations. Based on these data, a preliminary picture emerged that although historically NdFeB magnet industry participants saw environmental factors as a constraint, the current NdFeB magnet industry is using new methods and technologies to reduce its environmental impact and sees these processes as enabling competition with China, even though weaker Chinese environmental regulations increase the price gap between Chinese and non-Chinese magnets.

In 2014 the Department conducted a survey under section 705 of the DPA of U.S. rare earth suppliers and product manufacturers to support a 2016 supply chain assessment on dysprosium, erbium, neodymium, terbium, and ytterbium called ''U.S. Strategic Material Supply Chain Assessment: Select Rare Earth Elements'' (''2016 Rare Earths Assessment''). Of the 160 respondents, 126 indicated they used one of the rare earths that make up NdFeB magnets—neodymium, praseodymium, terbium, or dysprosium—and 115 indicated they used neodymium.

These survey data suggest that in the early 2010s environmental factors constrained multiple steps in the U.S. rare earths value chain. 36 respondents (22.5 percent) indicated that environmental regulations/remediation had a current and/or future impact on their rare earth element-related business lines.[238] Upstream in the value chain, mining firms stated environmental regulations were a source of concern. [TEXT REDACTED] The impact of environmental regulations propagated downstream to customers. [TEXT REDACTED]

In contrast, the current U.S. NdFeB magnet industry sees environmental factors as a relatively minor concern and cites environmentally friendly technologies as a source of opportunity. The Department's survey of the U.S. NdFeB magnet industry asked firms to identify the primary challenges affecting their competitive positions and rank the top five from a list of 30 potential responses. Among the 16 current or future U.S. producers that provided responses, [TEXT REDACTED]. Restricting the sample to the top five challenges, environmental regulations are tied with four other issues for the seventh most cited challenge. [TEXT REDACTED] These data suggest that environmental regulations matter but are relatively less important in comparison to the other challenges faced by the U.S. NdFeB magnet industry.

Input cost data from the Department's survey of the U.S. NdFeB magnet industry lend support for the view that environmental regulations are minor in comparison to other factors. The Department's survey asked respondents to estimate the percentage of operating costs due to a series of inputs, including environmental regulations. The median response from current or planned U.S. producers regarding environmental regulations was [TEXT REDACTED], lower than sourcing feedstock material ([TEXT REDACTED]), labor ([TEXT REDACTED]), other ([TEXT REDACTED], most often described as operating or overhead costs), electricity ([TEXT REDACTED]), transportation costs ([TEXT REDACTED]), and taxes ([TEXT REDACTED]). Only VAT taxes/tariffs/trade duties ([TEXT REDACTED]) and export regulations ([TEXT REDACTED]) ranked lower.

Environmental regulations increase the price gap between Chinese and non-Chinese NdFeB magnets, but consonant with their minor contribution to U.S. firms' production costs their impact appears to be small relative to other factors.[239] [TEXT REDACTED].[240] [TEXT REDACTED].[241] [TEXT REDACTED]. However, other industry participants tend to attribute differences in NdFeB magnet production costs more to Chinese tax policies or energy costs than environmental regulations[TEXT REDACTED].[242] Despite the minor role of environmental regulations, any price gaps can affect customer behavior. [TEXT REDACTED].[243]

Both upstream and downstream in the NdFeB magnet value chain, some firms see environmental factors as a competitive advantage and tout their small environmental footprints and new technologies that help minimize environmental waste.[244] [TEXT REDACTED].[TEXT REDACTED].[245] [TEXT REDACTED].[246] [247] [TEXT REDACTED].[248] [TEXT REDACTED].

Downstream in the value chain, Noveon highlighted its low environmental impact, [TEXT REDACTED].[249] Joint research with Purdue University suggests a 50 percent net reduction across a range of environmental indicators, including smog formation, acidification, and respiratory effects.[250] [251] [TEXT REDACTED].[252] NdFeB magnet industry participants throughout the value chain emphasize their low environmental impact and suggest that their more environmentally friendly technologies could act as a competitive advantage in the global marketplace.

8.3.3 Intellectual Property

NdFeB magnets were concurrently invented in 1983 by General Motors in the United States and by Sumitomo in Japan.[253] General Motors

[238] This analysis uses the larger sample of companies involved in any NdFeB magnet-related rare earths production, except when stated otherwise.

[239] However, in response to the Department's survey of the U.S. NdFeB magnet industry only [TEXT REDACTED] current or future U.S. producers (of 11 who provided responses) indicated that changing government regulations or incentives around environmental regulations would improve price competitiveness.

[240] Kazuaki Kobayashi, ''Trusted Supply-Chain for Rare Earths in the Age of Carbon Neutrality,'' Ministry of Economy, Trade, and Industry, n.d.

[241] Meeting between the Ministry of Economy, Trade, and Industry and the Department of Commerce, (Virtual Meeting, December 21, 2021)

[242] Meeting between Neo Performance Materials and the Department of Commerce, the Department of Defense, and the U.S. Geological Survey, (Virtual Meeting, November 30, 2021).

[243] Meeting between Lynas Rare Earths and the Department of Commerce, (Virtual Meeting, March 30, 2022).

[244] This anecdotal evidence is consistent with a view that environmental regulation may spur technological innovation and reduce marginal costs. Some research suggests that this process has meant environmental regulations have had no to a positive effect on rare earths exports from China. An Pan et al., ''How environmental regulation affects China's rare earth export?,'' PLoS One 16 (4), 2021, *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8062019/*.

[245] Meeting between MP Materials and the Department of Commerce, (Virtual Meeting, November 17, 2021).

[246] Energy Fuels briefing to the NSTC Critical Minerals Subcommittee, (Virtual Meeting, November 29, 2021).

[247] [TEXT REDACTED]. Meeting between Energy Fuels and the Department of Commerce, (Virtual Meeting, March 1, 2022).

[248] Meeting between USA Rare Earth and the Department of Commerce, (Virtual Meeting, December 10, 2021).

[249] Meeting between Noveon and the Department of Commerce, (Virtual Meeting, November 12, 2021).

[250] ''With Urban Mining, Recycled Bird Magnets are Transforming our Electric Future,'' Bird Cities Blog, June 6, 2021, *https://www.bird.co/blog/urban-mining-recycled-bird-magnets-transforming-electric-future/*.

[251] Hongyue Jin et al., ''Comparative Life Cycle Assessment of NdFeB Magnets: Virgin Production versus Magnet-to-Magnet Recycling,'' Procedia CRIP 48: 45–50, 2016, *https://www.sciencedirect.com/science/article/pii/S2212827116006508*.

[252] Meeting between Noveon and the Department of Commerce, (Virtual Meeting, November 12, 2021).

[253] The method developed by General Motors to produce NdFeB magnets is the predecessor to

commercialized its intellectual property by founding Magnequench, which was eventually acquired by the Canadian firm Neo Performance Materials. The Sumitomo intellectual property passed to Hitachi, which has an extensive NdFeB magnet-related patent portfolio of over 600 patents, including about one hundred U.S. patents.[254] Of these, there are four key U.S. patents for sintered NdFeB magnets that expired in 2021 or will expire in 2022.[255] Other relevant patents with longer expiration dates may exist.[256] In the public comments received for this investigation, many U.S. companies noted that Hitachi has repeatedly declined to offer licenses to U.S. companies. Hitachi granted licenses to eight Chinese firms as early as 2013, which facilitated Chinese firms' entrance in to the sintered NdFeB magnet market.[257] [258] [TEXT REDACTED] [259] Additional Chinese firms may gain de jure access to Hitachi licenses as a result of a 2021 ruling by the Ningbo Intermediate People's Court in China in which NdFeB magnet licenses were held to be essential facilities.[260] Under the essential facilities doctrine, a firm that controls an essential facility is obliged to make that facility available to competitors on non-discriminatory terms.[261] Hitachi has appealed the case, but may be required to license sintered NdFeB magnet patents to additional Chinese firms.

Hitachi has also defended its intellectual property rights in U.S. courts. In 2012, Hitachi filed a complaint with the United States International Trade Commission (U.S. ITC) against 29 manufacturers and importers of sintered rare earth magnets and products containing sintered rare earth magnets.[262] It sought an exclusion order prohibiting imports of these unlicensed NdFeB magnets and cease and desist orders to produce NdFeB magnets.[263] Some defendants settled with Hitachi, with five Chinese firms agreeing to new licenses. In 2013 Hitachi announced additional settlements and withdrew the U.S. ITC case. Later, some defendants filed for inter partes review with the United States Patent and Trademark Office, which granted the request and found the challenged claims obvious.[264] In an appellate opinion in 2017, the United States Court of Appeals for the Federal Circuit largely affirmed this ruling.[265] U.S. industry participants noted these actions instigated considerable discussion in the NdFeB magnet industry and deterred potential market entrants.[266]

In conversations with industry participants Hitachi's ownership of sintered NdFeB magnet patents was characterized on a spectrum from a critical barrier to entry to a nonexistent risk.[267] Arnold Magnetics considered Hitachi's patents to be a key barrier to market entry and indicated it could produce sintered NdFeB magnets if it had a license.[268] [TEXT REDACTED].[269] [TEXT REDACTED].[270] Some industry representatives also expressed hope that the acquisition of Hitachi's magnets business by Bain Capital may change Hitachi's willingness to license the patents to potential market entrants.[271] In contrast, Noveon relies on new proprietary technology to process recycled magnets and produce new material and is therefore unaffected by Hitachi's reluctance to license its patents. A related concern is whether magnets would need to be produced under licensed patents to be incorporated into some end-user's assemblies and, if so, how expensive qualification of alternative production methods may be. For example, some end-users may qualify magnets for use in their products based on the technology used to produce the magnets.

The Department's survey of the U.S. NdFeB magnet industry supports the view that intellectual property does not pose a major barrier to NdFeB magnet production, although access to Hitachi's technology would facilitate domestic production. In response to the question, ''Has your organization encountered difficulties in obtaining NdFeB Magnet related IP?'' [TEXT REDACTED]. Intellectual property is unlikely to derail current production estimates but may pose constraints on growth and use.

8.3.4 Prices and Price Volatility

NdFeB Magnet Feedstock Prices and Price Volatility

In comparison to NdFeB magnets, neodymium oxide and metal are relatively standard products for which comparable price data are available. Neodymium oxide and metal prices have seen considerable shifts over the previous 20 years (*see* Figure 25). Oxide and metal price changes are closely related because neodymium oxide is processed into neodymium metal.[272]

bonded magnets. The method developed by Sumitomo is the predecessor of sintered NdFeB magnets. Hitachi is an organizational descendent of Sumitomo and therefore holds the intellectual property for sintered magnets.

[254] ''Chinese Court Enforces Mandatory Licensing for ''Essential Facility'' Patents in Antitrust Case,'' Jones Day, June 2021, *https://www.jonesday.com/en/insights/2021/06/chinese-court-enforces-mandatory-licensing-for-essential-facility-patents-in-antitrust-case*.

[255] Some industry participants expressed concern that Hitachi may attempt to renew these patents, but the Department could not locate information on whether Hitachi had done so. Industry participants also mentioned that Bain Capital's potential acquisition of Hitachi Metals may shape Hitachi's behavior. For information on Bain Capital's potential acquisition of Hitachi Metals, *see* Appendix E, ''Global NdFeB Magnet Production: A Firm Level Perspective'' at footnote 144. [TEXT REDACTED].

[256] ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf*.

[257] Nathan Bush and Ray Xu, ''Framing patents as essential facilities in Chinese antitrust: Ningbo Ketian Magnet Co., Ltd. v. Hitachi Metals,'' DLA Piper, September 7, 2021, *https://www.dlapiper.com/en/us/insights/publications/2021/09/antitrust-matters-september-2021/framing-patents-as-essential-facilities-in-chinese-antitrust/*.

[258] ''Chinese Court Enforces Mandatory Licensing for ''Essential Facility'' Patents in Antitrust Case,'' Jones Day, June 2021, *https://www.jonesday.com/en/insights/2021/06/chinese-court-enforces-mandatory-licensing-for-essential-facility-patents-in-antitrust-case*.

[259] U.S. Department of Commerce, Bureau of Industry and Security, NdFeB Survey, 10, Part D.

[260] ''Chinese Court Enforces Mandatory Licensing for ''Essential Facility'' Patents in Antitrust Case,'' Jones Day, June 2021, *https://www.jonesday.com/en/insights/2021/06/chinese-court-enforces-mandatory-licensing-for-essential-facility-patents-in-antitrust-case*.

[261] There is no accepted definition of essential facility. *See* Christopher Seelen, ''The Essential Facilities Doctrine: What Does It Mean To Be Essential?,'' Marquette Law Review (80), Summer 1997, *https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1517&context=mulr*.

[262] Walter T. Benecki, ''Hitachi Metals, Ltd. The Magner Industry Newsmaker,'' Magnetics: Business and Technology, November 26, 2013, *https://magneticsmag.com/hitachi-metals-ltd-the-magnet-industry-newsmaker/*.

[263] Ibid.

[264] Anthony McCain, ''Patentlyo Bits and Bytes,'' Patentlyo, July 31, 2017, *https://patentlyo.com/2017/07*.

[265] ''*Hitachi Metals, Ltd.,* v. *Alliance of Rare-Earth Magnet Industry,*'' United States Court of Appeals for the Federal Court, July 6, 2017, *https://cafc.uscourts.gov/sites/default/files/opinions-orders/16-1824.Opinion.7-5-2017.1.PDF*.

[266] [TEXT REDACTED].

[267] Meeting between Arnold Magnetics and the Department of Commerce, (Virtual Meeting, December 6, 2021); Meeting between USA Rare Earth and the Department of Commerce, (Virtual Meeting, December 10, 2021); Meeting between Noveon and the Department of Commerce, (Virtual Meeting, November 12, 2021).

[268] Comments of Arnold Magnetics to Request for Public Comments, ''Section 232 National Security Investigation of Imports of Neodymium-Iron-Boron (NdFeB) Permanent Magnets,'' 86 FR 53277, November 12, 2021.

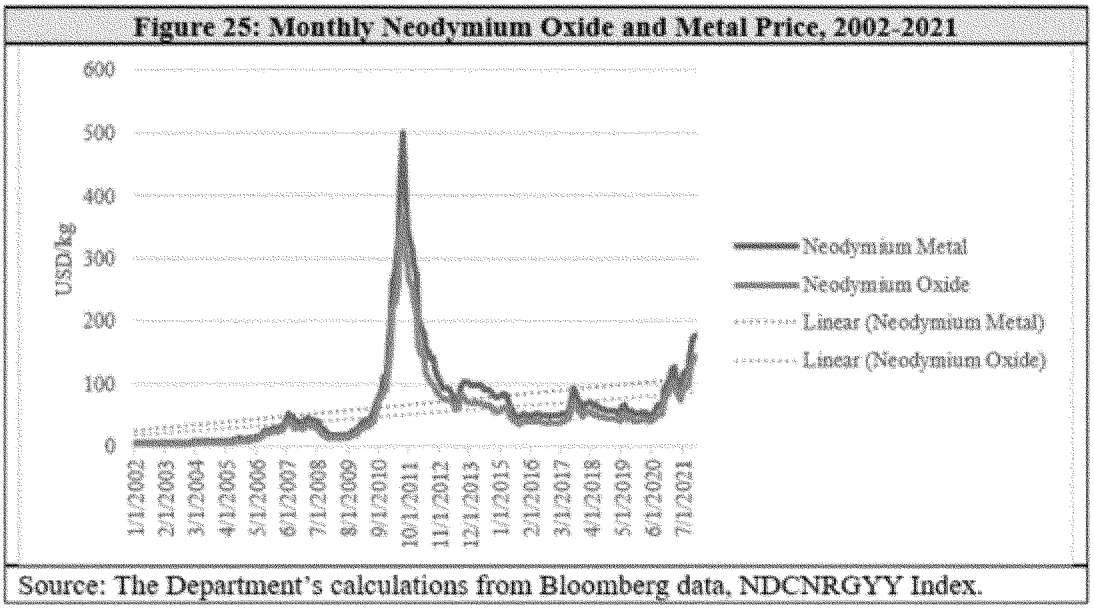
[269] Meeting between USA Rare Earth and the Department of Commerce, (Virtual Meeting, December 10, 2021).

[270] Ibid.

[271] For information on Bain Capital's potential acquisition of Hitachi Metals, see Appendix E, ''Global NdFeB Magnet Production: A Firm Level Perspective'' at footnote 144.

[272] The daily price of neodymium oxide and the daily price of neodymium metal are almost perfectly positively correlated at 0.99.

Price data indicate two periods of relative stability (2002 to mid-2010 and 2013 to mid-2020) punctuated with two sharp price increases corresponding to China's cuts to its export quotas in the early 2010s and the early 2020s' rise in prices, which may reflect increased demand.[273] The overall trendline from 2002 to 2021 is of increasing prices—neodymium oxide prices increased by 3,209 percent from $4.3 per kg in 2002 to $142.3 per kg in 2021, while neodymium metal prices increased by 2,443 percent from $7 per kg in 2002 to $178 per kg in 2021.[274] [275]



Although the neodymium oxide and metal price series appear to indicate high volatility, prices of neodymium and other rare earth elements used in NdFeB magnets are less volatile than other metals and materials. DoE estimated price volatility for the four key rare earth oxides used in NdFeB magnets (neodymium, praseodymium, dysprosium, and terbium), by analyzing changes in monthly average prices between January 2010 and June 2020, a period that includes the early 2010s price spike but not the more recent rise in prices. DoE found that price volatility was 0.1 for neodymium oxide, 0.09 for praseodymium oxide, 0.13 for dysprosium oxide, and 0.14 for terbium oxide, lower than the average of a set of 30 by-product metals and materials.[276] However, DoE still emphasizes the potential for large price swings, citing the high price volatility resulting from Chinese government policies in the early 2010s.[277]

Industry representatives emphasize the distortionary effects of price volatility. [TEXT REDACTED]. The Chinese government has recently expressed concern about rising prices, calling on major Chinese rare earths producers to maintain a steady supply chain and reduce price increases.[278] Anecdotally, price increases do not appear to have strongly negatively affected Chinese firms in the value chain. For example, ''Advanced Technology & Materials, a Chinese producer of NdFeB magnets, [said] the rare earth price increase has had ''little impact'' on the company because it has a guaranteed supply of raw materials at ''favorable prices'' from the state-owned giant China Northern Rare Earth Group.'' [279]

Price increases also have the potential to change consumer behavior and lead to greater interest in substitutes and alternatives. [TEXT REDACTED].[280] Neo Performance Materials also said heightened prices could incentivize substitution research.[281] [TEXT REDACTED].[282]

8.4 Recycling and Substitution

8.4.1 NdFeB Magnet Recycling

Recycling NdFeB magnets or NdFeB magnet swarf, the waste produced by shaping magnets, represents a potentially significant and largely untapped source of rare earth material.[283] In an extreme example, if all U.S. computer hard disk drives

[273] In contrast to the early 2010s spike, there is not a clear cause for the price increases that have occurred since mid-2020. Increased demand from end-users is the most common explanation, based on meetings with industry.

[274] Dysprosium oxide and terbium oxide prices have also increased. Dysprosium oxide prices are up almost 120 percent and terbium oxide prices increased over 375 percent from January 2017 to mid-April 2022, compared to over 265 percent and 188 percent for neodymium oxide and praseodymium oxide, respectively. *See* ''Rare Earth 2022 April 18,'' The Rare Earth Observer, April 18, 2022, *https://treo.substack.com/p/shanghai-infinite-lockdown-price?s=r.*

[275] For comparison, China's consumer price index increased by an average of 2.2 percent, with a range of −0.7 to 5.9 percent. *See* ''Inflation, consumer prices (annual %)—China,'' World Bank World Development Indicators, last accessed May 17, 2022, *https://data.worldbank.org/indicator/FP.CPI.TOTL.ZG?locations=CN.*

[276] Michael Redlinger and Roderick Eggert, ''Volatility of by-product metal and mineral prices,'' Resources Policy, 47: 69–77, 2016, *https://doi.org/10.1016/j.resourpol.2015.12.002.*

[277] ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf.*

[278] ''China Calls on Rare Earths Companies to Bring Prices Back to ''Reasonable'' Level,'' Reuters, March 4, 2022, *https://www.reuters.com/business/china-calls-rare-earths-companies-bring-prices-back-reasonable-level-2022-03-04/.*

[279] Mary Hui, ''Are High Rare Earth Prices Good for China?,'' Quartz, March 7, 2022, *https://finance.yahoo.com/news/high-rare-earth-prices-good-220022712.html.*

[280] Meeting between General Motors and the Department of Commerce, (Virtual Meeting, February 2, 2022).

[281] Mary Hui, ''Are High Rare Earth Prices Good for China?,'' Quartz, March 7, 2022, *https://finance.yahoo.com/news/high-rare-earth-prices-good-220022712.html.*

[282] Meeting between Turntide Technologies and the Department of Commerce, (Virtual Meeting, February 17, 2022).

[283] Magnet material known as swarf is generated when magnet blocks are shaped to customer specifications.

(HDDs) were recycled, the contained NdFeB magnets could satisfy up to 80 percent of electric vehicle magnet demand.[284] One market research firm estimates that in 2030 upwards of 90,000 tons of NdFeB magnets will be entering waste streams globally, equal to 23 percent of projected 2030 demand.[285] In the past 15 years, significant academic research has been conducted on NdFeB magnet recycling and reuse technologies.[286] The research directly led to attempts at commercialization either through firms that manufacture end-use products (*e.g.,* Nissan) or via specialized companies focused on the remanufacturing of sintered NdFeB magnets (*e.g.,* Noveon). Increased demand for NdFeB magnets is likely to further pressure end-users to commercialize recycling technologies.

Separating NdFeB magnets from the products which house them is a major challenge of the recycling process. Firms that recycle magnets have limited visibility into the construction and design of products that use magnets, which makes disassembly difficult.[287] Continuing with the example of HDDs as a feedstock for NdFeB magnet recycling, the first difficulty in recycling HDDs is that most drives are shredded due to data sensitivities. Shredding reduces the ability to recover and recycle the NdFeB magnets and results in significant material loss.[288] Another option is manual removal, which recovers more material and has a lower environmental cost but is very time consuming.[289] In 2010, Hitachi announced that it had developed a machine to dismantle neodymium magnets from hard discs and compressors. The machine has a capacity of one hundred magnets per hour, about eight times faster than manual labor. The machine was supposed to be employed in commercial operations in 2013 but no follow up details are available.[290] One solution to the issue of separating magnets from end-of-life products is a labeling system to describe the specifications of contained NdFeB magnets, which would facilitate magnet recovery and the recycling process.[291]

The complexities involved in NdFeB magnet separation increase recycling costs. In 2014 a company approached by Japanese magnet manufacturers found they could not dismantle rare earth elements from HDDs at a profit.[292] That said, end-user firms in the United States and abroad have expressed interest in recycling magnets.[293] [294] This interest has helped to facilitate the commercialization of Noveon's magnet recycling and reengineering technology, [TEXT REDACTED].[295] More generally, increased demand for NdFeB magnets is likely to incentivize the commercialization of magnet recycling technologies.

In theory, NdFeB magnet reuse is possible without dismantling assemblies and remanufacturing contained magnets because magnets do not lose much strength over their lifetime. However, NdFeB magnets are often produced and shaped for a specific end-use product, and it is difficult to change the properties of the manufactured magnets, such that reuse is generally uncommon.[296]

Returning to the 2016 Rare Earths Assessment, 30 respondents indicated they recycled rare earth elements or rare earth element-related products, and 25 indicated they used recycled rare earth elements or rare earth element-related products. However, a number of these respondents do not operate in the NdFeB magnet value chain and their operations are unrelated to magnets. Other respondents explained that they sold material to be recycled or outsourced recycling operations, including to known magnet producers. [TEXT REDACTED] Some of the pessimistic responses reflect the contemporaneous state of technology. For example, [TEXT REDACTED]

The Department's survey of the U.S. NdFeB magnet industry presents a more encouraging picture of the potential contributions of recycled rare earths to the U.S. NdFeB magnet value chain. Survey participants included five current and potential recyclers: [TEXT REDACTED].[297]

[TEXT REDACTED]

[TEXT REDACTED]

In addition to these firms, in February 2022 the Critical Materials Institute (CMI) announced it had partnered with TdVib of Boone, IA, to commercialize rare earth element recycling.[298] In 2017, CMI first developed a novel NdFeB magnet recycling process to recover rare earth elements that dissolved magnets in an acid-free solution.[299] CMI's method can handle shredded electronic waste like HDDs and obviates the need to pre-process—for example, sort—the NdFeB magnets.[300] Being acid-free, CMI's technology is also more environmentally friendly than acid-based recycling processes.[301] TdVib has licensed this technology and intends to produce three to five tons of rare earth oxides in the next one to two years as part of the method's eventual commercialization.[302] The Small Business Innovation Research Program awarded TdVib Small Business Technology Transfer funding for this partnership, $200,000 in Phase I and $1.1 million in Phase II.[303]

[284] Meeting between the Critical Materials Institute and the Department of Commerce, (Virtual Meeting, October 6, 2021).

[285] ''Adamas: cerium, lanthanum, terbium, and recycling can help fill the magnet rare earth gap,'' Green Car Congress, September 3, 2020, *https://www.greencarcongress.com/2020/09/20200903-adamas.html*; ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf*.

[286] Recycling refers to deconstructing NdFeB magnets and reprocessing the contained rare earth elements. In contrast, reuse refers to integrating NdFeB magnets contained in end-of-life products into new products. As discussed later in this section, research and attempts at commercialization generally focus on recycling.

[287] Meeting between the Critical Materials Institute and the Department of Commerce, (Virtual Meeting, October 6, 2021).

[288] ''Analysis of material efficiency aspects of personal computers product group,'' European Commission Joint Research Center, January 2018, *http://dx.doi.org/10.2788/89220*.

[289] Raymond Moss et al., ''Critical Metals in the Path towards the Decarbonisation of the EU Energy Sector: Assessing Rare Metals as Supply-Chain Bottlenecks in Low-Carbon Energy Technologies,'' European Commission Joint Research Center, 2013, *https://publications.jrc.ec.europa.eu/repository/handle/JRC82322*.

[290] Ibid.

[291] Meeting between the Critical Materials Institute and the Department of Commerce, (Virtual Meeting, October 6, 2021).

[292] Meeting between Hongyue Jin, Critical Materials Institute, and the Department of Commerce, (Virtual Meeting, October 22, 2021).

[293] Ibid.

[294] ''Bentley sets out path to sustainable, recyclable electric motors,'' Automotive World, February 18, 2021, *https://www.automotiveworld.com/news-releases/bentley-sets-out-path-to-sustainable-recyclable-electric-motors/*.

[295] Meeting between Noveon and the Department of Commerce, (Virtual Meeting, November 12, 2021).

[296] Raymond Moss et al., ''Critical Metals in the Path towards the Decarbonisation of the EU Energy Sector: Assessing Rare Metals as Supply-Chain Bottlenecks in Low-Carbon Energy Technologies,'' European Commission Joint Research Center, 2013, *https://publications.jrc.ec.europa.eu/repository/handle/JRC82322*.

[297] [TEXT REDACTED].

[298] ''Green rare-earth recycling goes commercial in the US,'' Ames Laboratory, February 25, 2022, *https://www.ameslab.gov/index.php/news/green-rare-earth-recycling-goes-commercial-in-the-us*.

[299] ''Critical Materials Institute develops new acid-free magnet recycling process,'' Ames Laboratory, September 5, 2017, *https://www.ameslab.gov/news/critical-materials-institute-develops-new-acid-free-magnet-recycling-process*.

[300] Ibid.

[301] ''Green rare-earth recycling goes commercial in the US,'' Ames Laboratory, February 25, 2022, *https://www.ameslab.gov/index.php/news/green-rare-earth-recycling-goes-commercial-in-the-us*.

[302] Ibid.

[303] ''TdVib LLC,'' SBIR, n.d., *https://www.sbir.gov/node/1653561*.

8.4.2 NdFeB Magnet Substitutes

NdFeB magnet substitution can occur through several paths.[304] One NdFeB magnet input, such as dysprosium, could be substituted with another input, such as terbium. Alternatively, NdFeB magnets can be redesigned to reduce the content of certain inputs. As discussed in more detail below, some end-users are developing methods to decrease the quantity of heavy rare earth elements due to their high cost and concentrated supply chains. Products that rely on NdFeB magnets can also be redesigned to require NdFeB magnets with different characteristics. Finally, NdFeB magnets themselves can be replaced with alternative technologies. This could either be in the form of another type of magnet or by eliminating the need for magnets.

Background and Status of NdFeB Magnet Substitution

The U.S. Government has provided valuable funding for research on NdFeB magnet substitutes. In 2011, the Advanced Research Projects Agency—Energy (ARPA–E) funded 14 projects aimed at developing replacements for rare earth elements in electric vehicles and wind turbines through its Rare Earth Alternatives in Critical Technologies (REACT) Program.[305] These projects included research into cerium-based magnets, iron-nitride alloy magnets, manganese-aluminum based magnets, iron-nickel-based magnets, and carbon-based magnets, as well as rare earths-free applications like superconducting wire.[306] Although none of these alternatives have resulted in a mainstream alternative to NdFeB magnets, there have been some initial steps towards commercialization.[307] For example, the Critical Materials Institute is partnering with bonded NdFeB magnet producer Bunting Magnetics to test and conduct a feasibility study for cerium-based magnets.[308] This research has also been applied to end-products. For example, GE Renewables is planning to produce a prototype of a wind turbine generator using superconducting wire instead of NdFeB magnets in mid-2023.[309] In other cases such as carbon-based magnets, academic research has continued with little commercial success.[310]

In 2020, the Defense Advanced Research Projects Agency's Basic Energy Sciences division awarded a total of $20 million to five projects dealing with rare earth extraction.[311] Another $30 million was awarded in August 2021 to 13 projects focused on the ''isolation of critical elements from natural and recycled resources'' and which may reduce or eliminate the use of critical elements without functionality losses.[312] Although it is too early to tell whether these projects will lead to commercial products, the U.S. Government's continued support for research that may reduce dependence on rare earths and enhance supply chain resiliency is critical.

The private sector has also actively pursued substitution research. Turntide Technologies manufactures motors using switch reluctance motors that do not use NdFeB magnets.[313] [TEXT REDACTED].[314] Among automobile manufacturers, Toyota has been working to develop NdFeB magnet substitutes for over a decade. In 2011, Toyota announced that it was researching rare earth-free motors.[315] In 2018, Toyota announced that it had produced a preliminary design for a magnet that partially replaced neodymium with lanthanum and cerium, reducing total neodymium content in the magnet by 20 to 50 percent.[316] In 2022, Toyota's subsidiary Denso announced that it is developing rare earths-free iron-nickel magnets, although it did not give a timeline for commercialization.[317] In 2016, Honda also announced it would use a heavy rare earth element-free motor in some hybrid electric vehicles.[318] Other automobile manufacturers, including BMW, Daimler, Nissan, and Volkswagen, are researching methods to reduce the amount of rare earth elements used in NdFeB magnets.[319] For example, the German firm Mahle announced rare earths-free motors for vehicle applications, with mass production to commence around 2024.[320]

Example: NdFeB Magnet Substitution Using Iron-Nitride Magnets

Iron-nitride magnets are a potential NdFeB magnet substitute with several attractive qualities.[321] Iron-nitride magnets are made of iron and nitrogen powder. [TEXT REDACTED].[322] [TEXT

[304] This paragraph draws on the DoE's ''Rare Earth Permanent Magnets'' report. ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf*.

[305] ''Rare Earth Alternatives in Critical Magnets,'' Advanced Research Projects Agency—Energy, n.d., *https://arpa-e.energy.gov/technologies/programs/react*.

[306] ''REACT Program Overview,'' Advanced Research Projects Agency—Energy, n.d., *https://arpa-e.energy.gov/sites/default/files/documents/files/REACT_ProgramOverview.pdf*.

[307] Research on iron-nitride magnets was spun-out to a private enterprise called Niron Magnetics, which is discussed later in this report and in Appendix G, ''NdFeB Magnet Substitutes: Niron Magnetics.''

[308] ''Commercialization of Cerium-based gap magnets—TCF award,'' Ames Laboratory, October 4, 2021, *https://www.ameslab.gov/cmi/research-highlights/commercialization-of-cerium-based-gap-magnets-tcf-award*.

[309] Brett Nelson, ''How Cool is This: Superconducting Generators Aim to Unlock More Offshore Wind Power at Lower Cost,'' GE Renewables, February 24, 2021, *https://www.ge.com/news/reports/how-cool-is-this-superconducting-generators-aim-to-unlock-more-offshore-wind-power-at-lower*.

[310] ''Revolutionary Carbon-Based Magnetic Material Finally Synthesized After 70 Years,'' SciTech Daily, January 28, 2022, *https://scitechdaily.com/revolutionary-carbon-based-magnetic-material-finally-synthesized-after-70-years/*.

[311] ''DOE Awards $20 Million for Research on Rare Earth Elements,'' Department of Energy, August 25, 2020, *https://www.energy.gov/articles/doe-awards-20-million-research-rare-earth-elements*.

[312] ''Critical Minerals and Materials: Chemical and Materials Sciences Research on Rare Earth and Platinum Group Elements,'' Department of Energy, *https://science.osti.gov/-/media/bes/pdf/Funding/2021/FY2021_CM_Awards.pdf?la=en&hash=D76330B7A090B12B63F0EB2AB83DD43FB367D61C*.

[313] Meeting between Turntide Technologies and the Department of Commerce, (Virtual Meeting, February 17, 2022).

[314] Ibid.

[315] Nikki Gordon-Bloomfield, ''Toyota Seeks to Ditch Rare Earth Metals from Electric Motors, Green Car Reports, January 17, 2011, *https://www.greencarreports.com/news/1053778_toyota-seeks-to-ditch-rare-earth-metals-from-electric-motors*.

[316] Megan Geuss, ''Toyota's new magnet won't depend on some key rare-earth minerals,'' ArsTechnica, February 28, 2018, *https://arstechnica.com/cars/2018/02/neodymium-more-like-neo-dont-mium-new-magnet-uses-fewer-key-rare-earths/*.

[317] ''High-performance magnet that does not use rare earths,'' Chunichi Shimbun, January 8, 2022, *https://www.chunichi.co.jp/article/394835*.

[318] Lindsay Brooke, ''Honda's new e-motor magnet aims to mitigate China rare-earth monopoly,'' SAE International, July 17, 2016, *https://www.sae.org/news/2016/07/hondas-new-e-motor-magnet-aims-to-mitigate-china-rare-earth-monopoly*.

[319] ''Factbox: Automakers Cutting Back on Rare Earth Magnets,'' Reuters, July 19, 2021, *https://www.reuters.com/business/autos-transportation/automakers-cutting-back-rare-earth-magnets-2021-07-19/*; Claudiu C. Pavel et al., ''Role of substitution in mitigating the supply pressure of rare earths in electric road transport applications,'' Sustainable Materials and Technologies (12): 62–72, July 2017, *https://doi.org/10.1016/j.susmat.2017.01.003*.

[320] Philip E. Ross, ''In Mahle's Contact-Free Electric Motor, Power Reaches the Rotor Wirelessly,'' IEEE Spectrum, May 12, 2021, *https://spectrum.ieee.org/mahles-electric-motor-says-look-ma-no-contacts*.

[321] [TEXT REDACTED].

[322] Meeting between Niron Magnetics and the Department of Commerce, (Virtual Meeting, January 7, 2022).

REDACTED].[323] [TEXT REDACTED].[324] [TEXT REDACTED].[325]

Although iron-nitride has been known for many years, it has yet to be commercialized because of the difficulties involved in manufacturing.[326] Researchers at the University of Minnesota, funded by ARPA–E's REACT program, were the first to produce an iron-nitride magnet prototype. This research was spun out into a commercial venture called Niron Magnetics. Niron Magnetics continues to develop this technology [TEXT REDACTED].[327] [TEXT REDACTED].[328] [TEXT REDACTED].[329]

Example: NdFeB Magnet Substitution Using Nanotechnology

Sintered NdFeB magnets used in critical infrastructure and high growth applications, such as electric vehicles and offshore wind turbines, require elevated temperature properties that necessitate the addition of heavy rare earths like dysprosium and terbium. Heavy rare earth deposits are even more concentrated in China than neodymium and, after recent Chinese industry consolidation, a single state-owned enterprise—China Rare Earth Group—will control most capacity.[330] [331] Although USA Rare Earth's Round Top Mine in Texas is expected to produce dysprosium, China will continue to dominate global production.[332]

MQ3 magnets, first developed by General Motors in 1985 and later commercialized by Magnequench in 1987, are a type of NdFeB magnet that may offer a reduced heavy rare earth element or heavy rare earth element-free alternative to sintered NdFeB magnets.[333] [334] With the exception of a reduced need for heavy rare earth elements, MQ3 magnets rely on similar feedstocks as sintered and bonded NdFeB magnets. However, MQ3 magnets are manufactured using different methods that affect their heavy rare earth element requirements. MQ3 magnets rely on thermomechanical processes to produce dense anisotropic microstructures that enable the development of high energy products required for elevated temperature applications like electric vehicles.[335] The production of MQ3 magnets involves the following steps: (1) rapid solidification of feedstock into ribbon and then milling into powder (also used for bonded NdFeB magnets), (2) hot deformation of powder into fully dense isotropic magnets through hot pressing, hot extrusion, or spark plasma sintering (called MQ2), and (3) die-upsetting or back extrusion to form fully dense anisotropic magnets (called MQ3).[336] MQ3 magnets can be made with very high energy density. In the 1990s, researchers reported energy products in MQ3 magnets comparable to high energy sintered NdFeB magnets.[337] [338] MQ3 magnets can possess similar characteristics as sintered NdFeB magnets, despite their different manufacturing processes.

While comparable in performance metrics to sintered NdFeB magnets, MQ3 magnets use a smaller amount of heavy rare earth elements due to microstructural differences. As the grain size of NdFeB magnets' microstructure is reduced, the magnets' resulting coercivity increases due to higher domain wall pinning.[339] MQ3 magnets' thermomechanical manufacturing process means that their grain sizes are in the range of 20 to one hundred nanometers, orders of magnitude smaller than the five to ten micrometers in a typical sintered NdFeB magnet.[340] MQ3 magnets thus display higher coercivity, including at elevated temperatures. As a result of these properties, MQ3 magnets require less heavy rare earth elements than sintered NdFeB magnets.[341] [342]

Extant research indicates that substituting MQ3 magnets for sintered NdFeB magnets could substantially reduce or even eliminate the use of heavy rare earth elements. In one study comparing equivalent MQ3 and sintered NdFeB magnets, dysprosium-free MQ3 magnets were equivalent to sintered NdFeB magnets with 3.43 percent dysprosium by weight.[343] Although MQ3 magnets needed to be four percent dysprosium by weight to be equivalent to a sintered NdFeB magnet composed of 6.45 percent dysprosium by weight, this still represents a considerable reduction in heavy rare earth element content.[344] In another study comparing MQ3 and sintered NdFeB magnets with similar temperature coercivities at 180 degrees, the MQ3 magnets required four percent less dysprosium by weight than their sintered NdFeB magnet counterparts.[345] Future research could further optimize the microstructure, reduce grain sizes to exhibit single domain behavior, and maximize pinning dominated demagnetization, which may enhance coercivity and result in even greater reductions in heavy rare earth element content.

Although the method to produce MQ3 magnets was first discovered in 1985, the current NdFeB magnet industry primarily produces bonded and especially sintered NdFeB magnets. One major reason for this equilibrium is that the processing costs for MQ3 magnets are higher than for sintered NdFeB magnets.[346] However, the rise in heavy rare earth prices has increased the proportion of magnet costs attributable to feedstock prices and may make MQ3 magnets more economically competitive. That said, MQ3 magnets

[323] Ibid.

[324] ''Niron Magnetics: Summary of Environmental Life Cycle Analysis,'' Niron Magnetics, November 25, 2021.

[325] Meeting between Niron Magnetics and the Department of Commerce, (Virtual Meeting, January 7, 2022).

[326] Ibid.

[327] Ibid.

[328] Ibid.

[329] Ibid.

[330] Meeting between USA Rare Earth and the Department of Commerce, (Virtual Meeting, December 10, 2021).

[331] Sun Yu and Tom Mitchell, ''China Merges 3 Rare Earth Miners to Strengthen Dominance of Sector,'' Financial Times, December 23, 2021, *https://www.ft.com/content/4dc538e8-c53e-41df-82e3-b70a1c5bae0c*.

[332] Meeting between USA Rare Earth and the Department of Commerce, (Virtual Meeting, December 10, 2021).

[333] R.W. Lee, ''Hot-pressed neodymium-iron-boron magnets,'' Applied Physics Letters 46: 790, 1985, *https://doi.org/10.1063/1.95884*.

[334] V. Panchanathan, ''Magnequench Magnets Status Overview,'' Journal of Materials Engineering and Performance, 4 (4) 423–429, 1995, *https://doi.org/10.1007/BF02649302*.

[335] Ibid.

[336] Ibid.

[337] C.D. Fuerst and E.G. Brewer, ''High-remanence rapidly solidified Nd-Fe-B: Die-upset magnets,'' Journal of Applied Physics 73: 5751, 1993, *https://doi.org/10.1063/1.353563*.

[338] V. Panchanathan, ''Magnequench Magnets Status Overview,'' Journal of Materials Engineering and Performance, 4 (4) 423–429, 1995, *https://doi.org/10.1007/BF02649302*.

[339] J.F. Herbst, ''$R_2Fe_{14}B$ materials: Intrinsic properties and technological aspects,'' Reviews of Modern Physics, 63 (4): 819–898, 1991, *https://doi.org/10.1103/RevModPhys.63.819*.

[340] Ibid.

[341] ''Automotive,'' Neo Magnequench, n.d., *https://mqitechnology.com/applications/automotive/*.

[342] ''Radially oriented, anisotropic Nd-Fe-B ring magnets (NEOQUENCH–DR),'' Daido Electronics, n.d., *http://daido-electronics.co.jp/english/product/neoquench_dr/index.html?msclkid=a3ef65e0cbb811ecb84db59d0093c2de*.

[343] Steve Constantinides, ''Manufacture of Modern Permanent Magnet Materials,'' Arnold Magnetic Technologies, n.d., *https://www.arnoldmagnetics.com/wp-content/uploads/2017/10/Manufacture-of-Modern-Permanent-Magnet-Materials-Constantinides-PowderMet-2014-ppr.pdf*.

[344] Ibid.

[345] John Ormerod, ''MQ3 Fully Dense NdFeB Magnets,'' Bunting, n.d., *https://bunting-dubois.com/tech-briefs/types-of-rare-earth-magnets-part-3/*.

[346] David Brown, Bao-Min Ma, and Zhongmin Chen, ''Developments in the processing and properties of NdFeb-type permanent magnets,'' Journal of Magnetism and Magnetic Materials, 248 (3): 432–440, 2002, *https://doi.org/10.1016/S0304-8853(02)00334-7*.

were never fully decommercialized. There are currently at least two firms that produce MQ3 magnets: Neo Performance Materials of Canada and Magnet e Motion of the Netherlands.[347] [348] In addition to these magnet manufacturers, Honda appears to have commercialized the use of MQ3 magnets.[349] In July 2016, Honda and Daido Steel announced the use of MQ3 magnets in one of its hybrid electric traction drive motors, with production to commence in August 2016.[350] Daido Steel planned to use feedstock from Neo Performance Materials' predecessor Magnequench International to produce the magnets at a facility in Japan.[351] [TEXT REDACTED]

In summary, there are two different approaches which can be used to improve coercivity and resulting resistance to demagnetization at elevated temperature, one of which—MQ3 magnets—is less reliant on heavy rare earth elements. In sintered NdFeB magnets, heavy rare earths such as terbium and dysprosium are added which results in higher feedstock costs and an even greater reliance on Chinese supply chains. MQ3 magnets' smaller grain size enables manufacturers to reduce or eliminate heavy rare earth elements while maintaining comparable performance. Although MQ3 magnets' processing methods are more expensive than sintered NdFeB magnets', heavy rare earth element feedstock prices may make MQ3 magnets economically competitive. In addition, using less heavy rare earth elements would decrease dependence on China, which dominates global heavy rare earth element production even more than global light rare earth element production. MQ3 magnets are a potential substitute for sintered NdFeB magnets and would be particularly useful in reducing U.S. dependence on heavy rare earth elements.

Commercial Viability of NdFeB Magnet Substitutes

Despite advances, most substitution technologies are still at least several years away from commercialization, which means they will be unable to satisfy growing demand for NdFeB magnets from green technology (*e.g.,* electric vehicles and wind turbines) over the same timeframe.[352] In addition, most substitutes currently being researched would require other rare earth elements (such as lanthanum) and would only replace lower-grade NdFeB magnets, meaning that NdFeB magnets would still be required in high heat application, including electric vehicle drive trains, or when efficiency is highly desired. Although other rare earth elements are cheaper, China dominates rare earth production. Any viable substitute would also have to quickly scale up production. The manufacture of different types of magnets is similar, so shifting a production facility from NdFeB magnets or samarium cobalt magnets to a substitute may be possible but would still require available facilities. Finally, because NdFeB magnets are highly tailored to end-user specifications, customers would have to make product adjustments to account for substitutes.[353] Substitution research has the potential to impact production in the long-term but requires present action to enable success.

The Department's survey of the U.S. NdFeB magnet industry provides support for the view that current substitutes are of limited commercial viability. The survey asked producers of assemblies or systems containing NdFeB magnets to indicate whether magnet substitutes were available for their primary products, and if so, to identify the potential substitute and discuss the advantages and disadvantages of the substitute. 21 firms indicated 57 products in response. [TEXT REDACTED].[354] [TEXT REDACTED] 14 firms indicated 38 products (67 percent) where no substitutes were available for NdFeB magnets.[355] [TEXT REDACTED], these were a mix of rotors and motors, in addition to speakers, wind turbines, and other products, to be used in 15 different industries.[356] For the vast majority of firms in our sample [TEXT REDACTED] substitutes were either unknown or unavailable for most products [TEXT REDACTED], and the only substitute listed was another rare earth magnet, speaking to the dearth of currently commercially viable NdFeB magnet substitutes.

The relationship between NdFeB magnet component prices and NdFeB magnet imports further underscores the lack of commercially viable NdFeB magnet substitutes. If NdFeB magnet substitutes are commercially available, then end-users should be able to switch production to use NdFeB magnet substitutes. As a result, as NdFeB magnet prices rise demand should fall, and vice versa. To examine whether this is the case, the Department analyzed the relationship between neodymium oxide prices and NdFeB magnet imports. Neodymium oxide prices are a good proxy for NdFeB magnet prices because neodymium is the largest contributor to NdFeB magnet cost. NdFeB magnet imports are a relatively reliable indicator of direct demand because the United States is nearly one hundred percent dependent on imports.[357] The correlation between the daily price of neodymium oxide and the daily value of NdFeB magnet imports from 2016 to 2021 is 0.23, while the equivalent correlation for the daily quantity (units) of NdFeB magnet imports is 0.06. Neodymium oxides prices are thus somewhat positively associated with the value of NdFeB magnet imports, given that increases in the value of NdFeB magnet components should raise the value of NdFeB magnets. However, the correlation with the quantity of NdFeB magnet imports is very weak, suggesting that end-users do not change their importing behavior in response to increases in NdFeB magnet costs. The relatively weak correlation between the price of neodymium oxide and the quantity of NdFeB magnet imports lends further credence to the view that although other magnets or non-magnet components can substitute for NdFeB magnets in certain situations, wholesale substitution is currently not possible.

9. Conclusion

9.1 Findings

In this section the Department discusses the key findings from its investigation into the effects of imports of NdFeB magnets on U.S. national security. These findings are based on data collected from an industry survey, industry meetings, extant U.S. Government research, and other sources, as discussed in earlier sections.

9.1.1 NdFeB Magnets Are Essential to U.S. National Security

NdFeB Magnets Are Key Components of National Defense Systems

NdFeB magnets are critical to the functioning of numerous defense systems, including fighter aircraft and

[347] ''Products,'' Neo Magnequench, n.d., *https://mqitechnology.com/products/*.

[348] ''Hot Formed NdFeB Magnets (MQ3),'' Magnet e Motion, n.d., *https://magnetemotion.com/technology-mq3-ndfeb-extrusion.html*.

[349] ''Daido Steel and Honda develop neodymium magnet free of heavy rare earth elements; Honda Freed hybrid first to adopt resulting new motor,'' Green Car Congress, July 12, 2016, *https://www.greencarcongress.com/2016/07/20160712-honda.html*.

[350] Ibid.

[351] Ibid.

[352] [TEXT REDACTED].

[353] [TEXT REDACTED].

[354] The NdFeB magnets in question were all sintered NdFeB magnets.

[355] [TEXT REDACTED].

[356] The industries cited included all [TEXT REDACTED] industries where the NdFeB magnets that could be substituted for [TEXT REDACTED] were destined to be used.

[357] The Department acknowledges that there is significant indirect demand for NdFeB magnets.

missile guidance systems. Although NdFeB magnets can sometimes be substituted for with alternative products, these products are usually not as effective and may reduce system performance. NdFeB magnets are therefore essential to U.S. national security.

NdFeB Magnets Are Key Components of Critical Infrastructure

NdFeB magnets are used in a broad range of products across virtually all 16 critical infrastructure sectors. NdFeB magnets are necessary and largely non-substitutable components of goods in multiple critical infrastructure sectors. NdFeB magnets are particularly important for the critical manufacturing and critical energy sectors, as they are key to the functioning of electric vehicle drive trains and offshore wind turbine generators. They also have an important role in the critical healthcare and public health sector, where they are used in MRI machines and other medical instruments, and the critical defense industrial base sector.

The Department previously determined that ''national security'' can be interpreted to include the general security and welfare of certain ''critical industries.'' [358] The Department currently uses the 16 critical infrastructure sectors identified in Presidential Policy Directive 21 to define critical industries.[359] NdFeB magnets are therefore also essential to U.S. national security by virtue of their indispensable use in critical infrastructure sectors. NdFeB magnets' criticality is heightened by the fact they are key components of electric vehicles and offshore wind turbines. These products are central to achieving the United States' clean energy goals and combating climate change, which have important national security implications.[360]

9.1.2 Domestic Demand for NdFeB Magnets Is Expected To Grow

Total U.S.—and global—demand for NdFeB magnets is expected to grow significantly in the coming decades, driven by increased production of electric vehicles and offshore wind turbines. Under high growth scenarios, total domestic demand is expected to more than double from 2020 to 2030, growing from just over 16,000 tons to 37,000 tons, and more than quadruple from 2020 to 2050, increasing to almost 69,000 tons.[361] Total global demand is forecasted to grow even more quickly, tripling from 2020 to 2030 from 119,000 tons to 387,000 tons and increasing sixfold from 2020 to 2050 to over 750,000 tons. Domestically, electric vehicles will consume more than 10,000 tons by 2030 and 23,000 tons by 2050, up from just under 2,000 tons in 2020. Domestic offshore wind turbine-driven demand will increase from zero in 2020 to over 10,000 tons in 2030 and 19,000 tons in 2050. Together, these critical infrastructure products will make up almost 55 percent of total U.S. demand in 2030 and over 61 percent of total U.S. demand by 2050, up from 11 percent in 2020. Total domestic demand from traditional end-users is also expected to grow, albeit at a slower rate.

A key outstanding question is the extent to which firms will locate the production of assemblies that integrate NdFeB magnets, such as electric vehicle motors and wind turbine generators, in the United States. If firms elect to produce products containing NdFeB magnets overseas this will increase embedded U.S. demand for NdFeB magnets but not affect direct U.S. demand or contribute to a domestic market for NdFeB magnets. U.S. NdFeB magnet value chain participants are more likely to successfully establish and maintain production if they are proximate to their customers, due to transportation costs and turn times.[362] In addition, even end-users that manufacture domestically may be unwilling to pay a premium for domestic or ally magnets over Chinese magnets. Onshoring or nearshoring of end-user industries and incentivizing the use of domestic NdFeB magnets will be critical to the success of the U.S. NdFeB magnet industry.

The substantial growth in total U.S. demand will increase U.S. dependence on imports of NdFeB magnets without the rapid development of a competitive U.S. NdFeB magnet industry. However, it also presents an opportunity to facilitate the formation of just such an industry. If a large enough proportion of the products that directly incorporate NdFeB magnets—such as electric vehicle drive trains—are manufactured in the United States and the price differential between U.S. and Chinese magnets can be sufficiently narrowed, domestic NdFeB magnet producers may benefit from a sizeable and stable source of demand.

9.1.3 The United States and Its Allies Are Dependent on Imports From China

The United States is currently one hundred percent dependent on imports of sintered NdFeB magnets and is highly dependent on imports of bonded NdFeB magnets. The United States does not currently possess the capacity to manufacture sintered NdFeB magnets and only makes a small amount of bonded NdFeB magnets. In addition, the United States does not produce rare earth oxides, NdFeB-related metals, or NdFeB alloys, such that current bonded NdFeB magnet manufacturers are dependent on imported feedstocks. The majority of direct U.S. NdFeB magnet demand is satisfied by imports from China. In 2021, China accounted for 75 percent of U.S. sintered NdFeB magnet imports by value, up from under 60 percent in 2016. Given substantial indirect demand, this may even underestimate the United States' overall dependence on China for NdFeB magnets. For example, up to 60 percent of essential civilian demand is satisfied through embedded imports.[363]

U.S. allies are also dependent to varying degrees on China. Although the European Union and Japan operate in the downstream steps of the NdFeB magnet value chain, they are dependent on China for feedstock to produce metals, alloys, and magnets. Other U.S. allies, such as Australia, only operate in the upstream portions of the NdFeB magnet value chain. More broadly, China can shape global prices due to its dominance in all value chain steps and the increasing concentration of its domestic industry.

9.1.4 The United States Will Continue To Depend on Imports

Multiple firms intend to establish domestic capacity at different steps of

[358] ''The Effects of Imports of Iron Ore and Semi-Finished Steel on the National Security,'' Department of Commerce, Bureau of Export Administration, October 2001 (''2001 Iron and Steel Report''), at 5, *https://www.bis.doc.gov/index.php/documents/steel/2224-the-effect-of-imports-of-steel-on-the-national-security-with-redactions-20180111/file*.

[359] Presidential Policy Directive 21, ''Critical Infrastructure Security and Resilience,'' February 12, 2013.

[360] David Vergun, ''Climate Change Has National Security Implications, DOD Official Says,'' Department of Defense, *https://www.defense.gov/News/News-Stories/Article/Article/2707739/climate-change-has-national-security-implications-dod-official-says/*.

[361] This section uses demand data from the DoE's ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report.'' *See* ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf*.

[362] Meeting between Lynas Rare Earths and the Department of Commerce, (Virtual Meeting, March 30, 2022); Meeting between Quadrant Magnetics and the Department of Commerce, (Virtual Meeting, February 15, 2022).

[363] ''Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth,'' The White House, June 2021, *https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chain-review-report.pdf*.

the NdFeB magnet value chain. If successful, these plans have the potential to create a U.S. NdFeB magnet value chain from mine to magnet and would reduce—but far from eliminate—import dependence on China. Based on its survey of the U.S. NdFeB magnet industry, the Department estimates that the United States could produce more than 14,000 tons of sintered NdFeB magnets by 2026. Should all these magnets be consumed domestically, import penetration may decline from one hundred percent in 2021 to as low as 49 percent in 2026.[364] Despite this potentially significant decline in import penetration, U.S. production would likely struggle to fulfill critical infrastructure demand. Assuming linear growth from 2020 to 2030, combined domestic NdFeB magnet demand from the automobile and wind energy sectors will be almost 15,000 tons in 2026, exceeding domestic production.[365] In addition, domestic NdFeB magnet manufacturing will be constrained by domestic production of rare earth metals and NdFeB alloys. The Department estimates the U.S. NdFeB magnet industry will produce [TEXT REDACTED] of NdFeB alloy by 2026, enough for between [TEXT REDACTED] of NdFeB magnets, far less than overall and critical infrastructure demand.[366] Despite diverse efforts to establish a U.S. NdFeB magnet industry, the United States will continue to depend on imports of NdFeB magnets and related feedstock to fulfill demand, including from critical infrastructure sectors.

9.1.5 The U.S. NdFeB Magnet Industry Faces Significant Challenges

The nascent U.S. NdFeB magnet industry faces significant barriers to achieve its production targets. In particular, the U.S. NdFeB magnet industry participants will need to compete with Chinese manufacturers, who benefit from favorable tax and tariff policies, low labor and energy costs, and comparatively relaxed environmental regulations, among other factors. Indeed, U.S. producers consistently cite foreign competition as a top challenge to their competitive position. Chinese competition is also often mediated by other major challenges such as labor costs and input availability.

In addition to Chinese competition, U.S. firms face financial and human capital constraints. NdFeB magnet facilities—and facilities at earlier value chain steps—are expensive, and U.S. firms have currently allocated almost no funds to establish planned facilities. For example, sintered NdFeB magnet facilities cost on average [TEXT REDACTED], but firms have on average allocated less than [TEXT REDACTED] for each facility. Further, the collapse of the U.S. NdFeB magnet industry in the 1990s means that planned U.S. NdFeB magnet producers struggle to find qualified and experienced workers, especially high wage employees such as materials scientists.

Finally, there is high uncertainty over demand for U.S. NdFeB magnets. Not only do a significant portion of end-users manufacture products overseas, but even domestic manufacturers may prefer to continue using less expensive Chinese NdFeB magnets. Ensuring that enough end-users integrate magnets into intermediate and final products in the United States will be crucial for the success of the U.S. NdFeB magnet industry. Planned U.S. NdFeB magnet industry participants may struggle to achieve production estimates, given these and other obstacles.

9.2 Determination

Based on the findings in this report, the Secretary concludes that the present quantities and circumstances of NdFeB magnet imports threaten to impair the national security as defined in section 232 of Trade Expansion Act of 1962, as amended.

9.3 The United States Should Not Restrict NdFeB Magnet Imports

Despite the heavy dependence of the United States on direct and indirect imports of NdFeB magnets, the Department currently recommends that the Administration not impose tariffs, quotas, or other import restrictions on NdFeB magnets or component products. Given the current severe lack of domestic production capability throughout the magnet supply chain, tariffs and quotas would have an adverse impact on consuming sectors and might incentivize businesses to move operations incorporating NdFeB magnets offshore. In both industry meetings and public comments, most representatives of consuming sectors oppose the imposition of trade restrictions for these reasons. As Dana, a manufacturer of electric motors, stated, tariffs ''would potentially curtail any future plans to bring parts of its electric motor manufacturing to the U.S.'' [367] Even planned magnet manufacturers, such as MP Materials, emphasize that tariffs could incentivize substitution or offshoring, although they do not discount the ability of tariffs or quotas to aid an established NdFeB magnet manufacturing sector. The U.S. Government may reconsider the merits of imposing tariffs or other import restrictions, based on section 232 of the Trade Expansion Act of 1962, as amended, or other policy levers, as the domestic supply chain develops production capacity.

9.4 Recommendations

The Department has identified several actions that would help to ensure reliable domestic sources of NdFeB magnets and lessen the risk that imports threaten the national security. These actions are not intended to be exhaustive or exclusive, and the Secretary recommends that the Administration pursue all proposed actions.

9.4.1 Engagement With Allies and Partners

U.S. Ally Vulnerabilities

The national security of U.S. allies and partners is essential to U.S. national security, and both are undermined by allies' and partners' reliance on China with respect to the NdFeB magnet value chain. Australia relies on China to buy rare earth materials, while both Japan and the European Union rely on China to purchase rare earth oxides and metals to make NdFeB magnets. There is also broad reliance by U.S. allies on China for NdFeB magnets—[TEXT REDACTED].[368] Such reliance leaves allies open to supply chain disruptions or potential economic coercion by China. For example, China has previously restricted its imports of Australian coal and its exports of rare earths to Japan. China's export restrictions to Japan in 2010, while only lasting two months, caused supply chain problems for Japanese firms and

[364] For further information on the assumptions and data used to reach these figures, *see* Section 8.1.4, ''Estimated NdFeB Magnet Import Penetration, 2017 to 2026.''

[365] This figure combines estimates of total U.S. demand for electric vehicles, offshore wind turbines, and non-electric vehicle drive trains, [TEXT REDACTED]. For the demand estimates *see* ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf.*

[366] *See* Section 5.2, ''Rare Earth Element Losses in Magnet Production,'' for estimates of material loss from alloy production to magnet production.

[367] Comments of Dana to Request for Public Comments, ''Section 232 National Security Investigation of Imports of Neodymium-Iron-Boron (NdFeB) Permanent Magnets,'' 86 FR 53277, November 12, 2021.

[368] [TEXT REDACTED]. *See* Adamas Intelligence, ''Rare Earth Magnet Market Outlook to 2030,'' 2020; ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf.*

galvanized Japan into diversifying its supply of rare earths.[369]

Multilateral Engagement on Critical Minerals

Shared vulnerabilities highlight the value of current multilateral—as well as bilateral—engagements on critical minerals, which can help transition the United States and allies from reliance on a potential adversary and national security threat. Continued multilateral engagement through existing fora, such as the Conference on Critical Materials and Minerals, in concert with current bilateral engagements, including with Australia, Canada, and the European Union, will facilitate efficient coordination on supply chain resiliency issues across the full NdFeB magnet value chain. The United States should work with allies through these existing engagements to develop production at different steps of the value chain, encourage intellectual property licensing, and cooperate on foreign investment reviews, in addition to other actions.

The United States and allies should leverage burgeoning multilateral mechanisms to enhance focus on identifying the most cost-effective deposits, prioritizing the most commercially viable ones, and then pooling funding for production. The United States has one of the highest-grade deposits of rare earth elements in the world at Mountain Pass Mine in California. Round Top Mine in Texas, scheduled to begin production in 2023, may become a viable source of dysprosium. Meanwhile, Australia has some of the richest deposits of uranium and gallium, along with significant rare earth elements. Leveraging assets and comparative advantage amongst allies and partners will help develop a critical minerals supply chain in economically viable locations in a manner consistent with the United States' labor, environmental, equity, and other values.

In addition to funding market development, multilateral action should address technology sharing. While not cited as a critical barrier to entry, NdFeB magnet industry participants indicate intellectual property licensing would facilitate production. Industry participants are also researching NdFeB magnet substitutes and methods to reduce rare earths content that would increase supply chain resiliency, the commercialization of which should be promoted. Intellectual property licensing to firms from ally and partner countries should be encouraged and facilitated, especially when it reduces reliance on sourcing from non-allies. Allies and partners should reciprocate and respect all intellectual property. Emphasis should be placed on sharing technology that reduces the negative impacts of mining or separation, improves the extraction of rare earth elements from unconventional sources, fosters novel and effective recycling technologies, and develops effective magnet substitutes.

Coordinating foreign investment review mechanisms, which affect how quickly international capital can flow to priority facilities, should also be part of multilateral engagements. U.S. foreign investment law has exceptions for investors from certain countries, including important NdFeB magnet value chain participants such as Australia and Canada.[370] Those exceptions facilitate investments between the United States and its allies; other countries should be encouraged to reciprocate for U.S.-origin investments. Coordinating inbound investment review regimes may also help protect against the risk that an untrusted investor gains access to an important piece of the supply chain by investing in a trusted country. Outbound investment controls, similar to the ones currently before Congress, may reduce the risk that a firm based in an allied country will sell key assets located overseas to a foreign adversary.[371] The Australian firm Peak Rare Earths is an example of how foreign investment controls could be used to monitor and reduce risk in the NdFeB magnet supply chain. Peak Rare Earths is a potentially important non-Chinese rare earths market participant. As discussed in Appendix E, ''Global NdFeB Magnet Production: A Firm-level Perspective,'' a Chinese firm recently took a significant stake in Peak Rare Earths in an inbound transaction to Australia. Outbound review could protect against the risk of Peak Rare Earths' Chinese investors compelling it to sell critical facilities to Chinese owners, whether those facilities are in allied countries (such as its planned rare earth oxide separation facility in the United Kingdom) or elsewhere (such as its Ngualla mining project in Tanzania).[372]

There are several established and relevant fora which can serve as venues for structured engagement with allies on these and other issues related to NdFeB magnets. For example, the Conference on Critical Materials and Minerals, which brings together Australia, Canada, the European Union, Japan, and the United States, is an important venue to regularly exchange information on policies for critical materials, research and development, and other efforts, and could be the site of further multilateral engagement.[373] In March 2022, the International Energy Agency announced a voluntary critical materials security program that could be another forum to coordinate on issues related to NdFeB magnets.[374] In addition to these multilateral fora, the Japan-U.S. Industrial Cooperation Partnership, the U.S.-Australia Action Plan, U.S.-Brazil Critical Minerals Working Group, the U.S.-Canada Action Plan, and the U.S.-E.U. Trade and Technology Council are all important bilateral venues in which the United States could engage in structured dialogue and coordination with allies on NdFeB magnet-related supply chain resiliency issues.

9.4.2 Bolster Domestic Supply

Establish Rare Earths Tax Credits

The Department recommends that the Administration support the passage of H.R. 5033, the Rare Earth Magnet Manufacturing Production Tax Credit Act, or similar legislation.[375] This bipartisan legislation would establish a $20 per kilogram tax credit for rare earth magnets manufactured in the United States, and an enhanced $30 per kilogram credit for magnets manufactured in the United States for

[369] Restrictions to Japan were first reported in September 2010 and were lifted two months later in November 2010. Kristen Vekasi, ''Politics, markets, and rare commodities: Responses to Chinese rare earth policy,'' Japanese Journal of Political Science 20 (1): 2–20, 2019, *https://doi.org/10.1017/S1468109918000385*; ''China resumes rare earth exports to Japan,'' BBC, November 24, 2010, *https://www.bbc.com/news/business-11826870*.

[370] ''CFIUS Exempted Foreign States,'' U.S. Department of the Treasury, *https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-excepted-foreign-states*.

[371] ''Text—H.R. 5421—United States Innovation and Competition Act,'' U.S. House of Representatives, February 4, 2022, *https://www.congress.gov/bill/117th-congress/house-bill/4521/text/eh* (Section 104001).

[372] Note that Shenghe Resources, the Chinese investor in Peak Rare Earths, also purchased eight percent of U.S. mining firm MP Materials. *See* Mary Hui, ''A Chinese rare earths giant is building international alliances worldwide,'' Quartz, February 19, 2021, *https://qz.com/1971108/chinese-rare-earths-giant-shenghe-is-building-global-alliances/*.

[373] For additional information on the Conference on Critical Materials and Minerals, *see* ''12th Conference on Critical Materials and Minerals Held,'' Ministry of Economy, Trade, and Industry, December 9, 2021, *https://www.meti.go.jp/english/press/2021/1209_002.html*.

[374] *See* ''2022 IEA Ministerial Communiqué,'' International Energy Agency, March 24, 2022, *https://www.iea.org/news/2022-iea-ministerial-communique*.

[375] *See* ''H.R. 5033—Rare Earth Magnet Manufacturing Production Tax Credit Act of 2021,'' Congress.gov, n.d., *https://www.congress.gov/bill/117th-congress/house-bill/5033*.

which all the component materials are produced domestically. This legislation covers both NdFeB magnets and samarium-cobalt magnets. In both the public comments and in industry meetings, NdFeB magnet producers and value chain participants expressed support for this legislation. Although they did not cite this legislation directly, end-users indicated support for domestic manufacturing incentives as opposed to tariffs. H.R. 5033 or similar legislation would increase the cost competitiveness of U.S. NdFeB magnets and magnet feedstocks relative to their Chinese counterparts and galvanize the development of a U.S. NdFeB magnet value chain. A tax credit should include magnets produced by or using materials from U.S. allies.

In addition to a tax credit for NdFeB magnets, the Department recommends that the Administration support the development of tax credits for non-NdFeB magnets that can substitute for NdFeB magnets and upstream rare earth products including carbonates, oxides, metals, and alloys. NdFeB magnet substitute and upstream rare earth product tax credits would similarly improve cost competitiveness and facilitate the growth of U.S.-produced magnetic materials. As with a rare earth tax credit, any NdFeB magnet substitute and upstream rare earth product tax credits should include materials produced by U.S. allies.

Defense Production Act Title III Funding

As discussed earlier, the Department of Defense (DoD) has made several notable awards through the Defense Production Act (DPA) Title III program to firms in the NdFeB magnet value chain. These awards have largely focused on the development of oxide separation and sintered NdFeB magnet production facilities. Further DoD awards for alloying and metallization production could facilitate the development of a holistic domestic NdFeB magnet value chain. Alloy and especially metal production are currently anticipated to be weak links in the future U.S. NdFeB value chain. Based on the Department's survey of the U.S. NdFeB magnet industry, alloy and metal production facilities are also, on average, less expensive than domestic mining or magnet facilities. DoD DPA funding for alloy and metal facilities would be an efficient use of resources to strengthen the nascent NdFeB magnet value chain.

Encourage the Use of Export-Import Bank Financing

Eligible U.S. NdFeB magnet industry participants, including NdFeB magnet manufacturers and producers at upstream and downstream steps in the value chain, should be encouraged to apply for loans from the Export-Import Bank of the United States (EXIM). EXIM financing is another mechanism to help ease the financial constraints faced by the nascent U.S. NdFeB magnet industry. EXIM has two initiatives that are particularly relevant for the U.S. NdFeB magnet industry: the Make More in America Initiative and the China and Transformational Exports Program (CTEP).[376] [377] The Make More in America Initiative extends EXIM's existing medium- and long-term loans and loan guarantees to domestic manufacturers that export a sufficient percentage of production (15 percent or 25 percent depending on firm characteristics), scaled by jobs created. Importantly, export suppliers are also eligible. U.S. NdFeB magnet industry participants who meet export thresholds directly or because of their customer relationships, and are facing financing gaps, should be encouraged to apply for EXIM loans and loan guarantees under this initiative.

CTEP is meant to help U.S. exporters facing competition from China and ensure that the United States leads in ten transformational export areas, including renewable energy, energy storage, and energy efficiency. It is highly probable that U.S. NdFeB magnet industry participants that seek to enter export markets will face considerable competition from Chinese firms, given that China is the global leader in the NdFeB magnet value chain and Chinese magnets are less expensive than their non-Chinese counterparts because of favorable tax rebates and subsidies, among other factors. NdFeB magnet industry participants should also be encouraged to apply for EXIM financing under CTEP.

Provide Additional Support for Domestic Manufacturing

As directed by the Bipartisan Infrastructure Law, the Department of Energy has allocated nearly $3 billion to boost domestic production of technologies critical to clean energy of the future, including electric vehicles. Although much of this funding is directed at electric vehicle battery-related technologies, a portion of it could be devoted to funding domestic NdFeB magnet production, as these are critical to clean energy and national security.[378] For example, $140 million is earmarked for the design, construction, and build-out of a facility to demonstrate the commercial feasibility of a full-scale integrated rare earth element extraction and separation facility and refinery. The facility will use recycled feedstock derived from acid mine draining, mine waste, or other deleterious material to separate rare earths into oxides and refine oxides into metals. Building domestic capacity in this phase of the supply chain would support both electric vehicle battery and NdFeB magnet production.

In addition to these existing funding sources, the Department recommends that the Administration support legislative action to develop resilient supply chains through the allocation of additional funding, such as the Supply Chain Resilience Program. Additional funding from such programs should support investment in domestic manufacturing in all steps of the NdFeB magnet value chain.

Defense Priorities and Allocation System

The investigation into NdFeB magnets focuses foremost on the national security. Under Title I of the Defense Production Act (DPA), the President is authorized to require preferential acceptance and performance of contracts or orders (other than contracts of employment) supporting certain approved national defense and energy programs.[379] The Department is delegated authority, through Executive Order 13603, to implement these authorities for industrial resources, which it does through the Defense Priorities and Allocation System (DPAS) regulation. The Department has delegated specific priority rating authority with respect to industrial resources to DoD, DoE, DHS, and the

[376] On the Make More in America Initiative, *see* ''Make More in America Initiative,'' Export-Import Bank of the United States, n.d., *https://www.exim.gov/about/special-initiatives/make-more-in-america-initiative*.

[377] On the China and Transformational Exports Program, *see* ''China and Transformational Exports Program,'' Export-Import Bank of the United States, n.d., *https://www.exim.gov/about/special-initiatives/ctep*.

[378] ''Biden Administration, DOE to Invest $3 Billion to Strengthen U.S. Supply Chain for Advanced Batteries for Vehicles and Energy Storage,'' Department of Energy, February 11, 2022, *https://www.energy.gov/articles/biden-administration-doe-invest-3-billion-strengthen-us-supply-chain-advanced-batteries*.

[379] The DPA's definition of ''national defense'' includes military, energy, homeland security, emergency preparedness, critical infrastructure and restoration, and military and critical infrastructure assistance to foreign nations. *See e.g.,* ''Defense Production Act Program Definitions,'' FEMA, n.d., *https://www.fema.gov/disaster/defense-production-act/dpa-definitions*.

General Services Administration (GSA). The U.S. Government should prioritize contracts for DoD programs while considering the extensive use of NdFeB magnets in U.S. critical industry to minimize ''disruption to normal commercial activities'' and ''provide an operating system to support rapid industrial response in a national emergency.'' [380]

Access to neodymium and NdFeB magnets is critical to the industrial base as a highly customizable component with a variety of uses. DoD, DoE, and DHS should use or continue to use their delegated authority under the DPAS to place priority ratings on contracts for programs related to or containing NdFeB magnets and magnet components. DPAS use ensures that approved national defense programs receive the appropriate priority in the marketplace. DPAS authorities could be particularly useful in ensuring that U.S. NdFeB magnet industry manufacturers are able to acquire critical equipment in a timely fashion. Across the industry, potential domestic producers face average lead times of around eight months for equipment, and for some market segments this increases to ten months for critical equipment. The Department's survey of the U.S. NdFeB magnet industry indicated the United States is the top source for equipment. DPAS could therefore be successfully deployed to shorten lead times and hasten the development of the U.S. NdFeB magnet industry. In addition, once sufficient domestic sources of feedstock are available, employing DPAS authorities could enhance the timeliness and stability of supply and increase the ability of U.S. NdFeB magnet firms to maintain production.

Export Controls

The Department recommends the Administration consider restrictions on exports of materials relevant to the NdFeB magnet value chain under the International Emergency Economic Powers Act (IEEPA). Export controls could address market distortions in the NdFeB magnet value chain that create substantial difficulties acquiring or face inflated prices for feedstocks from domestic sources due to competition with foreign consumers. [TEXT REDACTED].[381] [TEXT REDACTED]. The economic implications of export controls on the value chain should be analyzed to determine their efficacy while considering their impact on U.S. allies.

National Defense Stockpile

The Strategic and Critical Minerals Stockpiling Act (50 U.S.C.§ 98 *et seq.*), as amended, provides for the acquisition and retention of strategic and critical minerals stocks to decrease and preclude U.S. dependence on foreign sources or single points of failure for supplies during national emergencies.[382] The Defense Logistics Agency (DLA) Strategic Materials oversees the National Defense Stockpile. In Fiscal Year 2023, DLA announced potential acquisitions of one hundred metric tons of rare earth magnet block, 600 tons of neodymium, and 70 tons of praseodymium, potential conversions of 12 tons of rare earth elements, and potential recovery from government sources of ten tons of rare earths.[383] [384] [385] These potential acquisitions are part of the Annual Materials Plan, which is an unconstrained budget estimate that assumes that Congressional authorization and funding are available. Actual acquisitions may be lower. In DLA's view, the availability of rare earth element ore is not a problem, between MP Materials, Chemours, and Lynas Rare Earths. Rather, the processing stages (oxide to separation to alloying) create production vulnerabilities. DLA has not announced the purchase of specific magnet grades. [TEXT REDACTED].[386] Although this stockpile is a welcome corrective to current supply chain vulnerabilities, the proposed quantities are small in relation to essential civilian and overall U.S. demand.[387] A disruption of the NdFeB magnet supply chain could cause an essential civilian shortfall of more than ten times DoD's annual peacetime consumption.[388] Demand, including by critical infrastructure sectors, is only expected to grow. The Department recommends that the Administration support further national stockpile purchases of NdFeB magnet block and constituent materials including neodymium, praseodymium, and dysprosium. The Department also suggests that the Administration explore whether to include a commercial buffer for select essential civilian and critical infrastructure sectors, which could strengthen supply chain resiliency in the event of disruptions caused by non-market forces.

[TEXT REDACTED]. DoD has requested $253 million in new appropriations for the National Defense Stockpile Transaction Fund in the President's Budget Request for Fiscal Year 2023. These funds build towards the $1 billion funding goal established by the June 2021 White House Report ''*Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth: 100 Day Reviews under Executive Order 14017.*'' [389]

[380] ''Defense Priorities and Allocation System,'' Department of Defense, n.d., *https://www.dcma.mil/DPAS/*.

[381] [TEXT REDACTED].

[382] ''The Strategic and Critical Materials Stockpiling Act (50 U.S.C. 98 *et seq.*): As amended through Public Law 115–232, the National Defense Authorization Act for Fiscal Year 2019,'' Defense Logistics Agency, n.d., *https://www.dla.mil/Portals/104/Documents/Strategic%20Materials/The%20Strategic%20and%20Critical%20Materials%20Stock%20Piling%20Act%20Amended%20Thru%20FY2019.pdf?ver=2019-01-09-151703-093*.

[383] ''National Defense Stockpile Market Impact Committee Request for Public Comments on the Potential Market Impact of the Proposed Fiscal Year 2023 Annual Materials Plan,'' **Federal Register**, September 9, 2021, *https://www.federalregister.gov/documents/2021/09/09/2021-19415/national-defense-stockpile-market-impact-committee-request-for-public-comments-on-the-potential*.

[384] As previously mentioned, NdFeB magnets are shaped to meet product requirements. Stockpiling unshaped magnet block is prudent as it can be cut to meet specific end-use demands. However, each magnet block can only produce one grade of magnet, which requires the purchase of magnet blocks at multiple grades based on end-use demand. Stockpiling rare earth oxides may be preferable as they can be refined into metals, alloyed, and manufactured into magnets and obviate the need to consider magnet shape and grade requirements. That said, the United States currently does not possess the requisite downstream capacity to turn rare earth oxides into NdFeB magnets so any stockpile of rare earth oxides would need to be processed overseas until domestic capacity is established.

[385] NdFeB magnets typically contain about 30 percent rare earths, with combined neodymium and praseodymium content ranging from 19 to 29.5 percent depending on magnet grade and the remaining rare earths percentage composed of dysprosium or terbium. Based on the potential acquisition of neodymium and praseodymium the proposed National Defense Stockpile could produce up to about 1,980 tons of NdFeB magnet, not accounting for dysprosium or terbium requirements or material losses in the production process, in addition to the one hundred tons of rare earth magnet block.

[386] Meeting between the Defense Logistics Agency and the Department of Commerce, (Virtual Meeting, November 23, 2021).

[387] At a minimum, 2020 automobile sector demand was 3,300 tons of total U.S. demand of 16,100 tons. ''Rare Earth Permanent Magnets: Supply Chain Deep Dive Report,'' Department of Energy, February 24, 2022, *https://www.energy.gov/sites/default/files/2022-02/Neodymium%20Magnets%20Supply%20Chain%20Report%20-%20Final.pdf*.

[388] ''Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth: 100 Day Reviews Under Executive Order 14017,'' The White House, June 2021, *https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chain-review-report.pdf*.

[389] Ibid.

9.4.3 Bolster Domestic Demand

Cooperation and Information Sharing Between Producers and Consumers

The Department recommends that the Administration establish a forum under a lead U.S. Government agency to encourage information exchange and cooperation between emerging NdFeB magnet producers throughout the supply chain and NdFeB magnet end-users. As previously discussed, ensuring consistent domestic commercial demand is critical to the development of a U.S. NdFeB magnet industry. Industry stakeholders have cited uncertainty over both potential sources of domestic supply and consistent demand for domestic magnets as risks to the emerging U.S. NdFeB magnet value chain. This forum would provide additional assurance of domestic supply and demand, for example by promoting private sector offtake agreements using DPA Title VII. Japan's use of JOGMEC to establish definitive offtake agreements between overseas producers and Japanese consumers is a successful model the U.S. Government could emulate.[390] [391] Ongoing private sector efforts such as the recent agreements between General Motors and MP Materials and Vacuumschmelze are encouraging, but the U.S. Government should facilitate further cooperation.

This forum could also provide a platform to resolve other issues relevant to the NdFeB magnet industry. For example, industry participants could discuss whether developing a market in futures and derivatives based on neodymium or other rare earths could increase price transparency and reduce price volatility or provide additional access to capital markets that could be used to finance capital-intensive projects. The Chinese rare earths industry is already considering such a marketplace.[392] [TEXT REDACTED].[393]

Recycling and Reprocessing

The Department recommends that the Administration take legislative action to establish regulations and, working in collaborative with the private sector, voluntary consensus standards to promote the recovery, recycling, and reuse of NdFeB magnets. In particular, labelling requirements for end-of-life products would ensure recyclers know NdFeB magnet specifications. Uncertainty over magnet specifications is a significant barrier to recycling, so labelling would facilitate recycling.

The Department also recommends that the Administration leverage existing programs and assets to increase the demand for recycling. DLA runs a Strategic Material Recovery and Reuse Program, which allows the recovery of strategic and critical materials from excess materials made available by other Federal agencies.[394] Through this program, DLA mitigated germanium shortfalls and recovered alloys from turbine engines.[395] DLA could potentially recover rare earth magnets from hard disk drives under this authority from the more than 4,000 U.S. Government-owned data centers and thereby generate a source of recyclable end of life material for recycling firms.[396] Leveraging U.S. Government-owned data centers would also give federal authorities an opportunity to lead private industry in secure destruction of the devices containing NdFeB magnets without damaging the magnets. As noted above, private entities often shred their data devices; they may be more willing to follow secure destruction practices identified by the U.S. Government. In addition, Federal agencies could direct any Federally-owned end-of-life electric vehicles or wind turbines using NdFeB magnets to recycle contained magnets.

Finally, the Department recommends that the Administration evaluate whether removing and processing tailings sites, for example of heavy mineral sands and coal tailings, could ameliorate environmental concerns at site locations.[397] [398] If removing heavy mineral sands and coal tailings would improve environmental indicators at site locations, the Environmental Protection Agency should assess whether environmental cleanup funds such as its Superfund program could be used to repurpose these sites. Monazite, produced as a byproduct of heavy mineral sands operations and traditionally considered a waste material, and coal tailings are potential rare earth element feedstocks. As a result, removing and processing tailing sites could provide an additional source of rare earths and increase the resilience of the U.S. NdFeB magnet value chain.

Domestic Content Requirements

In Executive Order 14057, ''Catalyzing Clean Energy Industries and Jobs through Federal Sustainability'', the Biden Administration mandated that all federal agencies buy electric vehicles (in total about 600,000 car and trucks) by 2035 and that all 300,000 federal buildings be powered by wind, solar, or nuclear energy by 2030.[399] In addition, greatly expanded offshore wind energy is a major aspect of the Administration's efforts to accelerate the United States' clean energy economy and fight climate change. To support a vibrant and resilient green technology supply chain, federal procurement rules should specify that, to the extent possible, the electric vehicles purchased use domestically produced NdFeB magnets, and that the wind turbines supplying energy to federal facilities use domestically produced NdFeB magnets (for those using NdFeB magnets). The Department of Interior is sponsoring an offshore wind lease sale that includes lease provisions to promote the use of domestic materials.[400] These provisions

[390] For an example, *see* ''Sojitz and JOGMEC enter into Definitive Agreements with Lynas Including Availability Agreement to secure supply of Rare Earths products to Japanese Market,'' Japan Oils, Gas, and Metals National Corporation, March 30, 2011, *https://www.jogmec.go.jp/english/news/release/release0069.html*.

[391] JOGMEC's offtake agreement with Lynas Rare Earths enabled Lynas Rare Earths to survive a slump in rare earth element prices in the mid-2010s. JOGMEC-style actions and definitive offtakes more generally could be mechanisms to counteract price volatility in the rare earths market. Sonali Paul, ''Japanese shore up cash-strapped rare earths miner Lynas,'' Reuters, March 13, 2015, *https://finance.yahoo.com/news/japanese-shore-cash-strapped-rare-085926334.html*.

[392] ''China's SHFE speeds up RE futures research,'' Argus Media, October 21, 2019, *https://www.argusmedia.com/en/news/1999255-chinas-shfe-speeds-up-re-futures-research*.

[393] *See* Appendix F, ''U.S. NdFeB Magnet Industry: Company Profiles.''

[394] ''Strategic Material Recovery and Reuse Program,'' Defense Logistics Agency Strategic Materials, n.d., *https://www.dla.mil/HQ/Acquisition/StrategicMaterials/RRSMRP/*.

[395] Ibid.

[396] ''Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth: 100 Day Reviews Under Executive Order 14017,'' The White House, June 2021, *https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chain-review-report.pdf*.

[397] Heavy mineral sands operations produce monazite as a byproduct. Monazite was historically considered a waste material due to its radioactive content. As a result, monazite was blended into sand and reburied. Removing and processing monazite could therefore be conceptualized as reusing existing waste material. Meeting between Energy Fuels and the Department of Commerce, (Virtual Meeting, March 1, 2022).

[398] Multiple private and public sector actors are actively seeking to clean up coal mine byproduct waste while extracting rare earth elements. *See* Austyn Gaffney and Dane Rhys, ''In coal country, a new chance to clean up a toxic legacy,'' Washington Post, May 19, 2022, *https://www.washingtonpost.com/climate-solutions/2022/05/19/coal-mining-waste-recycling/*.

[399] ''Fact Sheet: President Biden Signs Executive Order Catalyzing America's Clean Energy Economy Through Federal Sustainability,'' The White House, December 8, 2021, *https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/08/fact-sheet-president-biden-signs-executive-order-catalyzing-americas-clean-energy-economy-through-federal-sustainability/*.

[400] ''Fact Sheet: Biden Administration Jumpstarts Offshore Wind Energy Projects to Create Jobs,'' The White House, March 29, 2021, *https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/29/fact-sheet-biden-administration-jumpstarts-offshore-wind-energy-projects-to-create-jobs/*.

should cover NdFeB magnets. In addition, electric vehicles and wind turbines might be procured by state or local governments or with state or local funding, and such content requirements could expand to these purchases. Domestic content requirements could mirror those of defense applications, which already have non-Chinese content requirements, and thereby include U.S. allies. Ensuring that requirements are structured to include magnets produced by U.S. allies is important to guarantee U.S. Government demand is adequately supported. To minimize disruption to U.S. procurement, content requirements can be phased-in and waived if insufficient quantities of eligible NdFeB magnets are available.

Consumer Rebates

Consumer rebates are another mechanism to incentivize the domestic production of NdFeB magnets. The Department recommends that the Administration develop and implement a tax rebate for consumers who purchase electric vehicles that are certified to contain U.S. or U.S. ally origin content. This rebate would help compensate automobile manufacturers for the increased cost of using domestic or ally produced NdFeB magnets. Such a rebate need not be limited to NdFeB magnets but could include U.S. or U.S. ally origin content batteries as well.

9.4.4 Support Medium- to Long-Term Industry Development and Resiliency

Research Into Reducing the Use of Rare Earth Elements

The Department recommends that the Administration continue to fund research that seeks to reduce rare earth element content, and especially heavy rare earth element content, in NdFeB magnets, develop NdFeB magnet substitutes, and avoid the use of magnets, including NdFeB magnets, in end-use products. This includes support for research on MQ3 magnets, which could reduce or eliminate heavy rare earth contents, more efficient NdFeB magnets, potential non-NdFeB magnets such as iron-nitride magnets, and assemblies that obviate the need for NdFeB magnets in applications such as electric vehicle motors and wind turbine generators.[401] Reducing rare earth element content would help alleviate projected rare earths shortages and increase supply chain resiliency by reducing dependence on China.

Human Capital Development

The Department recommends that the Administration use applicable programs to support the development of human capital as required by the nascent U.S. NdFeB magnet industry. The collapse of the U.S. NdFeB magnet industry in the 1990s hollowed out industry-specific knowledge and skills, such that the United States' stock of NdFeB magnet-related human capital is limited. Current and potential domestic producers indicated that finding qualified and experienced manufacturing engineers and scientists is an important constraint on their operations. Some firms also indicated that finding qualified and experienced production line workers is an issue. The U.S. Government, state governments, and local authorities should work with industry, labor, and educational institutions to develop skills relevant to NdFeB magnet production by creating and expanding training programs and scholarships. For example, the Department of Labor's Employment and Training Administration funding opportunities, such asthe Strengthening Community Colleges Training Grant, could be used to establish and enhance educational programs that teach NdFeB magnet-related skills.[402]

In addition, eligible entities should be encouraged to apply for the Economic Development Administration's Public Works and Economic Adjustment Assistance programs.[403] For example, higher education institutions or local governments in distressed communities (including coal communities) could apply for grants to develop and strengthen training facilities related to NdFeB magnet manufacturing, such as materials science.[404] Supporting the development of human capital related to the NdFeB magnet value chain would help grow a robust domestic NdFeB magnet industry and by extension enhance the resiliency of end-use product supply chains, including electric vehicles and offshore wind turbines.

9.4.5 Continue To Monitor the NdFeB Magnet Value Chain

The Department recommends that the Administration continue to monitor the NdFeB magnet value chain to ensure that U.S. and ally firms are not adversely impacted by non-market factors or unfair trade actions, such as intellectual property violations or dumping. As previously discussed, the U.S. NdFeB magnet industry disappeared in the 1990s and early 2000s in part because of Chinese policies such as tax rebates and subsidies as well as intellectual property infringement. To ensure that the nascent U.S. NdFeB magnet industry survives, the U.S. Government should remain cognizant of the health of the industry and the effects of Chinese competition. The Department and the Supply Chain Trade Task Force should periodically assess the health of the U.S. and global NdFeB magnet value chain to determine whether additional actions should be undertaken to counterbalance non-market factors or unfair trade practices.

Thea D. Rozman Kendler,

Assistant Secretary for Export Administration.

[FR Doc. 2023–03078 Filed 2–13–23; 8:45 am]

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[401] [TEXT REDACTED]. Meeting between Turntide Technologies and the Department of Commerce, (Virtual Meeting, February 17, 2022).

[402] For current Employment and Training Administration funding opportunities, *see* ''Funding Opportunities,'' U.S. Department of Labor, n.d., *https://www.dol.gov/agencies/eta/grants/apply/find-opportunities.*

[403] *See* ''PWEAA2020 FY 2020 EDA Public Works and Economic Adjustment Assistance Programs Including CARES Act Funding,'' *Grants.gov*, last modified April 1, 2022, *https://www.grants.gov/web/grants/view-opportunity.html?oppId=321695.*

[404] Some planned NdFeB magnet industry participants are located in areas that may qualify as distressed communities, while others are situated in places that could qualify as coal communities, such as Kentucky and Tennessee. Training facilities in these areas could be particularly useful for developing a local pipeline for talent.

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

In the Matter of: Luc Emond, 9300 Justine Street, Montreal, Quebec, H1J2P2, Canada; Order Denying Export Privileges

On February 19, 2020, in the U.S. District Court for the Northern District of New York, Luc Emond (''Emond'') was convicted of violating 18 U.S.C. 554(a). Specifically, Emond was convicted of knowingly and willfully attempting to smuggle from the U.S. to Canada, a Sig Sauer P228 pistol kit and a AR–15 300 AAC 7.5'' pistol kit, which were designated as defense articles on the United States Munitions List, without first obtaining the required license or written authorization from the Department of State. As a result of his conviction, the Court sentenced Emond to 10 months in prison, a fine of $3,000, and a $100 special assessment.

Pursuant to Section 1760(e) of the Export Control Reform Act (''ECRA''),[1]

[1] ECRA was enacted on August 13, 2018, as part of the John S. McCain National Defense

Continued

the export privileges of any person who has been convicted of certain offenses, including, but not limited to, Section 38 of AECA, may be denied for a period of up to ten (10) years from the date of his/her conviction. 50 U.S.C. 4819(e) (Prior Convictions). In addition, any Bureau of Industry and Security (BIS) licenses or other authorizations issued under ECRA, in which the person had an interest at the time of the conviction, may be revoked. *Id.*

BIS received notice of Emond's conviction for violating 18 U.S.C. 554 (a) and, as provided in Section 766.25 of the Export Administration Regulations (''EAR'' or the ''Regulations''), has provided notice and opportunity for Emond to make a written submission to BIS. 15 CFR 766.25.[2] BIS has not received a submission from Emond.

Based upon my review of the record and consultations with BIS's Office of Exporter Services, including its Director, and the facts available to BIS, I have decided to deny Emond's export privileges under the Regulations for a period of five-years from the date of Emond's conviction. The Office of Exporter Services has also decided to revoke any BIS-issued licenses in which Emond had an interest at the time of his conviction.[3]

Accordingly, it is hereby *ordered:*

First, from the date of this Order until February 19, 2025, Luc Emond, with a last known address of 9300 Justine Street, Montreal, Quebec, H1J2P2, Canada, and when acting for or on his behalf, his successors, assigns, employees, agents or representatives (''the Denied Person''), may not directly or indirectly participate in any way in any transaction involving any commodity, software, or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or engaging in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or from any other activity subject to the Regulations.

Second, no person may, directly or indirectly, do any of the following:

A. Export, reexport, or transfer (in-country) to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession, or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed, or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed, or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification, or testing.

Third, pursuant to Section 1760(e) of ECRA (50 U.S.C. 4819(e)) and Sections 766.23 and 766.25 of the Regulations, any other person, firm, corporation, or business organization related to the Denied Person by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order in order to prevent evasion of this Order.

Fourth, in accordance with part 756 of the Regulations, the Denied Person may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of part 756 of the Regulations.

Fifth, a copy of this Order shall be delivered to the Denied Person and shall be published in the **Federal Register**.

Sixth, this Order is effective immediately and shall remain in effect until February 19, 2025.

John Sonderman,

Director, Office of Export Enforcement.

[FR Doc. 2023–03104 Filed 2–13–23; 8:45 am]

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Authorization Act for Fiscal Year 2019 and, as amended, is codified at 50 U.S.C. 4801–4852.

[2] The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2022).

[3] The Director, Office of Export Enforcement, is the authorizing official for issuance of denial orders, pursuant to amendments to the Regulations (85 *FR* 73411, November 18, 2020).

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–151]

Tin Mill Products From the People's Republic of China: Initiation of Countervailing Duty Investigation

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable February 7, 2023.

FOR FURTHER INFORMATION CONTACT: Melissa Porpotage, 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) 482–1413.

SUPPLEMENTARY INFORMATION:

The Petition

On January 18, 2023, the U.S. Department of Commerce (Commerce) received a countervailing duty (CVD) petition concerning imports of tin mill products from the People's Republic of China (China) filed in proper form on behalf of Cleveland-Cliffs Inc. and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW) (collectively, the petitioners), a domestic producer of tin mill products and a certified union, which represents the workers engaged in the production of tin mill products in the United States.[1] The CVD petition was accompanied by antidumping duty (AD) petitions concerning imports of tin mill products from Canada, China, Germany, the Netherlands, the Republic

[1] *See* Petitioners' Letter, ''Petitions for the Imposition of Antidumping and Countervailing Duties on Imports of Tin Mill Products from Canada, China, Germany, Netherlands, South Korea, Taiwan, Turkey and the United Kingdom,'' dated January 18, 2023 (Petition).

of Korea, Taiwan, the Republic of Turkey and the United Kingdom.[2]

On January 23 and 31, and February 6, 2023, Commerce requested supplemental information pertaining to certain aspects of the Petition.[3] On January 27 and February 1, 2023, the petitioners filed timely responses to these requests for additional information.[4]

In accordance with section 702(b)(1) of the Tariff Act of 1930, as amended (the Act), the petitioners allege that the Government of China (GOC) is providing countervailable subsidies, within the meaning of sections 701 and 771(5) of the Act, to producers of tin mill products in China and that such imports are materially injuring, or threatening material injury to, the domestic industry producing in the United States. Consistent with section 702(b)(1) of the Act and 19 CFR 351.202(b), for those alleged programs on which we are initiating a CVD investigation, the Petition is supported by information reasonably available to the petitioners.

Commerce finds that the petitioners filed the Petition on behalf of the domestic industry because the petitioners are interested parties as defined in sections 771(9)(C) and (D) of the Act. Commerce also finds that the petitioners demonstrated sufficient industry support with respect to the initiation of the requested CVD investigation.[5]

Period of Investigation

Because the Petition was filed on January 18, 2023, the period of investigation (POI) is January 1, 2022, through December 31, 2022.[6]

Scope of the Investigation

The merchandise covered by this investigation is tin mill products from China. For a full description of the scope of this investigation, *see* the Appendix to this notice.

Comments on the Scope of the Investigation

On January 23 and 31, and February 6, 2023, Commerce requested information from the petitioners regarding the proposed scope to ensure that the scope language in the Petitions is an accurate reflection of the products for which the domestic industry is seeking relief.[7] On January 27, and February 1 and 6, 2023, the petitioners revised the scope language.[8] The description of merchandise covered by this investigation, as described in the appendix to this notice, reflects these clarifications.

As discussed in the *Preamble* to Commerce's regulations, we are setting aside a period for interested parties to raise issues regarding product coverage (*i.e.,* scope).[9] Commerce will consider all comments received from interested parties and, if necessary, will consult with interested parties prior to the issuance of the preliminary determination. If scope comments include factual information, all such factual information should be limited to public information.[10] To facilitate preparation of its questionnaires, Commerce requests that all interested parties submit such comments by 5:00 p.m. Eastern Time (ET) on February 27, 2023, which is 20 calendar days from the signature date of this notice. Any rebuttal comments, which may include factual information, must be filed by 5:00 p.m. ET on March 9, 2023, which is ten calendar days from the initial comment deadline.

Commerce requests that any factual information that the parties consider relevant to the scope of the investigation be submitted during this time period. However, if a party subsequently finds that additional factual information pertaining to the scope of the investigation may be relevant, the party may contact Commerce and request permission to submit the additional information. All scope comments must also be filed simultaneously on the record of the concurrent AD investigations.

Filing Requirements

All submissions to Commerce must be filed electronically via Enforcement and Compliance's Antidumping Duty and Countervailing Duty Centralized Electronic Service System (ACCESS), unless an exception applies.[11] An electronically filed document must be received successfully in its entirety by the time and date it is due.

Consultations

Pursuant to sections 702(b)(4)(A)(i) and (ii) of the Act, Commerce notified the GOC of the receipt of the Petition and provided it an opportunity for consultations with respect to the Petition.[12] However, the GOC did not request consultations.

Determination of Industry Support for the Petition

Section 702(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 702(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) at least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 702(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, Commerce shall: (i) poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method to poll the ''industry.''

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute

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[2] *Id.*

[3] *See* Commerce's Letter, ''Petitions for the Imposition of Antidumping and Countervailing Duties on Imports of Tin Mill Products from Canada, the People's Republic of China, Germany, the Netherlands, the Republic of Korea, Taiwan, the Republic of Turkey, and the United Kingdom: Supplemental Questions,'' dated January 23, 2023; *see also* Commerce's Letter, ''Petition for the Imposition of Countervailing Duties on Imports of Tin Mill Products from the People's Republic of China: Supplemental Questions,'' dated January 23, 2023 (General Issues Supplemental Questionnaire); Memorandum, ''Phone Call with Counsel to the Petitioner,'' dated January 31, 2023; and Memorandum, ''Phone Call with Counsel to the Petitioners,'' dated February 7, 2023 (Scope Memorandum).

[4] *See* Petitioners' Letters, ''Petitioners' Response to Supplemental Volume I Questionnaire,'' dated January 27, 2023 (First General Issues Supplement); ''Petitioners' Response to Supplemental Volume X Questionnaire,'' dated January 27, 2023; and ''Petitioners' Response to Second Supplemental Questionnaire,'' dated February 1, 2023 (Second General Issues Supplement).

[5] *See* ''Determination of Industry Support for the Petition'' section, *infra.*

[6] *See* 19 CFR 351.204(b)(2).

[7] *See* General Issues Supplemental Questionnaire at 3–4; *see also* Scope Memorandum.

[8] *See* First General Issues Supplement at 2–3 and Exhibit Supp I–S3; *see also* Second General Issues Supplement at 2 and Exhibit I–2S2; and Scope Memorandum.

[9] *See Antidumping Duties; Countervailing Duties,* 62 FR 27296, 27323 (May 19, 1997) (*Preamble*).

[10] *See* 19 CFR 351.102(b)(21) (defining ''factual information'').

[11] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011); *see also Enforcement and Compliance; Change of Electronic Filing System Name,* 79 FR 69046 (November 20, 2014), for details of Commerce's electronic filing requirements, effective August 5, 2011. Information on using ACCESS can be found at *https://access.trade.gov/help.aspx* and a handbook can be found at *https://access.trade.gov/help/Handbook_on_Electronic_Filing_Procedures.pdf.*

[12] *See* Commerce's Letter, ''Countervailing Duty Petition on Tin Mill Products from the People's Republic of China,'' dated January 19, 2023.

directs Commerce to look to producers and workers who produce the domestic like product. The U.S. International Trade Commission (ITC), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both Commerce and the ITC must apply the same statutory definition regarding the domestic like product,[13] they do so for different purposes and pursuant to a separate and distinct authority. In addition, Commerce's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law.[14]

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation'' (*i.e.,* the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition).

With regard to the domestic like product, the petitioners do not offer a definition of the domestic like product distinct from the scope of the investigation.[15] Based on our analysis of the information submitted on the record, we have determined that tin mill products, as defined in the scope, constitute a single domestic like product, and we have analyzed industry support in terms of that domestic like product.[16]

In determining whether the petitioners have standing under section 702(c)(4)(A) of the Act, we considered the industry support data contained in the Petition with reference to the domestic like product as defined in the ''Scope of the Investigation,'' in the appendix to this notice. To establish industry support, the petitioners provided Cleveland-Cliffs' production of tin mill products in 2022 and estimated the 2022 production of the remaining U.S. producers of tin mill products.[17] The petitioners stated that the USW represents workers accounting for all domestic production of tin mill products, and as such, the supporters of the Petition account for all U.S. production of tin mill products.[18] We relied on data provided by the petitioners for purposes of measuring industry support.[19]

On January 31, 2023, we received comments on industry support from United States Steel Corporation (U.S. Steel), a U.S. producer of tin mill products.[20] On February 2, 2023, the petitioners responded to the comments from U.S. Steel.[21]

Our review of the data provided in the Petition, the First General Issues Supplement, the Second General Issues Supplement, the Petitioners Letter, and other information readily available to Commerce indicates that the petitioners have established industry support for the Petition.[22] First, the Petition established support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product and, as such, Commerce is not required to take further action in order to evaluate industry support (*e.g.,* polling).[23] Second, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Petition account for at least 25 percent of the total production of the domestic like product.[24] Finally, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the Petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petition.[25] Accordingly, Commerce determines that the Petition was filed on behalf of the domestic industry within the meaning of section 702(b)(1) of the Act.[26]

Injury Test

Because China is a ''Subsidies Agreement Country'' within the meaning of section 701(b) of the Act, section 701(a)(2) of the Act applies to this investigation. Accordingly, the ITC must determine whether imports of the subject merchandise from China materially injure, or threaten material injury to, a U.S. industry.

Allegations and Evidence of Material Injury and Causation

The petitioners allege that imports of the subject merchandise are benefitting from countervailable subsidies and that such imports are causing, or threaten to cause, material injury to the U.S. industry producing the domestic like product. In addition, the petitioners allege that subject imports exceed the negligibility threshold provided for under section 771(24)(A) of the Act.[27]

The petitioners contend that the industry's injured condition is illustrated by the significant volume of subject imports; declining market share; underselling and price depression and/or suppression; lost sales and revenues; and adverse impact on the domestic industry's employment variables and

[13] *See* section 771(10) of the Act.

[14] *See USEC, Inc.* v. *United States,* 132 F. Supp. 2d 1, 8 (CIT 2001) (citing *Algoma Steel Corp., Ltd.* v. *United States,* 688 F. Supp. 639, 644 (CIT 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989)).

[15] *See* Petition at Volume I (pages 20 and 22–25); *see also* First General Issues Supplement at 1 and Exhibit I–S1 (containing *Tin- and Chromium-Coated Steel Sheet from Japan,* Inv. Nos. 731–TA–860 (Preliminary), USITC Pub. 3264 (December 1999), at 5; and *Tin- and Chromium-Coated Steel Sheet from Japan,* Inv. No. 731–TA–860 (Third Review), USITC Pub. 4795 (June 2018) (*Tin Mill Products Third Review*), at 6); and Second General Issues Supplement at 1 and Exhibit I–S1 (containing *Tin- and Chromium-Coated Steel Sheet from Japan,* Inv. No. 731–TA–860 (Final), USITC Pub. 3337 (August 2000), at 5).

[16] For a discussion of the domestic like product analysis as applied to this case and information regarding industry support, *see* CVD Investigation Initiation Checklist, ''Tin Mill Products from the People's Republic of China,'' dated concurrently with this notice (China CVD Initiation Checklist), at Attachment II (Analysis of Industry Support for the Antidumping and Countervailing Duty Petitions Covering Tin Mill Products from Canada, the People's Republic of China, Germany, the Netherlands, the Republic of Korea, Taiwan, the Republic of Turkey and the United Kingdom).

[17] *See* Petition at Volume I (pages 5–6 and Exhibit I–5); *see also* First General Issues Supplement at 3–5 and Exhibit I–S4; Second General Issues Supplement at 2 and Exhibit I–2S3; and Petitioners' Letter, ''Tin Mill products from Canada, China, Germany, Netherlands, South Korea, Taiwan, Turkey, and the United Kingdom,'' dated February 1, 2023 (Petitioners Letter).

[18] *See* Petition at Volume I (pages 2–6 and Exhibits I–5 and I–10 through I–12); *see also* First General Issues Supplement at 4–5.

[19] *See* Petition at Volume I (pages 2–6 and Exhibits I–5 and I–10 through I–12); *see also* First General Issues Supplement at 1, 3–5 and Exhibits I–S1 (containing *Tin Mill Products Third Review*) and I–S4; Second General Issues Supplement at 2 and Exhibit I–2S3; and Petitioners Letter. For further discussion, *see* Attachment II of China CVD Initiation Checklist.

[20] *See* U.S. Steel's Letter, ''Tin Mill Products from Canada, the People's Republic of China, Germany, the Netherlands, the Republic of Korea, Taiwan, the Republic of Turkey, and the United Kingdom: Comments on Industry Support,'' dated January 31, 2023 (U.S. Steel Letter).

[21] *See* Petitioners Letter.

[22] *See* Petition at Volume I (pages 4–6 and Exhibits I–5 and I–10 through I–12); *see also* First General Issues Supplement at 3–5 and Exhibits I–S1 (containing *Tin Mill Products Third Review*) and I–S4; Second General Issues Supplement at 2 and Exhibit I–2S3; U.S. Steel Letter; and Petitioners Letter. For further discussion, *see* Attachment II of the China CVD Initiation Checklist.

[23] *See* Attachment II of China CVD Initiation Checklist; *see also* section 702(c)(4)(D) of the Act.

[24] *See* Attachment II of the China CVD Initiation Checklist.

[25] *Id.*

[26] *Id.*

[27] *See* Petition at Volume I (pages 28–29 and Exhibit I–26).

profitability.[28] We assessed the allegations and supporting evidence regarding material injury, threat of material injury, causation, as well as negligibility, and we have determined that these allegations are properly supported by adequate evidence and meet the statutory requirements for initiation.[29]

Initiation of CVD Investigation

Based upon the examination of the Petition and supplemental responses, we find that they meet the requirements of section 702 of the Act. Therefore, we are initiating a CVD investigation to determine whether imports of tin mill products from China benefit from countervailable subsidies conferred by the GOC. Based on our review of the Petition, we find that there is sufficient information to initiate a CVD investigation on all of the 20 alleged programs; however, we recommend only initiating on Valued Added-Tax (VAT) Rebates on Domestically Produced Equipment and Import Tariff and VAT Exemptions on Imported Equipment in Encouraged Industries with respect to the pre-2009 period. For a full discussion of the basis for our decision to initiate on each program, *see* the China CVD Initiation Checklist. A public version of the initiation checklist for this investigation is available on ACCESS. In accordance with section 703(b)(1) of the Act and 19 CFR 351.205(b)(1), unless postponed, we will make our preliminary determination no later than 65 days after the date of this initiation.

Respondent Selection

The petitioners named 19 companies in China as producers and/or exporters of tin mill products.[30] Commerce intends to follow its standard practice in CVD investigations and calculate company-specific subsidy rates in this investigation. In the event that Commerce determines that the number of companies is large and it cannot individually examine each company based upon Commerce's resources, where appropriate, Commerce intends to select mandatory respondents based on U.S. Customs and Border Protection (CBP) data for U.S. imports of tin mill products from China during the POI under the appropriate Harmonized Tariff Schedule of the United States subheadings listed in the ''Scope of the Investigation'' in the Appendix.

Distribution of Copies of the Petition

In accordance with section 702(b)(4)(A) of the Act and 19 CFR 351.202(f), a copy of the public version of the Petition has been provided to the GOC via ACCESS. To the extent practicable, we will attempt to provide a copy of the public version of the CVD Petition to each exporter named in the CVD Petition, as provided under 19 CFR 351.203(c)(2).

ITC Notification

Commerce will notify the ITC of its initiation, as required by section 702(d) of the Act.

Preliminary Determination by the ITC

The ITC will preliminarily determine, within 45 days after the date on which the Petition was filed, whether there is a reasonable indication that imports of tin mill products from China are materially injuring, or threatening material injury to, a U.S. industry.[31] A negative ITC determination will result in the investigation being terminated.[32] Otherwise, this CVD investigation will proceed according to statutory and regulatory time limits.

Submission of Factual Information

Factual information is defined in 19 CFR 351.102(b)(21) as: (i) evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by Commerce; and (v) evidence other than factual information described in (i)–(iv). Section 351.301(b) of Commerce's regulations requires any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted [33] and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct.[34] Time limits for the submission of factual information are addressed in 19 CFR 351.301, which provides specific time limits based on the type of factual information being submitted. Interested parties should review the regulations prior to submitting factual information in this investigation.

Extensions of Time Limits

Parties may request an extension of time limits before the expiration of a time limit established under 19 CFR 351.301, or as otherwise specified by Commerce. In general, an extension request will be considered untimely if it is filed after the expiration of the time limit established under 19 CFR 351.301, or as otherwise specified by Commerce.[35] For submissions that are due from multiple parties simultaneously, an extension request will be considered untimely if it is filed after 10:00 a.m. ET on the due date. Under certain circumstances, we may elect to specify a different time limit by which extension requests will be considered untimely for submissions which are due from multiple parties simultaneously. In such a case, Commerce will inform parties in a letter or memorandum of the deadline (including a specified time) by which extension requests must be filed to be considered timely. An extension request must be made in a separate, standalone submission; under limited circumstances we will grant untimely filed requests for the extension of time limits. Parties should review Commerce's regulations concerning the extension of time limits and the *Time Limits Final Rule* prior to submitting factual information in this investigation.[36]

Certification Requirements

Any party submitting factual information in an AD or CVD proceeding must certify to the accuracy and completeness of that information.[37] Parties must use the certification formats provided in 19 CFR 351.303(g).[38] Commerce intends to reject factual submissions if the submitting party does not comply with

[28] *See* Petition at Volume I (pages 25–48 and Exhibits I–3, I–5, I–9, I–19, and I–25 through I–28); *see also* First General Issues Supplement at 1, 7–9, and Exhibits I–S1 (containing *Tin Mill Products Third Review*), I–S5, and I–S8.

[29] *See* China CVD Initiation Checklist at Attachment III (Analysis of Allegations and Evidence of Material Injury and Causation for the Antidumping and Countervailing Duty Petitions Covering Tin Mill Products from Canada, the People's Republic of China, Germany, the Netherlands, the Republic of Korea, Taiwan, the Republic of Turkey, and United Kingdom).

[30] *See* Petition at Volume I (Exhibit I–21).

[31] *See* section 703(a)(1) of the Act.

[32] *Id.*

[33] *See* 19 CFR 351.301(b).

[34] *See* 19 CFR 351.301(b)(2).

[35] *See* 19 CFR 351.302.

[36] *See* 19 CFR 351.301; *see also Extension of Time Limits; Final Rule,* 78 FR 57790 (September 20, 2013) (*Time Limits Final Rule*), available at *https://www.gpo.gov/fdsys/pkg/FR-2013-09-20/html/2013-22853.htm.*

[37] *See* section 782(b) of the Act.

[38] *See Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings,* 78 FR 42678 (July 17, 2013) (*Final Rule*); *see also* frequently asked questions regarding the *Final Rule,* available at *https://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.*

the applicable certification requirements.

Notification to Interested Parties

Interested parties must submit applications for disclosure under administrative protective order in accordance with 19 CFR 351.305. Parties wishing to participate in this investigation should ensure that they meet the requirements of 19 CFR 351.103(d) (*e.g.,* by filing the required letters of appearance). Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[39]

This notice is issued and published pursuant to sections 702 and 777(i) of the Act, and 19 CFR 351.203(c).

Dated: February 7, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

Scope of the Investigation

The products within the scope of this investigation are tin mill flat-rolled products that are coated or plated with tin, chromium, or chromium oxides. Flat-rolled steel products coated with tin are known as tinplate. Flat-rolled steel products coated with chromium or chromium oxides are known as tin-free steel or electrolytic chromium-coated steel. The scope includes all the noted tin mill products regardless of thickness, width, form (in coils or cut sheets), coating type (electrolytic or otherwise), edge (trimmed, untrimmed or further processed, such as scroll cut), coating thickness, surface finish, temper, coating metal (tin, chromium, chromium oxide), reduction (single- or double-reduced), and whether or not coated with a plastic material.

All products that meet the written physical description are within the scope of this investigation unless specifically excluded. The following products are outside and/or specifically excluded from the scope of this investigation:

- Single reduced electrolytically chromium coated steel with a thickness 0.238 mm (85 pound base box) (±10%) or 0.251 mm (90 pound base box) (±10%) or 0.255 mm (±10%) with 770 mm (minimum width) (±1.588 mm) by 900 mm (maximum length if sheared) sheet size or 30.6875 inches (minimum width) (±1/16 inch) and 35.4 inches (maximum length if sheared) sheet size; with type MR or higher (per ASTM) A623 steel chemistry; batch annealed at T2 ½ anneal temper, with a yield strength of 31 to 42 kpsi (214 to 290 Mpa); with a tensile strength of 43 to 58 kpsi (296 to 400 Mpa); with a chrome coating restricted to 32 to 150 mg/m^2; with a chrome oxide coating restricted to 6 to 25 mg/m^2 with a modified 7B ground roll finish or blasted roll finish; with roughness average (Ra) 0.10 to 0.35 micrometers, measured with a stylus instrument with a stylus radius of 2 to 5 microns, a trace length of 5.6 mm, and a cut-off of 0.8 mm, and the measurement traces shall be made perpendicular to the rolling direction; with an oil level of 0.17 to 0.37 grams/base box as type BSO, or 2.5 to 5.5 mg/m^2 as type DOS, or 3.5 to 6.5 mg/m^2 as type ATBC; with electrical conductivity of static probe voltage drop of 0.46 volts drop maximum, and with electrical conductivity degradation to 0.70 volts drop maximum after stoving (heating to 400 degrees F for 100 minutes followed by a cool to room temperature).
- Single reduced electrolytically chromium- or tin-coated steel in the gauges of 0.0040 inch nominal, 0.0045 inch nominal, 0.0050 inch nominal, 0.0061 inch nominal (55 pound base box weight), 0.0066 inch nominal (60 pound base box weight), and 0.0072 inch nominal (65 pound base box weight), regardless of width, temper, finish, coating or other properties.
- Single reduced electrolytically chromium coated steel in the gauge of 0.024 inch, with widths of 27.0 inches or 31.5 inches, and with T–1 temper properties.
- Single reduced electrolytically chromium coated steel, with a chemical composition of 0.005% max carbon, 0.030% max silicon, 0.25% max manganese, 0.025% max phosphorous, 0.025% max sulfur 0.070% max aluminum, and the balance iron, with a metallic chromium layer of 70–130 mg/m^2, with a chromium oxide layer of 5–30 mg/m^2, with a tensile strength of 260–440 N/mm^2, with an elongation of 28–48%, with a hardness (HR–30T) of 40–58, with a surface roughness of 0.5–1.5 microns Ra, with magnetic properties of Bm (kg) 10.0 minimum, Br (kg) 8.0 minimum, Hc (Oe) 2.5–3.8, and MU 1400 minimum, as measured with a Riken Denshi DC magnetic characteristic measuring machine, Model BHU–60.
- Bright finish tin-coated sheet with a thickness equal to or exceeding 0.0299 inch, coated to thickness of ¾ pound (0.000045 inch) and 1 pound (0.00006 inch).
- Electrolytically chromium coated steel having ultra flat shape defined as oil can maximum depth of 5/64 inch (2.0 mm) and edge wave maximum of 5/64 inch (2.0 mm) and no wave to penetrate more than 2.0 inches (51.0 mm) from the strip edge and coilset or curling requirements of average maximum of 5/64 inch (2.0 mm) (based on six readings, three across each cut edge of a 24 inches (61 cm) long sample with no single reading exceeding 4/32 inch (3.2 mm) and no more than two readings at 4/32 inch (3.2 mm)) and (for 85 pound base box item only: crossbuckle maximums of 0.001 inch (0.0025 mm) average having no reading above 0.005 inch (0.127 mm)), with a camber maximum of ¼ inch (6.3 mm) per 20 feet (6.1 meters), capable of being bent 120 degrees on a 0.002 inch radius without cracking, with a chromium coating weight of metallic chromium at 100 mg/m^2 and chromium oxide of 10 mg/m^2, with a chemistry of 0.13% maximum carbon, 0.60% maximum manganese, 0.15% maximum silicon, 0.20% maximum copper, 0.04% maximum phosphorous, 0.05% maximum sulfur, and 0.20% maximum aluminum, with a surface finish of Stone Finish 7C, with a DOS–A oil at an aim level of 2 mg/square meter, with not more than 15 inclusions/foreign matter in 15 feet (4.6 meters) (with inclusions not to exceed 1/32 inch (0.8 mm) in width and 3/64 inch (1.2 mm) in length), with thickness/temper combinations of either 60 pound base box (0.0066 inch) double reduced CADR8 temper in widths of 25.00 inches, 27.00 inches, 27.50 inches, 28.00 inches, 28.25 inches, 28.50 inches, 29.50 inches, 29.75 inches, 30.25 inches, 31.00 inches, 32.75 inches, 33.75 inches, 35.75 inches, 36.25 inches, 39.00 inches, or 43.00 inches, or 85 pound base box (0.0094 inch) single reduced CAT4 temper in widths of 25.00 inches, 27.00 inches, 28.00 inches, 30.00 inches, 33.00 inches, 33.75 inches, 35.75 inches, 36.25 inches, or 43.00 inches, with width tolerance of ⅛ inch, with a thickness tolerance of 0.0005 inch, with a maximum coil weight of 20,000 pounds (9071.0 kg), with a minimum coil weight of 18,000 pounds (8164.8 kg), with a coil inside diameter of 16 inches (40.64 cm) with a steel core, with a coil maximum outside diameter of 59.5 inches (151.13 cm), with a maximum of one weld (identified with a paper flag) per coil, with a surface free of scratches, holes, and rust.
- Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents in the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.7 mg/square foot of chromium applied as a cathodic dichromate treatment, with coil form having restricted oil film weights of 0.3–0.4 grams/base box of type DOS–A oil, coil inside diameter ranging from 15.5 to 17 inches, coil outside diameter of a maximum 64 inches, with a maximum coil weight of 25,000 pounds, and with temper/coating/dimension combinations of: (1) CAT4 temper, 1.00/.050 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 33.1875 inch ordered width; or (2) CAT5 temper, 1.00/0.50 pound/base box coating, 75 pound/base box (0.0082 inch) thickness, and 34.9375 inch or 34.1875 inch ordered width; or (3) CAT5 temper, 1.00/0.50 pound/base box coating, 107 pound/base box (0.0118 inch) thickness, and 30.5625 inch or 35.5625 inch ordered width; or (4) CADR8 temper, 1.00/0.50 pound/base box coating, 85 pound/base box (0.0093 inch) thickness, and 35.5625 inch ordered width; or (5) CADR8 temper, 1.00/0.25 pound/base box coating, 60 pound/base box (0.0066 inch) thickness, and 35.9375 inch ordered width; or (6) CADR8 temper, 1.00/0.25 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 32.9375 inch, 33.125 inch, or 35.1875 inch ordered width.
- Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents on the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.5 mg/square foot of chromium applied as

[39] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

a cathodic dichromate treatment, with ultra flat scroll cut sheet form, with CAT5 temper with 1.00/0.10 pound/base box coating, with a lithograph logo printed in a uniform pattern on the 0.10 pound coating side with a clear protective coat, with both sides waxed to a level of 15–20 mg/216 sq. in., with ordered dimension combinations of (1) 75 pound/base box (0.0082 inch) thickness and 34.9375 inch x 31.748 inch scroll cut dimensions; or (2) 75 pound/base box (0.0082 inch) thickness and 34.1875 inch x 29.076 inch scroll cut dimensions; or (3) 107 pound/base box (0.0118 inch) thickness and 30.5625 inch x 34.125 inch scroll cut dimension.

- Tin-free steel coated with a metallic chromium layer between 100–200 mg/m^2 and a chromium oxide layer between 5–30 mg/m^2; chemical composition of 0.05% maximum carbon, 0.03% maximum silicon, 0.60% maximum manganese, 0.02% maximum phosphorous, and 0.02% maximum sulfur; magnetic flux density (Br) of 10 kg minimum and a coercive force (Hc) of 3.8 Oe minimum.
- Tin-free steel laminated on one or both sides of the surface with a polyester film, consisting of two layers (an amorphous layer and an outer crystal layer), that contains no more than the indicated amounts of the following environmental hormones: 1 mg/kg BADGE (BisPhenol—A Di-glycidyl Ether), 1 mg/kg BFDGE (BisPhenol—F Di-glycidyl Ether), and 3 mg/kg BPA (BisPhenol—A).

The merchandise subject to this investigation is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS), under HTSUS subheadings 7210.11.0000, 7210.12.0000, 7210.50.0020, 7210.50.0090, 7212.10.0000, and 7212.50.0000 if of non-alloy steel and under HTSUS subheadings 7225.99.0090, and 7226.99.0180 if of alloy steel. Although the subheadings are provided for convenience and customs purposes, the written description of the scope of the investigation is dispositive.

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–122–869, A–570–150, A–428–851, A–580–915, A–421–816, A–583–870, A–489–848, A–412–827]

Tin Mill Products From Canada, the People's Republic of China, Germany, the Netherlands, the Republic of Korea, Taiwan, the Republic of Turkey, and the United Kingdom: Initiation of Less-Than-Fair-Value Investigations

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable February 7, 2023.

FOR FURTHER INFORMATION CONTACT: Yang Jin Chun (Canada), Emily Halle or Samuel Frost (the People's Republic of China (China)), George McMahon or Carolyn Adie (Germany); Jacob Saude (the Republic of Korea (Korea)), Brittany Bauer (the Netherlands), Elfi Blum (Taiwan), Alice Maldonado or Ann Marie Caton (the Republic of Turkey (Turkey)), and Charles DeFilippo (the United Kingdom), AD/CVD Operations, Offices II, V, VI, and VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5760, (202) 482–0176 or (202) 482–8180, (202) 482–1167 or (202) 482–6250, (202) 482–0981, (202) 482–3860, (202) 482–0197, (202) 482–4682 or (202) 482–2607, and (202) 482–3797, respectively.

SUPPLEMENTARY INFORMATION:

The Petitions

On January 18, 2023, the U.S. Department of Commerce (Commerce) received antidumping duty (AD) petitions concerning imports of tin mill products from Canada, China, Germany, the Netherlands, Korea, Taiwan, Turkey, and the United Kingdom, filed in proper form on behalf of Cleveland-Cliffs Inc. and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the petitioners), a domestic producer of tin mill products and a certified union, which represents the workers engaged in the production of tin mill products in the United States.[1] These AD petitions were accompanied by a countervailing duty (CVD) petition concerning imports of tin mill products from China.[2]

On January 23 and 31, and February 6, 2023, Commerce requested supplemental information pertaining to certain aspects of the Petitions.[3] The petitioners filed timely responses to these requests on January 27, 2023, and February 1, 2023.[4]

In accordance with section 732(b) of the Tariff Act of 1930, as amended (the Act), the petitioners allege that imports of tin mill products from Canada, China, Germany, the Netherlands, Korea, Taiwan, Turkey, and the United Kingdom are being, or are likely to be, sold in the United States at less than fair value (LTFV) within the meaning of section 731 of the Act, and that imports of such products are materially injuring, or threatening material injury to, the tin mill products industry in the United States. Consistent with section 732(b)(1) of the Act, the Petitions are accompanied by information reasonably available to the petitioners supporting their allegations.

Commerce finds that the petitioners filed the Petition on behalf of the domestic industry, because the petitioners are interested parties, as defined in sections 771(9)(C) and (D) of the Act.[5] Commerce also finds that the petitioners demonstrated sufficient industry support for the initiation of the requested AD investigations.[6]

Periods of Investigations

Because the Petitions were filed on January 18, 2023, pursuant to 19 CFR 351.204(b)(1), the period of investigation (POI) for the Canada, Germany, Netherlands, Korea, Taiwan, Turkey, and United Kingdom AD investigations is January 1, 2022, through December 31, 2022. Because China is a non-market economy (NME) country, pursuant to 19 CFR 351.204(b)(1), the POI for the China AD investigation is July 1, 2022, through December 31, 2022.

Scope of the Investigations

The products covered by these investigations are tin mill products from Canada, China, Germany, Korea, the Netherlands, Taiwan, Turkey, and the United Kingdom. For a full description of the scope of these investigations, *see* the appendix to this notice.

[1] *See* Petitioners' Letter, ''Petitions for the Imposition of Antidumping and Countervailing Duties on Imports of Certain Tin Mill Products from Canada, China, Germany, Netherlands, South Korea, Taiwan, Turkey, and the United Kingdom,'' dated January 18, 2023 (Petitions).

[2] *Id.*

[3] *See* Commerce's Letter, ''Petitions for the Imposition of Antidumping and Countervailing Duties on Imports of Tin Mill Products from Canada, the People's Republic of China, Germany, the Netherlands, the Republic of Korea, Taiwan, the Republic of Turkey, and the United Kingdom: Supplemental Questions,'' dated January 23, 2023 (General Issues Supplemental Questionnaire); *see also* Country-Specific Supplemental Questionnaires: Canada Supplemental, China Supplemental, Germany Supplemental, Netherlands Supplemental, Korea Supplemental, Taiwan Supplemental, Turkey Supplemental, and United Kingdom Supplemental, dated January 23, 2023; Memorandum, ''Phone Call with Counsel to the Petitioners,'' dated January 31, 2023; and Memorandum, ''Phone Call with Counsel to the Petitioners,'' dated February 7, 2023 (Scope Memorandum).

[4] *See* Petitioners' Country-Specific Supplemental Responses, dated January 27, 2023; *see also* Petitioner's Letters, ''Tin Mill Products from Canada, China, Germany, Netherlands, South Korea, Taiwan, Turkey, and the United Kingdom/Petitioners' Response to Supplemental Volume I Questionnaire,'' dated January 27, 2023 (General Issues Supplement); and ''Tin Mill Products from Canada, China, Germany, Netherlands, South Korea, Taiwan, Turkey, and the United Kingdom/Petitioners' Response to Second Supplemental Questionnaire,'' dated February 1, 2023 (Second General Issues Supplement).

[5] *See* Petitions at Volume I (pages 1–4).

[6] *See infra,* at section on ''Determination of Industry Support for the Petitions.''

Comments on the Scope of the Investigations

On January 23 and 31, and February 6, 2023, Commerce requested further information and clarification from the petitioners regarding the proposed scope to ensure that the scope language in the Petitions is an accurate reflection of the products for which the domestic industry is seeking relief.[7] On January 27, and February 1 and 6, 2023, the petitioners revised the scope.[8] The description of the merchandise covered by these investigations, as described in the appendix to this notice, reflects these clarifications.

As discussed in the *Preamble* to Commerce's regulations, we are setting aside a period of time for interested parties to raise issues regarding product coverage (*i.e.,* scope).[9] Commerce will consider all comments received from interested parties and, if necessary, will consult with interested parties prior to the issuance of the preliminary determinations. If scope comments include factual information,[10] all such factual information should be limited to public information. To facilitate preparation of its questionnaires, Commerce requests that all interested parties submit such comments by 5:00 p.m. Eastern Time (ET) on February 27, 2023, which is 20 calendar days from the signature date of this notice. Any rebuttal comments, which may include factual information, must be filed by 5:00 p.m. ET on March 9, 2023, which is ten calendar days from the initial comment deadline.

Commerce requests that any factual information that parties consider relevant to the scope of the investigations be submitted during that period. However, if a party subsequently finds that additional factual information pertaining to the scope of the investigations may be relevant, the party may contact Commerce and request permission to submit the additional information. All such submissions must be filed simultaneously on the records of the concurrent AD and CVD investigations.

Filing Requirements

All submissions to Commerce must be filed electronically using Enforcement and Compliance's Antidumping Duty and Countervailing Duty Centralized Electronic Service System (ACCESS), unless an exception applies.[11] An electronically-filed document must be received successfully in its entirety by the time and date it is due.[12]

Comments on Product Characteristics

Commerce is providing interested parties an opportunity to comment on the appropriate physical characteristics of tin mill products to be reported in response to Commerce's AD questionnaires. This information will be used to identify the key physical characteristics of the subject merchandise in order to report the relevant factors of production (FOP) or costs of production (COP) accurately, as well as to develop appropriate product comparison criteria where appropriate.

Subsequent to the publication of this notice, Commerce intends to release a proposed list of physical characteristics and product-comparison criteria, and interested parties may provide any information or comments that they feel are relevant to the development of an accurate list of physical characteristics. Specifically, they may provide comments as to which characteristics are appropriate to use as: (1) general product characteristics; and (2) product comparison criteria. We note that it is not always appropriate to use all product characteristics as product comparison criteria. We base product comparison criteria on meaningful commercial differences among products. In other words, although there may be some physical product characteristics utilized by manufacturers to describe tin mill products, it may be that only a select few product characteristics take into account commercially meaningful physical characteristics. In addition, interested parties may comment on the order in which the physical characteristics should be used in matching products. Generally, Commerce attempts to list the most important physical characteristics first and the least important characteristics last.

In order to consider the suggestions of interested parties in developing and issuing the AD questionnaires, Commerce intends to establish a deadline for relevant comments and submissions at the time it releases the proposed list of physical characteristics and product-comparison criteria. All comments and submissions to Commerce must be filed electronically using ACCESS, as explained above, on the record of each of the AD investigations.

Determination of Industry Support for the Petitions

Section 732(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 732(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) at least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 732(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, Commerce shall: (i) poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method to poll the ''industry.''

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the Act directs Commerce to look to producers and workers who produce the domestic like product. The U.S. International Trade Commission (ITC), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both Commerce and the ITC must apply the same statutory definition regarding the domestic like product,[13] they do so for different purposes and pursuant to a separate and distinct authority. In addition, Commerce's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the

[7] *See* General Issues Supplemental Questionnaire at 3–4; *see also* Scope Memorandum.

[8] *See* First General Issues Supplement at 2–3 and Exhibit I–S3; *see also* Second General Issues Supplement at 2 and Exhibit I–2S2; and Scope Memorandum.

[9] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997) (*Preamble*).

[10] *See* 19 CFR 351.102(b)(21) (defining ''factual information'').

[11] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011); *see also Enforcement and Compliance; Change of Electronic Filing System Name,* 79 FR 69046 (November 20, 2014) for details of Commerce's electronic filing requirements, effective August 5, 2011. Information on help using ACCESS can be found at *https://access.trade.gov/help.aspx* and a handbook can be found at *https://access.trade.gov/help/Handbook_on_Electronic_Filing_Procedures.pdf.*

[12] *See* 19 CFR 351.303(b)(1).

[13] *See* section 771(10) of the Act.

decision of either agency contrary to law.[14]

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation'' (*i.e.,* the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition).

With regard to the domestic like product, the petitioners do not offer a definition of the domestic like product distinct from the scope of the investigations.[15] Based on our analysis of the information submitted on the record, we have determined that tin mill products, as defined in the scope, constitute a single domestic like product, and we have analyzed industry support in terms of that domestic like product.[16]

In determining whether the petitioners have standing under section 732(c)(4)(A) of the Act, we considered the industry support data contained in the Petitions with reference to the domestic like product as defined in the ''Scope of the Investigations,'' in the appendix to this notice. To establish industry support, the petitioners provided Cleveland-Cliffs' production of tin mill products in 2022 and estimated the 2022 production of the remaining U.S. producers of tin mill products.[17] The petitioners stated that the USW represents workers accounting for all U.S. production of tin mill products, and as such, the supporters of the Petitions account for all U.S. production of tin mill products.[18] We relied on data provided by the petitioners for purposes of measuring industry support.[19]

On January 31, 2023, we received comments on industry support from United States Steel Corporation (U.S. Steel), a U.S. producer of tin mill products.[20] On February 2, 2023, the petitioners responded to the comments from U.S. Steel.[21]

Our review of the data provided in the Petitions, the First General Issues Supplement, the Second General Issues Supplement, the Petitioners Letter, and other information readily available to Commerce indicates that the petitioners have established industry support for the Petitions.[22] First, the Petitions established support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product and, as such, Commerce is not required to take further action in order to evaluate industry support (*e.g.,* polling).[23] Second, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Petitions account for at least 25 percent of the total production of the domestic like product.[24] Finally, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the Petitions account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petitions.[25] Accordingly, Commerce determines that the Petitions were filed on behalf of the domestic industry within the meaning of section 732(b)(1) of the Act.[26]

Allegations and Evidence of Material Injury and Causation

The petitioners allege that the U.S. industry producing the domestic like product is being materially injured, or is threatened with material injury, by reason of the imports of the subject merchandise sold at LTFV. In addition, the petitioners allege that subject imports exceed the negligibility threshold provided for under section 771(24)(A) of the Act.[27]

The petitioners contend that the industry's injured condition is illustrated by the significant volume of subject imports; declining market share; underselling and price depression and/or suppression; lost sales and revenues; and adverse impact on the domestic industry's employment variables and profitability.[28] We assessed the allegations and supporting evidence regarding material injury, threat of material injury, causation, as well as negligibility, and we have determined that these allegations are properly supported by adequate evidence and meet the statutory requirements for initiation.[29]

Allegations of Sales at LTFV

The following is a description of the allegations of sales at LTFV upon which Commerce based its decision to initiate

[14] *See USEC, Inc.* v. *United States,* 132 F. Supp. 2d 1, 8 (CIT 2001) (citing *Algoma Steel Corp., Ltd.* v. *United States,* 688 F. Supp. 639, 644 (CIT 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989)).

[15] *See* Petitions at Volume I (pages 20 and 22–25); *see also* First General Issues Supplement at 1 and Exhibit I–S1 (containing *Tin- and Chromium-Coated Steel Sheet from Japan,* Inv. Nos. 731–TA–860 (Preliminary), USITC Pub. 3264 (December 1999), at 5; and *Tin- and Chromium-Coated Steel Sheet from Japan,* Inv. No. 731–TA–860 (Third Review), USITC Pub. 4795 (June 2018) (*Tin Mill Products Third Review*), at 6); and Second General Issues Supplement at 1 and Exhibit I–2S1 ((containing *Tin- and Chromium-Coated Steel Sheet from Japan,* Inv. No. 731–TA–860 (Final), USITC Pub. 3337 (August 2000), at 5)).

[16] For a discussion of the domestic like product analysis as applied to these cases and information regarding industry support, *see,* individually, Antidumping Duty Investigation Initiation Checklists, ''Tin Mill Products from Canada, the People's Republic of China, Germany, the Netherlands, the Republic of Korea, Taiwan, the Republic of Turkey, and the United Kingdom,'' dated concurrently with this notice (Country-Specific AD Initiation Checklists), at Attachment II (Analysis of Industry Support for the Antidumping and Countervailing Duty Petitions Covering Tin Mill Products from Canada, the People's Republic of China, Germany, the Netherlands, the Republic of Korea, Taiwan, the Republic of Turkey and the United Kingdom).

[17] *See* Petitions at Volume I (pages 5–6 and Exhibit I–5); *see also* First General Issues Supplement at 3–5 and Exhibit I–S4; Second General Issues Supplement at 2 and Exhibit I–2S3; and Petitioners' Letter, ''Tin Mill products from Canada, China, Germany, Netherlands, South Korea, Taiwan, Turkey, and the United Kingdom/Petitioners' Comments Regarding Industry Support,'' dated February 2, 2023 (Petitioners' Letter).

[18] *See* Petitions at Volume I (pages 2–6 and Exhibits I–5 and I–10 through I–12); *see also* First General Issues Supplement at 4–5.

[19] *See* Petitions at Volume I (pages 2–6 and Exhibits I–5 and I–10 through I–12); *see also* First General Issues Supplement at 1, 3–5 and Exhibits I–S1 (containing *Tin Mill Products Third Review*) and I–S4; Second General Issues Supplement at 2 and Exhibit I–2S3; and Petitioners Letter. For further discussion, *see* Attachment II of the Country-Specific AD Initiation Checklists.

[20] *See* U.S. Steel's Letter, ''Tin Mill Products from Canada, the People's Republic of China, Germany, the Netherlands, the Republic of Korea, Taiwan, the Republic of Turkey, and the United Kingdom: Comments on Industry Support,'' dated January 31, 2023 (U.S. Steel Letter).

[21] *See* Petitioners Letter.

[22] *See* Petitions at Volume I (pages 4–6 and Exhibits I–5 and I–10 through I–12); *see also* First General Issues Supplement at 3–5 and Exhibits I–S1 (containing *Tin Mill Products Third Review*) and I–S4; Second General Issues Supplement at 2 and Exhibit I–2S3; U.S. Steel Letter; and Petitioners Letter. For further discussion, *see* Attachment II of the Country-Specific AD Initiation Checklists.

[23] *See* Attachment II of the Country-Specific AD Initiation Checklists; *see also* section 732(c)(4)(D) of the Act.

[24] *See* Attachment II of the Country-Specific AD Initiation Checklists.

[25] *Id.*

[26] *Id.*

[27] *See* Petitions at Volume I (pages 28–29 and Exhibit I–26).

[28] *Id.* at 25–48 and Exhibits I–3, I–5, I–9, I–19, and I–25 through I–28; *see also* First General Issues Supplement at 1, and 5–9 and Exhibits I–S1 (containing *Tin Mill Products Third Review*), I–S5, and I–S8.

[29] *See* Country-Specific AD Initiation Checklists at Attachment III, Analysis of Allegations and Evidence of Material Injury and Causation for the Antidumping and Countervailing Duty Petitions Covering Tin Mill Products from Canada, the People's Republic of China, Germany, the Netherlands, the Republic of Korea, Taiwan, the Republic of Turkey, and the United Kingdom (Attachment III).

AD investigations of imports of tin mill products from Canada, China, Germany, Korea, the Netherlands, Taiwan, Turkey, and the United Kingdom. The sources of data for the deductions and adjustments relating to U.S. price and normal value (NV) are discussed in greater detail in the Country-Specific AD Initiation Checklists.

U.S. Price

For Canada, China, Germany, the Netherlands, Taiwan, Turkey, and the United Kingdom, the petitioners based export price (EP) on the POI average unit values (AUVs) derived from official U.S. import data for imports of tin mill products produced in and exported from each country. For the Netherlands, Taiwan, and Turkey, the petitioners also based EP on month- and port-specific AUVs derived from official import data and tied to ship manifest data obtained from Datamyne. For Korea, the petitioners based EP on month- and port-specific AUVs derived from official import data and tied to ship manifest data obtained from Datamyne alone. The petitioners made certain adjustments to U.S. price to calculate a net ex-factory U.S. price, where applicable.[30]

Normal Value [31]

For Canada, Germany, Korea, the Netherlands, Taiwan, Turkey, and the United Kingdom, the petitioners were unable to obtain home market prices for tin mill products produced and sold in the subject countries. Therefore, for these countries, the petitioners based NV on AUVs of publicly-available export data for exports of tin mill products from the subject countries to third countries.[32] For each of the countries, the petitioners provided information showing that the AUVs were below the COP and, therefore, the petitioners calculated NV based on constructed value (CV).[33] For further discussion of CV, *see* the section ''Normal Value Based on Constructed Value.''

Commerce considers China to be an NME country.[34] In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by Commerce. Therefore, we continue to treat China as an NME country for purposes of the initiation of this investigation. Accordingly, NV in China is appropriately based on FOPs valued in surrogate market economy countries, in accordance with section 773(c) of the Act.

The petitioners claim that Turkey is an appropriate surrogate country for China because Turkey is a market economy country that is at a level of economic development comparable to that of China and is a significant producer of identical merchandise.[35] The petitioners provided publicly-available information from Turkey to value all FOPs.[36] Based on the information provided by the petitioners, we determine that it is appropriate to use Turkey as a surrogate country for initiation purposes.

Interested parties will have the opportunity to submit comments regarding surrogate country selection and, pursuant to 19 CFR 351.301(c)(3)(i), will be provided an opportunity to submit publicly available information to value FOPs within 30 days before the scheduled date of the preliminary determination.

Factors of Production

Because information regarding the volume of inputs consumed by Chinese producers/exporters was not reasonably available, the petitioners used product-specific consumption rates from a U.S. producer of tin mill products as a surrogate to value Chinese manufacturers' FOPs.[37] Additionally, the petitioners calculated factory overhead; selling, general and administrative (SG&A) expenses; and profit based on the experience of a Turkish producer of identical merchandise.[38]

Normal Value Based on Constructed Value

As noted above, the petitioners demonstrated that the third country export AUVs for Canada, Germany, Korea, the Netherlands, Taiwan, Turkey, and the United Kingdom were below COP. Accordingly, the petitioners based NV on CV.[39] Pursuant to section 773(e) of the Act, the petitioners calculated CV as the sum of the cost of manufacturing, SG&A expenses, financial expenses, and profit.[40]

In calculating the cost of manufacturing, the petitioners relied on the production experience and input consumption rates of a U.S. producer of tin mill products, valued using publicly-available information applicable to each respective country.[41] In calculating SG&A expenses, financial expenses, and profit ratios (where applicable), the petitioners relied on the fiscal year 2021–2022 financial statements of a producer of identical or comparable merchandise domiciled in each respective subject country, where appropriate.[42]

Fair Value Comparisons

Based on the data provided by the petitioners, there is reason to believe that imports of tin mill products from Canada, China, Germany, Korea, the Netherlands, Taiwan, Turkey, and the United Kingdom, are being, or are likely to be, sold in the United States at LTFV. Based on comparisons of EP to NV in accordance with sections 772 and 773 of the Act, the estimated dumping margins for tin mill products for each of the countries covered by this initiation are as follows: (1) Canada—79.59 percent; (2) China—122.52 percent; (3) Germany—70.15 percent; (4) Korea—13.28 to 110.50 percent; (5) the Netherlands—125.10 to 296.04 percent; (6) Taiwan—46.76 to 59.61 percent; (7) Turkey—87.73 to 97.21 percent; and (8) the United Kingdom—111.92 percent.[43]

Initiation of LTFV Investigations

Based upon the examination of the Petitions and supplemental responses, we find that they meet the requirements of section 732 of the Act. Therefore, we are initiating AD investigations to determine whether imports of tin mill products from Canada, China, Germany, Korea, the Netherlands, Taiwan, Turkey, and the United Kingdom are being, or are likely to be, sold in the United States at LTFV. In accordance with section 733(b)(1)(A) of the Act and 19 CFR 351.205(b)(1), unless postponed, we will make our preliminary determinations no

[30] *See* Country-Specific AD Initiation Checklists for Canada, Germany, Korea, the Netherlands, Taiwan, Turkey, and the United Kingdom.

[31] In accordance with section 773(b)(2) of the Act, for these investigations, Commerce will request information necessary to calculate the constructed value and cost of production (COP) to determine whether there are reasonable grounds to believe or suspect that sales of the foreign like product have been made at prices that represent less than the COP of the product.

[32] *See* Country-Specific AD Initiation Checklists for Canada, Germany, Korea, the Netherlands, Taiwan, Turkey, and the United Kingdom.

[33] *Id.*

[34] *See Antidumping Duty Investigation of Certain Aluminum Foil from the People's Republic of China: Affirmative Preliminary Determination of Sales at Less-Than-Fair Value and Postponement of Final Determination,* 82 FR 50858, 50861 (November 2, 2017), and accompanying Preliminary Decision Memorandum, unchanged in *Certain Aluminum Foil from the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 83 FR 9282 (March 5, 2018).

[35] *See* Country-Specific AD Initiation Checklists for China.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *See* Country-Specific AD Initiation Checklists for Canada, Germany, Korea, the Netherlands, Taiwan, Turkey, and the United Kingdom for details of the calculations.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *See* Country-Specific AD Initiation Checklists for details of the calculations.

later than 140 days after the date of this initiation.

Respondent Selection

Canada, Germany, the Netherlands, Taiwan, and the United Kingdom

In the Petitions, the petitioners identified one company in Canada as a producer/exporter of tin mill products (*i.e.,* ArcelorMittal Dofasco G.P.), one company in Germany as a producer/exporter of tin mill products (*i.e.,* ThyssenKrupp Rasselstein GmbH), two companies in the Netherlands as producers/exporters of tin mill products (*i.e.,* Tata Steel Netherlands and Tata Steel Ijmuiden, B.V.), one company in Taiwan as a producer/exporter of tin mill products (*i.e.,* Ton Yi Industrial Corporation), and one company in the United Kingdom as a producer/exporter of tin mill products (*i.e.,* Tata Steel UK Limited), and provided independent third-party information as support.[44] We currently know of no additional producers/exporters of tin mill products from Canada, Germany, the Netherlands, Taiwan, and the United Kingdom.

Accordingly, Commerce intends to individually examine all known producers/exporters in the investigations from these countries (*i.e.,* the companies cited above). We invite interested parties to comment on this issue. Such comments may include factual information within the meaning of 19 CFR 351.102(b)(21). Parties wishing to comment must do so within three business days of the publication of this notice in the **Federal Register**. Comments must be filed electronically using ACCESS. An electronically filed document must be received successfully in its entirety via ACCESS by 5:00 p.m. ET on the specified deadline. Because we intend to examine all known producers/exporters in Canada, Germany, the Netherlands, Taiwan, and the United Kingdom, if no comments are received or if comments received further support the existence of these sole producers/exporters in Canada, Germany, the Netherlands, Taiwan, and the United Kingdom, respectively, we do not intend to conduct respondent selection and will proceed to issuing the initial AD questionnaires to the companies identified. However, if comments are received which create a need for a respondent selection process, we intend to finalize our decisions regarding respondent selection within 20 days of publication of this notice.

Korea and Turkey

In the Petitions, the petitioners identified three companies in Korea as producers/exporters of tin mill products and three companies in Turkey as producers/exporters of tin mill products.[45] Following standard practice in AD investigations involving market economy countries, in the event Commerce determines that the number of exporters or producers is large such that Commerce cannot individually examine each company based on its resources, where appropriate, Commerce intends to select mandatory respondents in these cases based on U.S. Customs and Border Protection (CBP) data for U.S. imports under the appropriate Harmonized Tariff Schedule of the United States subheadings listed in the ''Scope of the Investigation,'' in the appendix.

On February 2, 2023, Commerce released CBP data on imports of tin mill products from Korea and Turkey under administrative protective order (APO) to all parties with access to information protected by APO and indicated that interested parties wishing to comment on CBP data must do so within three business days of the publication date of the notice of initiation of these investigations.[46] Comments must be filed electronically using ACCESS. An electronically-filed document must be received successfully in its entirety via ACCESS by 5:00 p.m. ET on the specified deadline. Commerce will not accept rebuttal comments regarding the CBP data or respondent selection.

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305(b). Instructions for filing such applications may be found on Commerce's website at *https://enforcement.trade.gov/apo.*

China

In the Petitions, the petitioners named 19 companies in China as producers and/or exporters of tin mill products.[47] In accordance with our standard practice for respondent selection in AD investigations involving NME countries, Commerce selects respondents based on quantity and value (Q&V) questionnaires in cases where it has determined that the number of companies is large and it cannot individually examine each company based upon its resources. Therefore, considering the number of producers and/or exporters identified in the Petitions, Commerce will solicit Q&V information that can serve as a basis for selecting exporters for individual examination in the event that Commerce decides to limit the number of respondents individually examined pursuant to section 777A(c)(2) of the Act. Because there are 19 Chinese producers and/or exporters identified in the Petitions, Commerce has determined that it will issue Q&V questionnaires to each potential respondent for which the petitioners have provided a complete address.

In addition, Commerce will post the Q&V questionnaires along with filing instructions on Commerce's website at *https://www.trade.gov/ec-adcvd-case-announcements.* Producers/exporters of tin mill products from China that do not receive Q&V questionnaires may still submit a response to the Q&V questionnaire and can obtain a copy of the Q&V questionnaire from Commerce's website. Additional information on Q&V questionnaires can be found on Commerce's website at *https://enforcement.trade.gov/questionnaires/questionnaires-ad.html.* In accordance with the standard practice for respondent selection in AD cases involving NME countries, in the event Commerce decides to limit the number of respondents individually investigated, Commerce intends to base respondent selection on the responses to the Q&V questionnaire that it receives.

Responses to the Q&V questionnaire must be submitted by the relevant Chinese producers/exporters no later than 5:00 p.m. ET on February 21, 2023, which is two weeks from the signature date of this notice. All Q&V questionnaire responses must be filed electronically via ACCESS. An electronically-filed document must be received successfully, in its entirety, by ACCESS no later than 5:00 p.m. ET on the deadline noted above.

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305(b). Instructions for filing such applications may be found on Commerce's website at *https://enforcement.trade.gov/apo.* Commerce intends to make its decisions regarding respondent selection within 20 days of publication of this notice.

[44] *See* Petitions at Volume I (page 21 and Exhibit I–21); *see also* Petitions at Volume II (Exhibit II–3); Petitions at Volume IV (Exhibit IV–4); Petitions at Volume V (Exhibit V–3); and First General Issues Supplement at Exhibit I–S2.

[45] *See* Petitions at Volume I (Exhibit I–21); *see also* First General Issues Supplement at 1–2 and Exhibits I–S2, S–6, and S–7; and Second General Issues Supplement at 1–2.

[46] *See* Memoranda, ''Antidumping Duty Petition on Imports of Tin Mill Products from the Republic of Korea: Release of U.S. Customs and Border Protection Data,'' dated February 2, 2023; and ''Antidumping Duty Petition on Imports of Tin Mill Products from the Republic of Turkey: Release of U.S. Customs and Border Protection Data,'' dated February 2, 2023.

[47] *See* Petitions at Volume I (Exhibit I–21).

Separate Rates

In order to obtain separate rate status in an NME investigation, exporters and producers must submit a separate rate application.[48] The specific requirements for submitting a separate rate application in an NME investigation are outlined in detail in the application itself, which is available on Commerce's website at *https://enforcement.trade.gov/nme/nme-sep-rate.html.* The separate rate application will be due 30 days after publication of this initiation notice.[49] Exporters and producers who submit a separate rate application and have been selected as mandatory respondents will be eligible for consideration for separate rate status only if they respond to all parts of Commerce's AD questionnaire as mandatory respondents. Commerce requires that companies from China submit a response both to the Q&V questionnaire and to the separate rate application by the respective deadlines in order to receive consideration for separate rate status. Companies not filing a timely Q&V questionnaire response will not receive separate rate consideration.

Use of Combination Rates

Commerce will calculate combination rates for respondents that are eligible for a separate rate in an NME investigation. The Separate Rates and Combination Rates Bulletin states:

{w}hile continuing the practice of assigning separate rates only to exporters, all separate rates that {Commerce} will now assign in its NME Investigation will be specific to those producers that supplied the exporter during the period of investigation. Note, however, that one rate is calculated for the exporter and all of the producers which supplied subject merchandise to it during the period of investigation. This practice applies both to mandatory respondents receiving an individually calculated separate rate as well as the pool of non-investigated firms receiving the {weighted average} of the individually calculated rates. This practice is referred to as the application of ''combination rates'' because such rates apply to specific combinations of exporters and one or more producers. The cash-deposit rate assigned to an exporter will apply only to merchandise both exported by the firm in question *and* produced by a firm that supplied the exporter during the period of investigation.[50]

Distribution of Copies of the Petitions

In accordance with section 732(b)(3)(A) of the Act and 19 CFR 351.202(f), copies of the public version of the AD Petitions have been provided to the governments of Canada, China, Germany, the Netherlands, Korea, Taiwan, Turkey, and the United Kingdom via ACCESS. To the extent practicable, we will attempt to provide a copy of the public version of the AD Petitions to each exporter named in the AD Petitions, as provided under 19 CFR 351.203(c)(2).

ITC Notification

Commerce will notify the ITC of its initiation, as required by section 732(d) of the Act.

Preliminary Determinations by the ITC

The ITC will preliminarily determine, within 45 days after the date on which the AD Petitions were filed, whether there is a reasonable indication that imports of tin mill products from Canada, China, Germany, the Netherlands, Korea, Taiwan, Turkey, and/or the United Kingdom, are materially injuring, or threatening material injury to, a U.S. industry.[51] A negative ITC determination for any country will result in the investigation being terminated with respect to that country.[52] Otherwise, these AD investigations will proceed according to statutory and regulatory time limits.

Submission of Factual Information

Factual information is defined in 19 CFR 351.102(b)(21) as: (i) evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by Commerce; and (v) evidence other than factual information described in (i)–(iv). Section 351.301(b) of Commerce's regulations requires any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted [53] and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct.[54] Time limits for the submission of factual information are addressed in 19 CFR 351.301, which provides specific time limits based on the type of factual information being submitted. Interested parties should review the regulations prior to submitting factual information in this investigation.

Particular Market Situation Allegation

Section 773(e) of the Act addresses the concept of particular market situation (PMS) for purposes of CV, stating that ''if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology.'' When an interested party submits a PMS allegation pursuant to section 773(e) of the Act, Commerce will respond to such a submission consistent with 19 CFR 351.301(c)(2)(v). If Commerce finds that a PMS exists under section 773(e) of the Act, then it will modify its dumping calculations appropriately.

Neither section 773(e) of the Act, nor 19 CFR 351.301(c)(2)(v), sets a deadline for the submission of PMS allegations and supporting factual information. However, in order to administer section 773(e) of the Act, Commerce must receive PMS allegations and supporting factual information with enough time to consider the submission. Thus, should an interested party wish to submit a PMS allegation and supporting new factual information pursuant to section 773(e) of the Act, it must do so no later than 20 days after submission of a respondent's initial response to section D of the AD questionnaire.

Extensions of Time Limits

Parties may request an extension of time limits before the expiration of a time limit established under 19 CFR 351.301, or as otherwise specified by Commerce. In general, an extension request will be considered untimely if it is filed after the expiration of the time limit established under 19 CFR 351.301. For submissions that are due from multiple parties simultaneously, an extension request will be considered untimely if it is filed after 10:00 a.m. ET on the due date. Under certain circumstances, Commerce may elect to specify a different time limit by which extension requests will be considered untimely for submissions which are due

[48] *See* Enforcement and Compliance's Policy Bulletin 05.1, regarding, ''Separate-Rates Practice and Application of Combination Rates in Antidumping Investigation involving NME Countries,'' (April 5, 2005) (Policy Bulletin 05.1), available at *https://enforcement.trade.gov/policy/bull05-1.pdf.*

[49] Although in past investigations this deadline was 60 days, consistent with 19 CFR 351.301(a), which states that ''the Secretary may request any person to submit factual information at any time during a proceeding,'' this deadline is now 30 days.

[50] *See* Policy Bulletin 05.1 at 6 (emphasis added).

[51] *See* section 733(a) of the Act.

[52] *Id.*

[53] *See* 19 CFR 351.301(b).

[54] *See* 19 CFR 351.301(b)(2).

from multiple parties simultaneously. In such a case, Commerce will inform parties in a letter or memorandum of the deadline (including a specified time) by which extension requests must be filed to be considered timely. An extension request must be made in a separate, stand-alone submission; under limited circumstances, Commerce will grant untimely-filed requests for the extension of time limits. Parties should review Commerce's regulations concerning the extension of time limits and the *Time Limits Final Rule* prior to submitting factual information in these investigations.[55]

Certification Requirements

Any party submitting factual information in an AD or CVD proceeding must certify to the accuracy and completeness of that information.[56] Parties must use the certification formats provided in 19 CFR 351.303(g).[57] Commerce intends to reject factual submissions if the submitting party does not comply with the applicable certification requirements.

Notification to Interested Parties

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305. Parties wishing to participate in these investigations should ensure that they meet the requirements of 19 CFR 351.103(d) (*e.g.,* by filing the required letter of appearance). Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[58]

This notice is issued and published pursuant to sections 732(c)(2) and 777(i) of the Act, and 19 CFR 351.203(c).

Dated: February 7, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

Scope of the Investigations

The products within the scope of these investigations are tin mill flat-rolled products that are coated or plated with tin, chromium, or chromium oxides. Flat-rolled steel products coated with tin are known as tinplate. Flat-rolled steel products coated with chromium or chromium oxides are known as tin-free steel or electrolytic chromium-coated steel. The scope includes all the noted tin mill products regardless of thickness, width, form (in coils or cut sheets), coating type (electrolytic or otherwise), edge (trimmed, untrimmed or further processed, such as scroll cut), coating thickness, surface finish, temper, coating metal (tin, chromium, chromium oxide), reduction (single- or double-reduced), and whether or not coated with a plastic material.

All products that meet the written physical description are within the scope of these investigations unless specifically excluded. The following products are outside and/or specifically excluded from the scope of these investigations:

- Single reduced electrolytically chromium coated steel with a thickness 0.238 mm (85 pound base box) (±10%) or 0.251 mm (90 pound base box) (±10%) or 0.255 mm (±10%) with 770 mm (minimum width) (±1.588 mm) by 900 mm (maximum length if sheared) sheet size or 30.6875 inches (minimum width) (±1/16 inch) and 35.4 inches (maximum length if sheared) sheet size; with type MR or higher (per ASTM) A623 steel chemistry; batch annealed at T2 ½ anneal temper, with a yield strength of 31 to 42 kpsi (214 to 290 Mpa); with a tensile strength of 43 to 58 kpsi (296 to 400 Mpa); with a chrome coating restricted to 32 to 150 mg/m^2; with a chrome oxide coating restricted to 6 to 25 mg/m^2 with a modified 7B ground roll finish or blasted roll finish; with roughness average (Ra) 0.10 to 0.35 micrometers, measured with a stylus instrument with a stylus radius of 2 to 5 microns, a trace length of 5.6 mm, and a cut-off of 0.8 mm, and the measurement traces shall be made perpendicular to the rolling direction; with an oil level of 0.17 to 0.37 grams/base box as type BSO, or 2.5 to 5.5 mg/m^2 as type DOS, or 3.5 to 6.5 mg/m^2 as type ATBC; with electrical conductivity of static probe voltage drop of 0.46 volts drop maximum, and with electrical conductivity degradation to 0.70 volts drop maximum after stoving (heating to 400 degrees F for 100 minutes followed by a cool to room temperature).
- Single reduced electrolytically chromium- or tin-coated steel in the gauges of 0.0040 inch nominal, 0.0045 inch nominal, 0.0050 inch nominal, 0.0061 inch nominal (55 pound base box weight), 0.0066 inch nominal (60 pound base box weight), and 0.0072 inch nominal (65 pound base box weight), regardless of width, temper, finish, coating or other properties.
- Single reduced electrolytically chromium coated steel in the gauge of 0.024 inch, with widths of 27.0 inches or 31.5 inches, and with T–1 temper properties.
- Single reduced electrolytically chromium coated steel, with a chemical composition of 0.005% max carbon, 0.030% max silicon, 0.25% max manganese, 0.025% max phosphorous, 0.025% max sulfur 0.070% max aluminum, and the balance iron, with a metallic chromium layer of 70–130 mg/m^2, with a chromium oxide layer of 5–30 mg/m^2, with a tensile strength of 260–440 N/mm^2, with an elongation of 28–48%, with a hardness (HR–30T) of 40–58, with a surface roughness of 0.5–1.5 microns Ra, with magnetic properties of Bm (kg) 10.0 minimum, Br (kg) 8.0 minimum, Hc (Oe) 2.5–3.8, and MU 1400 minimum, as measured with a Riken Denshi DC magnetic characteristic measuring machine, Model BHU–60.
- Bright finish tin-coated sheet with a thickness equal to or exceeding 0.0299 inch, coated to thickness of ¾ pound (0.000045 inch) and 1 pound (0.00006 inch).
- Electrolytically chromium coated steel having ultra flat shape defined as oil can maximum depth of 5/64 inch (2.0 mm) and edge wave maximum of 5/64 inch (2.0 mm) and no wave to penetrate more than 2.0 inches (51.0 mm) from the strip edge and coilset or curling requirements of average maximum of 5/64 inch (2.0 mm) (based on six readings, three across each cut edge of a 24 inches (61 cm) long sample with no single reading exceeding 4/32 inch (3.2 mm) and no more than two readings at 4/32 inch (3.2 mm)) and (for 85 pound base box item only: crossbuckle maximums of 0.001 inch (0.0025 mm) average having no reading above 0.005 inch (0.127 mm)), with a camber maximum of ¼ inch (6.3 mm) per 20 feet (6.1 meters), capable of being bent 120 degrees on a 0.002 inch radius without cracking, with a chromium coating weight of metallic chromium at 100 mg/m^2 and chromium oxide of 10 mg/m^2, with a chemistry of 0.13% maximum carbon, 0.60% maximum manganese, 0.15% maximum silicon, 0.20% maximum copper, 0.04% maximum phosphorous, 0.05% maximum sulfur, and 0.20% maximum aluminum, with a surface finish of Stone Finish 7C, with a DOS–A oil at an aim level of 2 mg/square meter, with not more than 15 inclusions/foreign matter in 15 feet (4.6 meters) (with inclusions not to exceed 1/32 inch (0.8 mm) in width and 3/64 inch (1.2 mm) in length), with thickness/temper combinations of either 60 pound base box (0.0066 inch) double reduced CADR8 temper in widths of 25.00 inches, 27.00 inches, 27.50 inches, 28.00 inches, 28.25 inches, 28.50 inches, 29.50 inches, 29.75 inches, 30.25 inches, 31.00 inches, 32.75 inches, 33.75 inches, 35.75 inches, 36.25 inches, 39.00 inches, or 43.00 inches, or 85 pound base box (0.0094 inch) single reduced CAT4 temper in widths of 25.00 inches, 27.00 inches, 28.00 inches, 30.00 inches, 33.00 inches, 33.75 inches, 35.75 inches, 36.25 inches, or 43.00 inches, with width tolerance of ⅛ inch, with a thickness tolerance of 0.0005 inch, with a maximum coil weight of 20,000 pounds (9071.0 kg), with a minimum coil weight of 18,000 pounds (8164.8 kg), with a coil inside diameter of 16 inches (40.64 cm) with a steel

[55] *See* 19 CFR 351.302; *see also, e.g., Extension of Time Limits; Final Rule,* 78 FR 57790 (September 20, 2013) (*Time Limits Final Rule*), available at *http://www.gpo.gov/fdsys/pkg/FR-2013-09-20/html/2013-22853.htm.*

[56] *See* section 782(b) of the Act.

[57] *See Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings,* 78 FR 42678 (July 17, 2013) (*Final Rule*). Answers to frequently asked questions regarding the *Final Rule* are available at *http://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.*

[58] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

core, with a coil maximum outside diameter of 59.5 inches (151.13 cm), with a maximum of one weld (identified with a paper flag) per coil, with a surface free of scratches, holes, and rust.

• Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents in the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.7 mg/square foot of chromium applied as a cathodic dichromate treatment, with coil form having restricted oil film weights of 0.3–0.4 grams/base box of type DOS–A oil, coil inside diameter ranging from 15.5 to 17 inches, coil outside diameter of a maximum 64 inches, with a maximum coil weight of 25,000 pounds, and with temper/coating/dimension combinations of: (1) CAT4 temper, 1.00/.050 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 33.1875 inch ordered width; or (2) CAT5 temper, 1.00/0.50 pound/base box coating, 75 pound/base box (0.0082 inch) thickness, and 34.9375 inch or 34.1875 inch ordered width; or (3) CAT5 temper, 1.00/0.50 pound/base box coating, 107 pound/base box (0.0118 inch) thickness, and 30.5625 inch or 35.5625 inch ordered width; or (4) CADR8 temper, 1.00/0.50 pound/base box coating, 85 pound/base box (0.0093 inch) thickness, and 35.5625 inch ordered width; or (5) CADR8 temper, 1.00/0.25 pound/base box coating, 60 pound/base box (0.0066 inch) thickness, and 35.9375 inch ordered width; or (6) CADR8 temper, 1.00/0.25 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 32.9375 inch, 33.125 inch, or 35.1875 inch ordered width.

• Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents on the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.5 mg/square foot of chromium applied as a cathodic dichromate treatment, with ultra flat scroll cut sheet form, with CAT5 temper with 1.00/0.10 pound/base box coating, with a lithograph logo printed in a uniform pattern on the 0.10 pound coating side with a clear protective coat, with both sides waxed to a level of 15–20 mg/216 sq. inch, with ordered dimension combinations of (1) 75 pound/base box (0.0082 inch) thickness and 34.9375 inch x 31.748 inch scroll cut dimensions; or (2) 75 pound/base box (0.0082 inch) thickness and 34.1875 inch x 29.076 inch scroll cut dimensions; or (3) 107 pound/base box (0.0118 inch) thickness and 30.5625 inch x 34.125 inch scroll cut dimension.

• Tin-free steel coated with a metallic chromium layer between 100–200 mg/m^2 and a chromium oxide layer between 5–30 mg/m^2; chemical composition of 0.05% maximum carbon, 0.03% maximum silicon, 0.60% maximum manganese, 0.02% maximum phosphorous, and 0.02% maximum sulfur; magnetic flux density (Br) of 10 kg minimum and a coercive force (Hc) of 3.8 Oe minimum.

• Tin-free steel laminated on one or both sides of the surface with a polyester film, consisting of two layers (an amorphous layer and an outer crystal layer), that contains no more than the indicated amounts of the following environmental hormones: 1 mg/kg BADGE (BisPhenol—A Di-glycidyl Ether), 1 mg/kg BFDGE (BisPhenol—F Di-glycidyl Ether), and 3 mg/kg BPA (BisPhenol—A).

The merchandise subject to these investigations is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS), under HTSUS subheadings 7210.11.0000, 7210.12.0000, 7210.50.0020, 7210.50.0090, 7212.10.0000, and 7212.50.0000 if of non-alloy steel and under HTSUS subheadings 7225.99.0090, and 7226.99.0180 if of alloy steel. Although the subheadings are provided for convenience and customs purposes, the written description of the scope of the investigations is dispositive.

[FR Doc. 2023–03085 Filed 2–13–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Open Meetings of the Internet of Things Advisory Board

AGENCY: National Institute of Standards and Technology (NIST).

ACTION: Notice of open meetings.

SUMMARY: The Internet of Things (IoT) Advisory Board will meet Tuesday, March 7, 2023; Tuesday, April 18, 2023 and Wednesday, April 19, 2023; and Tuesday, May 16, 2023 and Wednesday, May 17, 2023 from 11:00 a.m. until 5:00 p.m., Eastern Time. All sessions will be open to the public.

DATES: The meetings will be held on Tuesday, March 7, 2023; Tuesday, April 18, 2023 and Wednesday, April 19, 2023; and Tuesday, May 16, 2023 and Wednesday, May 17, 2023 from 11:00 a.m. until 5:00 p.m., Eastern Time.

ADDRESSES: The meetings in March and May will be virtual meetings via Webex webcast hosted by the National Cybersecurity Center of Excellence (NCCoE) at NIST. The meeting in April 2023 will be hybrid with in-person seating at the NCCoE as well as a virtual option via Webex webcast, also hosted by the NCCoE. Please note registration instructions under the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: Barbara Cuthill, Information Technology Laboratory, National Institute of Standards and Technology, Telephone: (301) 975–3273, Email address: *barbara.cuthill@nist.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act, as amended, 5 U.S.C. app., notice is hereby given that the IoT Advisory Board will hold open meetings on Tuesday, March 7, 2023 Tuesday, April 18, 2023, Wednesday, April 19, 2023, Tuesday, May 16, 2023 and Wednesday, May 17, 2023 from 11:00 a.m. until 5:00 p.m., Eastern Time. All sessions will be open to the public. The IoT Advisory Board is authorized by section 9204(b)(5) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116–283) and advises the IoT Federal Working Group convened by the Secretary of Commerce pursuant to section 9204(b)(1) of the Act on matters related to the Federal Working Group's activities. Details regarding the IoT Advisory Board's activities are available at *https://www.nist.gov/itl/applied-cybersecurity/nist-cybersecurity-iot-program/internet-things-advisory-board.*

The agenda for the March meeting is expected to focus on establishing consensus on the outline of the IoT Advisory Board's report and data gathering framework.

The agendas for the April and May meetings will focus on discussion of specific focus areas for the report cited in the legislation and the charter:

- Smart traffic and transit technologies
- Augmented logistics and supply chains
- Sustainable infrastructure
- Precision agriculture
- Environmental monitoring
- Public safety
- Health care

In addition, the IoT Advisory Board may discuss other elements called for in the report:

- whether adequate spectrum is available to support the growing Internet of Things and what legal or regulatory barriers may exist to providing any spectrum needed in the future;
- policies, programs, or multi-stakeholder activities that—
  - promote or are related to the privacy of individuals who use or are affected by the Internet of Things;
  - may enhance the security of the Internet of Things, including the security of critical infrastructure;
  - may protect users of the Internet of Things; and
  - may encourage coordination among Federal agencies with jurisdiction over the Internet of Things.

Note that agenda items may change without notice. The final agendas will be posted on the IoT Advisory Board web page: *https://www.nist.gov/itl/applied-cybersecurity/nist-cybersecurity-iot-program/internet-things-advisory-board.*

Public Participation: Written comments from the public are invited

and may be submitted electronically by email to Barbara Cuthill at the contact information indicated in the **FOR FURTHER INFORMATION CONTACT** section of this notice by 5 p.m. on the Tuesday prior to each meeting for distribution to members prior to the meeting.

Each IoT Advisory Board meeting agenda will include a period, not to exceed sixty minutes, for submitted comments from the public to be presented. Submitted comments from the public will be selected on a first-come, first-served basis and limited to five minutes per person for oral presentation if requested by the commenter. For the April meeting, the commenter needs to specify if they plan to be in-person at the meeting or want to provide their comments virtually. Both options will be available in April.

Members of the public who wish to expand upon their submitted statements, those who had wished to submit a comment but could not be accommodated on the agenda, and those who were unable to attend the meeting via webinar are invited to submit written statements. In addition, written statements are invited and may be submitted to the IoT Advisory Board at any time. All written statements should be directed to the IoT Advisory Board Secretariat, Information Technology Laboratory by email to: *Barbara.Cuthill@nist.gov.*

Admittance Instructions: Participants planning to attend via webinar must register via the instructions found on the IoT Advisory Board's page *https://www.nist.gov/itl/applied-cybersecurity/nist-cybersecurity-iot-program/internet-things-advisory-board.*

For attendance in person at the hybrid meeting in April, in-person attendance is limited to 50 and will be on a first-come, first-served basis. Registration will close for in-person attendance on April 11, 2023 at 5:00 p.m. EST.

Alicia Chambers,

NIST Executive Secretariat.

[FR Doc. 2023–03039 Filed 2–13–23; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

ANSI/NIST–ITL Standards Update Workshop: Data Format for the Interchange of Fingerprint, Facial & Other Biometric Information

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of open meeting.

SUMMARY: The National Institute of Standards and Technology (NIST) is hosting a public workshop to inform an update of the ANSI/NIST–ITL standard, ''Data Format for the Interchange of Fingerprint, Facial & Other Biometric Information.'' This event will be completely virtual and occur February 21–23, 2023, from 9:00 a.m.–4:00 p.m. Eastern Standard Time. The purpose of this workshop is to solicit recommendations to identify and pursue updates needed to the above-referenced standard.

DATES: The workshop will take place February 21–23, 2023 from 9:00 a.m.–4:00 p.m. Eastern Standard Time. Subject Matter Expert (SME) working group meetings will occur on February 22–23, 2023.

ADDRESSES: This meeting will be held virtually, and additional participation information and logistics will be provided once registration is completed.

FOR FURTHER INFORMATION CONTACT: Diane Stephens at *diane.stephens@nist.gov* or (301) 975–4493 or at *biometrics-editor@nist.gov.*

SUPPLEMENTARY INFORMATION: Law enforcement and related criminal justice agencies, as well as identity management organizations, procure equipment and systems intended to facilitate the determination of the personal identity of a subject or verify the identity of a subject using biometric information. To effectively exchange identity data across jurisdictional lines or between dissimilar systems made by different manufacturers, a standard is needed to specify a common format for the data exchange.

Biometric data refers to a digital or analog representation of a behavioral or physical characteristic of an individual that can be used by an automated system to distinguish an individual as belonging to a subgroup of the entire population or, in many cases, can be used to uniquely establish or verify the identity of a person (compared to a claimed or referenced identity). Biometric modalities specifically included in this standard are: fingerprints, plantars (footprints), palm prints, facial images, DNA and iris images. Identifying characteristics that may be used manually to establish or verify the identity of an individual are included in the standard. These identifying characteristics include scars, (needle) marks, tattoos, and certain characteristics of facial photos, iris images and images of other body parts. Latent friction ridge prints (fingerprint, palm print and plantars) are included in this standard and may be used in either an automated system or forensically (or both).

NIST's Information Technology Laboratory (ITL) led the development of this American National Standards Institute (ANSI) approved American National Standard using the NIST Canvass Method to demonstrate evidence of consensus. NIST, as the Editor of the ANSI/NIST–ITL Standard, is soliciting recommendations and/or presentations to highlight specific updates the community of interest may want included in the next update of this document. Hence, NIST is hosting a public workshop to update the ANSI/NIST–ITL 1–2001 Update: 2015 standard, ''Data Format for the Interchange of Fingerprint, Facial & Other Biometric Information'' (NIST Special Publication 500–290 Edition 3 (2015)). This event will be completely virtual and occur February 21–23, 2023, from 9:00 a.m.–4:00 p.m. Eastern Standard Time. Federal, industry, and academic stakeholders and interested parties who wish to participate in this workshop should please use this link to register: *https://www.nist.gov/news-events/events/2023/02/ansi-nist-itl-standards-update-workshop.*

Alicia Chambers,

NIST Executive Secretariat.

[FR Doc. 2023–03110 Filed 2–13–23; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XC759]

Addition of Species to the Annexes of the Protocol Concerning Specially Protected Areas and Wildlife in the Wider Caribbean Region

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; request for public comments.

SUMMARY: During a meeting of the Scientific and Technical Advisory Committee (STAC) under the Protocol to the Cartagena Convention on Specially Protected Areas and Wildlife (SPAW Protocol), held virtually on January 30–February 1, 2023, 24 animal species were nominated to be added to the Annexes of the SPAW Protocol. The Department of State and National Marine Fisheries Service (NMFS) solicit

comment on the nominations to add these species to the Annexes.

DATES: Comments must be received by March 16, 2023.

ADDRESSES: You may submit comments on the recommendations to add the 24 species to the Annexes of the SPAW Protocol, identified by NOAA–NMFS–2023–0017, by the following method:

- *Electronic Submissions:* Submit all electronic comments via the Federal eRulemaking Portal. Go to *https://www.regulations.gov* and enter NOAA–NMFS–2023–0017 in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. Anonymous comments will be accepted (enter N/A in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Kristen Koyama, (301) 427–8456; *kristen.koyama@noaa.gov.*

SUPPLEMENTARY INFORMATION: The SPAW Protocol is a protocol to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagena Convention or Convention). There is also a protocol to the Convention addressing land-based sources of pollution and a protocol addressing regional cooperation on oil pollution preparedness and response. The SPAW Protocol was adopted in 1990 and entered into force in 2000. The United States ratified the SPAW Protocol in 2003. There are currently 18 countries that are Parties to the SPAW Protocol from throughout the Wider Caribbean Region.

Participants at the January 2023 meeting of the STAC to the SPAW Protocol included representatives from: Barbados, Belize, Colombia, Dominican Republic, France, Guyana, Honduras, the Netherlands, Nicaragua, Panama, Saint Lucia, Trinidad and Tobago, the United States of America, and Venezuela. Representatives of several non-governmental organizations also attended as observers.

The U.S. delegation included representatives from the U.S. Department of State and NOAA's National Marine Fisheries Service (NMFS) and National Ocean Service. Additional information and meeting documents can be obtained at *https://www.unep.org/cep/events/scientific-and-technical-advisory-committee-meetings-stacs/spaw-stac10.*

Convention and Convention Area

The Cartagena Convention is a regional agreement for the protection and development of the marine environment of the wider Caribbean. The Convention was adopted in 1983 and entered into force in 1986. The United States ratified the Convention in 1984. The Convention area includes the marine environment of the Gulf of Mexico, the Caribbean Sea and the adjacent areas of the Atlantic Ocean south of lat. 30° N and within 200 nautical miles (nmi) of the Atlantic coasts of the Parties. The United States' responsibility within this Convention area includes: U.S. waters off of Puerto Rico, the U.S. Virgin Islands, and peninsular Florida, including the Atlantic coast; the waters off of a number of islands including coastal barrier islands and the Florida Keys; and the Gulf of Mexico waters under U.S. jurisdiction. The SPAW Protocol provides that each Party may designate related terrestrial areas over which they have sovereignty and jurisdiction (including watersheds) to be covered by the SPAW Protocol. The United States has not designated any terrestrial areas under the SPAW Protocol and ''does not intend to designate a terrestrial area under the Protocol unless requested to do so by an interested state or territory . . .'' (Senate Executive Report 107–8).

The Annexes and U.S. Obligations Under Each Annex

The SPAW Protocol includes three Annexes. Plant species subject to the highest levels of protection are listed in Annex I, and animal species subject to the highest levels of protection are listed in Annex II. Plants and animals subject to some management, but lesser protections than those afforded to species listed in Annexes I or II, are listed in Annex III.

Annexes I (flora) and II (fauna) are to include endangered and threatened species, or subspecies, or their populations as well as rare species. The SPAW Protocol describes rare species as those ''that are rare because they are usually localized within restricted geographical areas or habitats or are thinly scattered over a more extensive range and which are potentially or actually subject to decline and possible endangerment or extinction.''

Under Article 11(1), for fauna listed in Annex II, Parties ''shall ensure total protection and recovery to the species . . . by prohibiting: (i) the taking, possession or killing (including, to the extent possible, the incidental taking, possession or killing) or commercial trade in such species, their eggs, parts or products; [and] (ii) to the extent possible, the disturbance of such species, particularly during periods of breeding, incubation, estivation or migration, as well as other periods of biological stress.''

Also under Article 11(1), for Annex III species, the SPAW Protocol states: ''Each Party shall adopt appropriate measures to ensure the protection and recovery of the species of flora and fauna listed in Annex III and may regulate the use of such species in order to ensure and maintain their populations at the highest possible levels.'' Therefore, some regulated harvest may be permitted for species on Annex III. The protective provisions of this Annex are not intended to be more restrictive than the provisions of Annexes I and II.

The United States ratified the SPAW Protocol, including Annexes, subject to certain reservations, including the following with respect to Article 11(1): ''The United States does not consider itself bound by Article 11(1) of the [SPAW] Protocol to the extent that United States law permits the limited taking of flora and fauna listed in Annexes I and II which is incidental, or for the purpose of public display, scientific research, photography for educational or commercial purposes, or rescue and rehabilitation.''

The United States has not designated any terrestrial area under the SPAW Protocol. As the United States explained at the time the SPAW Protocol was ratified, ''The United States does not plan to designate terrestrial area under the Protocol since no state or territory has identified a need or desire to designate terrestrial area . . . .'' (Senate Treaty Document 103–5). In addition, ''Several terrestrial species, *e.g.* bats (*Tadarida brasiliensis* and *Brachyphylla cavernarum*) and falcons (*Falco peregrinus*), are listed in the Annexes. The listing of these species, however, is not intended to describe the relevant terrestrial scope of the Protocol. As the United States has not designated any terrestrial area, the Protocol obligations will not apply with respect to such species.'' *Id.*

Summary of Annexes

Annex I contains a total of 53 plant species. All plant species on Annex I are either: (1) listed under the U.S.

Endangered Species Act (ESA; 16 U.S.C. 1531 *et seq.*); (2) endemic to Florida and protected under Florida law; (3) occur only on Federal land and are fully protected where they occur; (4) are not native to the United States, and are listed in the Appendices of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) where primarily commercial trade would be prohibited; or (5) are not native nor believed to be commercially imported into the United States. 56 FR 12026, 12028 (March 21, 1991). There have been no additions to Annex I since the adoption of the SPAW Protocol.

Annex II currently contains 117 species and 3 groups of species, including all sea turtles and all marine mammals in the region. Most of these animal species are either: (1) listed under the ESA or the Marine Mammal Protection Act (16 U.S.C. 1361 *et seq.*); (2) are not native to the United States and are listed in Appendix I of CITES; (3) are offered complete protection by domestic legislation in all range countries (whereby the Lacey Act, among other things, prohibits commercial trade in specimens taken, possessed, transported or sold in violation of foreign law); or (4) are endemic to foreign countries and are not commercially imported into the United States. The most recent addition to Annex II by the SPAW Parties was in June 2019.

Annex III currently contains 43 species of plants and 42 species of animals in addition to species of corals, mangroves, and sea-grasses that occur in the region.

Composition of the Annexes

The plant and animal species included on each Annex can be found here: *https://www.car-spaw-rac.org/?The-SPAW-Protocol-769.*

Species Nominated To Be Added to the SPAW Protocol Annexes

ANNEX II

Species	Common name
SHARKS	
Carcharhinus longimanus	Oceanic whitetip shark.
Rhincodon typus	Whale shark.
Sphyrna lewini	Scalloped hammerhead shark.
Sphyrna mokarran	Great hammerhead shark.
Sphyrna zygaena	Smooth hammerhead shark.
RAYS	
Manta birostris	Giant manta ray.

ANNEX II—Continued

Species	Common name
REPTILES	
Iguana delicatissima	Lesser Antillean iguana.

ANNEX III

Species	Common name
FISH	
Scaridae spp. (16 species).	Parrotfish (16 species).
SHARKS	
Carcharhinus perezi	Caribbean reef shark.

Circumstances of SPAW Species Nominations

Article 11(4) of the SPAW Protocol details the requirements for amending the Annexes and states, in part, that a Party may submit a nomination of a species for inclusion in or deletion from the Annexes; that the Party shall submit supporting documentation; and that the SPAW STAC shall review the nomination. At the January 2023 meeting, the SPAW STAC reviewed the species proposed by Parties for listing under the SPAW Protocol and made recommendations to the twelfth SPAW Conference of the Parties (COP12) meeting, expected to be held in April 2023. The STAC recommended that the oceanic whitetip shark and the Lesser Antillean iguana be uplisted from Annex III to Annex II, and that parrotfish (*Scaridae spp.*) and the Caribbean reef shark be added to Annex III. The STAC did not provide a consensus recommendation on the proposals to uplist the whale shark, giant manta ray, and three species of hammerhead sharks from Annex III to Annex II. The STAC referred these nominations to SPAW COP12, which will take a final decision on all species nominations at its meeting in April 2023.

Species Under the Jurisdiction of the National Marine Fisheries Service

Six species nominated to be added to Annex II at the January 2023 meeting fall under the jurisdiction of NMFS: the oceanic whitetip shark (*Carcharhinus longimanus*), giant manta ray (*Manta birostris*), whale shark (*Rhincodon typus*), scalloped hammerhead shark (*Sphyrna lewini*), great hammerhead shark (*S. mokarran*), and smooth hammerhead shark (*S. zygaena*). All six of these species are currently listed in Annex III of the SPAW Protocol. The oceanic whitetip shark, giant manta ray, and four distinct population segments of the scalloped hammerhead shark are currently listed under the U.S. Endangered Species Act. All species nominated to be added to Annex III fall under the jurisdiction of NMFS, including all parrotfish (*Scaridae*) and the Caribbean reef shark (*Carcharhinus perezi*).

Species Under the Jurisdiction of the U.S. Fish and Wildlife Service

The Lesser Antillean iguana (*Iguana delicatissima*), which the STAC recommended to be uplisted from Annex III to Annex II at the January 2023 meeting, falls under the jurisdiction of the U.S. Fish and Wildlife Service. The Lesser Antillean iguana is a terrestrial species. As explained earlier in this notice, the United States has not designated any terrestrial area under the SPAW Protocol and the obligations under the SPAW Protocol do not apply in the United States with respect to terrestrial species. Accordingly, no obligations under the SPAW Protocol would apply to this species if it is added to SPAW Annex II.

Comments Solicited

The Department of State and NMFS solicit comments and information that will inform the United States' consideration of the potential listing of these species in the SPAW Annexes.

Dated: February 8, 2023.

Kimberly Damon-Randall,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2023–03048 Filed 2–13–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XC764]

North Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of hybrid meeting.

SUMMARY: The North Pacific Fishery Management Council (Council) Bering Sea Fishery Ecosystem Plan Climate Change Taskforce (BSFEP CC) will meet March 1, 2023 through March 2, 2023.

DATES: The meeting will be held on Wednesday, March 1, 2023, from 9 a.m. to 5 p.m. and on Thursday, March 2, 2023, from 9 a.m. to 12 p.m. Pacific Time.

ADDRESSES: The meetings will be a hybrid meeting. The in-person component of the meeting will be held at the Alaska Fisheries Science Center in the room 2039, 7600 Sand Point Way NE, Building 4, Seattle, WA 98115, or join online through the link at *https://meetings.npfmc.org/Meeting/Details/2979.*

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

Wednesday, March 1, 2023 Through Thursday, March 2, 2023

The agenda will include: (a) review changes to climate readiness synthesis from the SSC; (b) discuss concept of soliciting stakeholder input on climate resilient metrics; (c) review ongoing process for incorporating climate information into council process and future plans; (d) discuss and recommend agenda, format and goals and objectives for scenario planning workshop; (e) work plan for 2023–2024; and (f) other business. The agenda is subject to change, and the latest version will be posted at *https://meetings.npfmc.org/Meeting/Details/2979* 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/2979.*

Public Comment

Public comment letters will be accepted and should be submitted electronically to *https://meetings.npfmc.org/Meeting/Details/2979.*

Authority: 16 U.S.C. 1801 *et seq.*

Dated: February 8, 2023.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–03068 Filed 2–13–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No.: PTO–P–2022–0025]

Request for Comments on USPTO Initiatives To Ensure the Robustness and Reliability of Patent Rights

AGENCY: United States Patent and Trademark Office, Department of Commerce.

ACTION: Request for comments; extension of comment period.

SUMMARY: The United States Patent and Trademark Office (USPTO) is extending the comment period for the notice titled ''Request for Comments on USPTO Initiatives to Ensure the Robustness and Reliability of Patent Rights'' that was published in the **Federal Register** on October 4, 2022. The notice's comment period was previously extended until February 1, 2023. The comment period is now extended a second time; this will be the last extension of the comment period.

DATES: The comment period for the notice published at 87 FR 60130, which was extended at 87 FR 66282 on November 3, 2022, is further extended. Comments are due by February 28, 2023.

ADDRESSES: For reasons of government efficiency, comments must be submitted through the Federal eRulemaking Portal at *www.regulations.gov.* This docket closed on February 1, 2023, but is now reopened to accept additional comments. To submit comments via the portal, enter docket number PTO–P–2022–0025 on the homepage and click ''Search.'' The site will provide a search results page listing all documents associated with this docket. Find a reference to this document and click on the ''Comment'' icon, complete the required fields, and enter or attach your comments. Attachments to electronic comments will be accepted as various file types, including Adobe® portable document format (PDF) and Microsoft Word® format. Because comments will be made available for public inspection, information the submitter does not desire to make public, such as an address or phone number, should not be included in the comments.

Visit the Federal eRulemaking Portal for additional instructions on providing comments via the portal. If electronic submission of comments is not feasible due to a lack of access to a computer and/or the internet, please contact the USPTO using the contact information below (at **FOR FURTHER INFORMATION CONTACT**) for special instructions.

FOR FURTHER INFORMATION CONTACT: Linda Horner, Administrative Patent Judge, at 571–272–9797; June Cohan, Senior Legal Advisor, Office of Patent Legal Administration, Office of the Deputy Commissioner for Patents, at 571–272–7744; or Raul Tamayo, Senior Legal Advisor, Office of Patent Legal Administration, Office of the Deputy Commissioner for Patents, at 571–272–7728.

SUPPLEMENTARY INFORMATION: On October 4, 2022, the USPTO published a notice titled ''Request for Comments on USPTO Initiatives to Ensure the Robustness and Reliability of Patent Rights'' to seek initial public comments on proposed initiatives directed at bolstering the robustness and reliability of patents to incentivize and protect new and nonobvious inventions while facilitating the broader dissemination of public knowledge, which will, in turn, promote innovation and competition. *See* 87 FR 60130. On November 3, 2022, the USPTO extended the written comment period until February 1, 2023. *See* 87 FR 66282. The USPTO is now extending the written comment period a second time until February 28, 2023, to ensure that all stakeholders have a sufficient opportunity to submit comments on the questions presented in the October 4, 2022, notice. This will be the last extension of the comment period.

Comments previously submitted to the docket through the Federal eRulemaking Portal do not need to be resubmitted. Any comments sent directly to USPTO after the close of the previous deadline of February 1, 2023, must be submitted through the Federal eRulemaking Portal before the newly extended deadline to be given full consideration. All other information and instructions to commenters provided in the October 4, 2022, notice remain unchanged.

Katherine K. Vidal,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2023–03119 Filed 2–13–23; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No. PTO–P–2022–0045]

Request for Comments Regarding Artificial Intelligence and Inventorship

AGENCY: United States Patent and Trademark Office, Department of Commerce.

ACTION: Request for comments.

SUMMARY: The United States Patent and Trademark Office (USPTO) plays an important role in incentivizing and protecting innovation, including innovation enabled by artificial intelligence (AI), to ensure continued U.S. leadership in AI and other emerging technologies (ET). In June 2022, the USPTO announced the formation of the AI/ET Partnership, which provides an opportunity to bring stakeholders together through a series of engagements to share ideas, feedback, experiences, and insights on the intersection of intellectual property and AI/ET. To build on the AI/ET Partnership efforts, the USPTO is seeking stakeholder input on the current state of AI technologies and inventorship issues that may arise in view of the advancement of such technologies, especially as AI plays a greater role in the innovation process. As outlined in sections II to IV below, the USPTO is pursuing three main avenues of engagement with stakeholders to inform its future efforts on inventorship and promoting AI-enabled innovation: a series of stakeholder engagement sessions; collaboration with academia through scholarly research; and a request for written comments to the questions identified in section IV. The USPTO encourages stakeholder engagement through one or more of these avenues.

DATES: Submissions to the special issue of the ''Journal of the Patent and Trademark Office Society'' may be made directly to the journal at *editor@jptos.org* by July 1, 2023. Comments, in general, and responses to the questions identified in section IV must be received by May 15, 2023 to ensure consideration.

ADDRESSES: For reasons of Government efficiency, comments must be submitted through the Federal eRulemaking Portal at *www.regulations.gov.* To submit comments via the portal, enter docket number PTO–P–2022–0045 on the homepage and click ''Search.'' The site will provide a search results page listing all documents associated with this docket. Find a reference to this notice and click on the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments. Attachments to electronic comments will be accepted in ADOBE® portable document format or MICROSOFT WORD® format. Because comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone number, should not be included in the comments.

Visit the Federal eRulemaking Portal website (*www.regulations.gov*) for additional instructions on providing comments via the portal. If electronic submission of comments is not feasible due to a lack of access to a computer and/or the internet, please contact the USPTO using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Matthew Sked, Senior Legal Advisor, Office of Patent Legal Administration, at 571–272–7627. Inquiries can also be sent to *AIPartnership@uspto.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In August 2019, the USPTO issued a request for public comments on patenting AI inventions. Among the various policy questions raised in the notice, the USPTO requested comments on several issues involving inventorship, such as the different ways a natural person can contribute to the conception of an AI invention and whether current laws and regulations involving inventorship need to be revised to consider contributions from entities other than natural persons. *See* Request for Comments on Patenting Artificial Intelligence Inventions, 84 FR 44889 (August 27, 2019). In October 2020, the USPTO published a report titled ''Public Views on Artificial Intelligence and Intellectual Property Policy,'' which took a comprehensive look at the stakeholder feedback received in response to the questions posed in the August 2019 notice.[1] With respect to inventorship, some commenters took the position that current AI could not invent without human intervention and that current inventorship law is equipped to handle inventorship that involves AI technologies. However, other commenters indicated that AI can potentially contribute to the creation of inventions in a variety of ways, including generating patentable inventions to which no human has made an inventive contribution.[2]

Subsequently, in June 2022, the USPTO held its inaugural AI/ET Partnership meeting. During a panel discussion on ''Inventorship and the Advent of Machine Generated Inventions,'' there was a discussion among the panelists about AI's increasing role in innovation. Although there was consensus that AI cannot ''conceive'' of inventions, some panelists contended that AI is merely a tool like any other tool used in the inventive process, while others pointed to situations in which AI systems can output patentable inventions or contribute at the level of a joint inventor. Details and a recording of the inaugural AI/ET Partnership event are available at *https://www.uspto.gov/about-us/events/aiet-partnership-series-1-kickoff-uspto-aiet-activities-and-patent-policy.*

While the USPTO was exploring the contours of inventorship law with respect to AI generated inventions, the USPTO received applications asserting that an AI machine was the inventor. On April 22, 2020, the USPTO issued a pair of decisions denying petitions to name Device for Autonomous Bootstrapping of Unified Sentience (DABUS), an AI system, as the inventor. The USPTO's decision explained that under current U.S. patent laws, inventorship is limited to a natural person(s). The USPTO's decision was upheld on September 2, 2021 in a decision from the United States District Court for the Eastern District of Virginia. *Thaler* v. *Hirshfeld,* 558 F.Supp.3d 238 (E.D. Va. 2021). On appeal, the Court of Appeals for the Federal Circuit (Federal Circuit) affirmed the holding that an inventor must be a natural person. *Thaler* v. *Vidal,* 43 F.4th 1207, 1210 (Fed. Cir. 2022). Specifically, the Federal Circuit held that 35 U.S.C. 100(f) defines an inventor as ''the individual or, if a joint invention, the individuals collectively who invented or discovered the subject matter of the invention.'' The court found that based on Supreme Court precedent, an ''individual'' ordinarily means a human being unless Congress provided some indication that a different meaning was intended. *Id.* at 1211 (citing *Mohamad* v. *Palestinian Auth.* 566 U.S. 449, 454 (2012)). Based on the finding that there is nothing in the Patent Act to indicate Congress intended a different meaning, and that the Act includes other language to support the conclusion that an ''individual'' in the Act refers to a natural person, the court concluded that an inventor must be a natural person. *Id.* The court explained, however, that it was not confronted with ''the question of whether inventions made by human beings with the *assistance* of AI are eligible for patent protection.'' *Thaler* v. *Vidal,* 43 F.4th at 1213.

In addition, there is a growing consensus that AI is playing a greater role in the innovation process (*i.e.,* AI is being used to drive innovation in other

[1] The full report is available at *www.uspto.gov/sites/default/files/documents/USPTO_AI-Report_2020-10-07.pdf.*

[2] *See, e.g.,* Response from Ryan Abbott (November 5, 2019) at 3–4, *www.uspto.gov/sites/default/files/documents/Ryan-Abbott_RFC-84-FR-44889.pdf.*

technologies). For example, at the AI/ET Partnership meetings, the USPTO heard that new AI models are being used in drug discovery, personalized medicine, and chip design. As noted above, some stakeholders have indicated that technologies using machine learning may be able to contribute at the level of a joint inventor in some inventions today. Further, Congress has taken note of the increased role that AI plays in innovation. On October 27, 2022, Senators Thom Tillis and Chris Coons called on the USPTO and the U.S. Copyright Office to jointly create a national commission on AI to consider changes to existing law to incentivize future AI-related innovations and creations.

In the wake of the *Thaler* decision and in view of the current state of AI and machine learning, there remains uncertainty around AI inventorship. This uncertainty is becoming more immediate as AI, particularly machine learning, systems make greater contributions to innovation, as noted above. If these technologies are in fact capable of significantly contributing to the creation of an invention, the question arises whether the current state of the law provides patent protection for these inventions. Accordingly, in order to foster and promote AI-enabled innovation, the USPTO requests further stakeholder feedback on the current state of AI technology in the invention creation process and on how to address inventions created with significant AI contributions.

II. Stakeholder Engagement Sessions

The USPTO will hold stakeholder engagement sessions regarding inventorship and AI-enabled innovation. Information about these sessions will be announced in the **Federal Register** and posted on the AI/ET Partnership web page at *www.uspto.gov/aipartnership.*

III. Collaboration With Academia

The USPTO also seeks to foster increased academic engagement on inventorship and AI-enabled innovation. Universities and academic researchers play a multifaceted role in illuminating AI's role in innovation. Many of the technical breakthroughs that underpin AI's potential ability to contribute to the inventive process are inspired by work in university research labs. Legal and policy scholars from those same institutions can help explore the resulting implications from an intellectual property perspective. The USPTO encourages universities to support research and related academic initiatives—particularly those that foster interdisciplinary collaboration between AI technical researchers, legal scholars, and other contributors—that can help address open questions in this area, such as the ones posed in section IV of this notice, from a scholarly perspective. When appropriate, the USPTO will consider opportunities to engage and collaborate with such academic initiatives via the AI/ET Partnership.

The USPTO welcomes novel scholarship that can inform its future efforts as to inventorship and AI-enabled innovation. Recognizing the value of a diversity of perspectives, the USPTO invites both descriptive and normative contributions from a variety of disciplines, including but not limited to computer science, law, public policy, economics, applied mathematics, and cognitive science. The ''Journal of the Patent and Trademark Office Society'' plans to publish a special issue focused on inventorship and AI-enabled innovation. Submissions for this special issue may be made directly to the journal at *editor@jptos.org* by July 1, 2023.[3] The USPTO will closely monitor scholarship published in this and other venues for helpful insights that advance our understanding of current inventorship doctrine, the present and future capabilities of AI systems relevant to the inventive process, and considerations about whether the U.S. patent system should be modified.

IV. Questions for Public Comment

The USPTO invites written responses from the public to the following questions:

1. How is AI, including machine learning, currently being used in the invention creation process? Please provide specific examples. Are any of these contributions significant enough to rise to the level of a joint inventor if they were contributed by a human?

2. How does the use of an AI system in the invention creation process differ from the use of other technical tools?

3. If an AI system contributes to an invention at the same level as a human who would be considered a joint inventor, is the invention patentable under current patent laws? For example:

a. Could 35 U.S.C. 101 and 115 be interpreted such that the Patent Act only requires the listing of the natural person(s) who invent(s), such that inventions with additional inventive contributions from an AI system can be patented as long as the AI system is not listed as an inventor?

b. Does the current jurisprudence on inventorship and joint inventorship, including the requirement of conception, support the position that only the listing of the natural person(s) who invent(s) is required, such that inventions with additional inventive contributions from an AI system can be patented as long as the AI system is not listed as an inventor?

c. Does the number of human inventors impact the answer to the questions above?

4. Do inventions in which an AI system contributed at the same level as a joint inventor raise any significant ownership issues? For example:

a. Do ownership rights vest solely in the natural person(s) who invented or do those who create, train, maintain, or own the AI system have ownership rights as well? What about those whose information was used to train the AI system?

b. Are there situations in which AI-generated contributions are not owned by any entity and therefore part of the public domain?

5. Is there a need for the USPTO to expand its current guidance on inventorship to address situations in which AI significantly contributes to an invention? How should the significance of a contribution be assessed?

6. Should the USPTO require applicants to provide an explanation of contributions AI systems made to inventions claimed in patent applications? If so, how should that be implemented, and what level of contributions should be disclosed? Should contributions to inventions made by AI systems be treated differently from contributions made by other (*i.e.,* non-AI) computer systems?

7. What additional steps, if any, should the USPTO take to further incentivize AI-enabled innovation (*i.e.,* innovation in which machine learning or other computational techniques play a significant role in the invention creation process)?

8. What additional steps, if any, should the USPTO take to mitigate harms and risks from AI-enabled innovation? In what ways could the USPTO promote the best practices outlined in the *Blueprint for an AI Bill*

[3] The ''Journal of the Patent and Trademark Office Society'' is independently edited and published under the direction of a Board of Governors appointed by the Patent and Trademark Office Society. Although members of the Board of Governors and the publication staff are employees of the USPTO, their involvement with the journal is in a strictly personal capacity. Note that due to the limited space available in the print volume, submission to the journal does not guarantee publication. Selected articles must comply with the journal's publication standards, including, but not limited to, being an original work and substantially not duplicative of recent or upcoming articles. The terms and conditions of the journal's article publication process are available at *www.jptos.org/authorcontract.*

of Rights[4] and the *AI Risk Management Framework*[5] within the innovation ecosystem?

9. What statutory changes, if any, should be considered as to U.S. inventorship law, and what consequences do you foresee for those statutory changes? For example:

a. Should AI systems be made eligible to be listed as an inventor? Does allowing AI systems to be listed as an inventor promote and incentivize innovation?

b. Should listing an inventor remain a requirement for a U.S. patent?

10. Are there any laws or practices in other countries that effectively address inventorship for inventions with significant contributions from AI systems?

11. The USPTO plans to continue engaging with stakeholders on the intersection of AI and intellectual property. What areas of focus (*e.g.,* obviousness, disclosure, data protection) should the USPTO prioritize in future engagements?

Katherine K. Vidal,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2023–03066 Filed 2–13–23; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No.: PTO–P–2021–0037]

Sixth Extension of the Modified COVID–19 Prioritized Examination Pilot Program for Patent Applications

AGENCY: United States Patent and Trademark Office, Department of Commerce.

ACTION: Notice.

SUMMARY: To continue to support the acceleration of innovations in the fight against COVID–19 during the public health emergency, the United States Patent and Trademark Office (USPTO or Office) is extending the modified COVID–19 Prioritized Examination Pilot Program, which provides prioritized examination of certain patent applications. Requests that are compliant with the pilot program's requirements and are filed on or before May 11, 2023, will be accepted.

DATES: The COVID–19 Prioritized Examination Pilot Program is extended as of February 14, 2023, to run until May 11, 2023.

FOR FURTHER INFORMATION CONTACT: Raul Tamayo, Senior Legal Advisor, Office of Patent Legal Administration (571–272–77285, *raul.tamayo@uspto.gov*).

SUPPLEMENTARY INFORMATION: In 2020, the USPTO published a notice on the implementation of the COVID–19 Prioritized Examination Pilot Program. *See* COVID–19 Prioritized Examination Pilot Program, 85 FR 28932 (May 14, 2020) (COVID–19 Track One Notice). The pilot program was implemented to support the acceleration of innovations in the fight against COVID–19. The COVID–19 Track One Notice indicated that an applicant may request prioritized examination without payment of the prioritized examination fee and associated processing fee if: (1) the patent application's claim(s) covered a product or process related to COVID–19, (2) the product or process was subject to an applicable Food and Drug Administration (FDA) approval for COVID–19 use, and (3) the applicant met other requirements noted in the COVID–19 Track One Notice.

Since the COVID–19 Track One Notice, the USPTO has modified the pilot program by removing the limit on the number of patent applications that could receive prioritized examination and extending the pilot program five times through notices published in the **Federal Register**. The most recent notice (87 FR 78661, December 22, 2022) extended the program until February 15, 2023.

As of January 9, 2023, 364 patents had issued from applications granted prioritized status under the pilot program. The average total pendency for those applications was 356 days. The shortest pendency from filing date to issue date for those applications was 75 days.

The USPTO is further extending the pilot program by setting the expiration date as May 11, 2023. The extension aligns with the January 30, 2023, announcement by the White House that it plans to extend the public health emergency to May 11, 2023, and then end it on that date. See *www.whitehouse.gov/wp-content/uploads/2023/01/SAP-H.R.-382-H.J.-Res.-7.pdf.*

Following the expiration of this extension, the pilot program will be terminated in favor of the Office dedicating its resources to its other prioritized examination programs. Patent applicants interested in expediting the prosecution of their patent application may instead seek to use the Prioritized Examination (Track One) Program. Patent applications accorded prioritized examination under the pilot program will not lose that status merely because the application is still pending after the date the pilot program is terminated but will instead retain prioritized examination status until that status is terminated for one or more reasons, as described in the COVID–19 Track One Notice.

The Track One Program permits an applicant to have a patent application advanced out of turn (accorded special status) for examination under 37 CFR 1.102(e) if the applicant timely files a request for prioritized (Track One) examination accompanied by the appropriate fees and meets the other conditions of 37 CFR 1.102(e). *See* § 708.02(b)(2) of the Manual of Patent Examining Procedure (9th ed., rev. 10.2019, June 2020). The current USPTO fee schedule is available at *www.uspto.gov/Fees.*

The Track One Program does not have the restrictions of the COVID–19 Prioritized Examination Pilot Program regarding the types of inventions for which special status may be sought, as the Track One Program does not require a connection to any particular technology. Moreover, under the Track One Program, an applicant can avoid delays associated with the determination of whether a patent application presents a claim that covers a product or process related to COVID–19 and whether the product or process is subject to an applicable FDA approval for COVID–19 use.

Katherine K. Vidal,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2023–03216 Filed 2–13–23; 8:45 am]

BILLING CODE 3510–16–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 88 FR 8262, February 8, 2023.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 1:00 p.m. EST, Wednesday, February 15, 2023.

CHANGES IN THE MEETING: The place of the meeting has changed. This meeting will now take place virtually. The meeting time and date, Closed status, and matters to be considered, as previously announced, remain unchanged.

CONTACT PERSON FOR MORE INFORMATION: Christopher Kirkpatrick, 202–418–5964.

[4] *See https://www.whitehouse.gov/ostp/ai-bill-of-rights/.*

[5] *See https://www.nist.gov/itl/ai-risk-management-framework.*

Authority: 5 U.S.C. 552b.

Dated: February 9, 2023.

Christopher Kirkpatrick,

Secretary of the Commission.

[FR Doc. 2023–03179 Filed 2–10–23; 11:15 am]

BILLING CODE 6351–01–P

CONSUMER PRODUCT SAFETY COMMISSION

[Docket No. CPSC–2010–0041]

Collection of Information; Proposed Extension of Approval; Comment Request—Publicly Available Consumer Product Safety Information Database

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: As required by the Paperwork Reduction Act of 1995 (PRA), the Consumer Product Safety Commission (CPSC) announces that the CPSC has submitted to the Office of Management and Budget (OMB) a request for extension of approval of a collection of information for the Publicly Available Consumer Product Safety Information Database, previously under OMB Control No. 3041–0146. On December 8, 2022, the CPSC published a notice in the **Federal Register** announcing the agency's intent to seek this extension. CPSC received one comment in support of the collection of information in response to that notice. By publication of this notice, the Commission announces that CPSC has submitted to the OMB a request for extension of approval of that collection of information, without change.

DATES: Written comments on this request for extension of approval of information collection requirements should be submitted by March 16, 2023.

ADDRESSES: Submit comments about this request by email: *OIRA_submission@omb.eop.gov* or fax: 202–395–6881. Comments by mail should be sent to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the CPSC, Office of Management and Budget, Room 10235, 725 17th Street NW, Washington, DC 20503. In addition, written comments that are sent to OMB, also should be submitted electronically at: *http://www.regulations.gov,* under Docket No. CPSC–2010–0041.

FOR FURTHER INFORMATION CONTACT: For further information, or a copy of the supporting statement, contact: Cynthia Gillham, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; (301) 504–7791, or by email to: *cgillham@cpsc.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

Section 212 of the Consumer Product Safety Improvement Act of 2008 (CPSIA) added to the Consumer Product Safety Act (CPSA) a new section 6A, which requires the CPSC to establish and maintain a publicly available, searchable database (Database) on the safety of consumer products and other products or substances regulated by the CPSC. Among other things, section 6A requires the CPSC to collect reports of harm from the public for potential publication in the publicly available Database, and to collect and publish comments from manufacturers about reports of harm.

In a proposed rule published on May 24, 2010 (75 FR 29156), the CPSC announced that a proposed collection of information in conjunction with the Database, called the Publicly Available Consumer Product Safety Information Database, had been submitted to OMB for review and clearance under 44 U.S.C. 3501–3520. The CPSC issued a final rule on the Database on December 9, 2010 (75 FR 76832). The final rule interprets various statutory requirements in section 6A of the CPSA pertaining to the information to be included in the Database. The final rule also establishes provisions regarding submitting reports of harm; providing notice of reports of harm to manufacturers; publishing reports of harm and manufacturer comments in the Database; and dealing with confidential and materially inaccurate information.

OMB approved the collection of information for the Database under control number 3041–0146. OMB's most recent extension of approval, issued on March 31, 2020, will expire on March 31, 2023. Accordingly, the CPSC is seeking an extension of approval of this collection of information.

B. Response To Comment

One individual commenter stated that this collection of information is necessary for general consumer safety, but that the public lacks knowledge of the Database. The commenter states that CPSC should prioritize a campaign regarding the existence and purpose of the Database to benefit consumers. The commenter states that the burden estimates could be reduced through automated and electronic collection techniques, and that these options should be explored, but that CPSC must maintain data quality. CPSC appreciates the commenter's feedback and generally agrees with the commenter's statements. CPSC is not making any changes to the burden estimates for this information collection based on this comment.

C. Information Collected Through the Database

The primary purpose of this information collection is to populate the publicly searchable Database of consumer product safety information mandated by section 6A of the CPSA. The Database information collection has four components: reports of harm, manufacturer comments, branding information, and the Small Batch Manufacturer Registry (SBMR).

Reports of Harm: Reports of harm communicate information regarding an injury, illness, or death, or any risk (as determined by CPSC) of injury, illness, or death, relating to the use of a consumer product or other product or substance regulated by the CPSC. Reports can be submitted to the CPSC by consumers; local, state, or federal government agencies; healthcare professionals; child service providers; public safety entities; and others. Reports may be submitted via the CPSC website (*www.SaferProducts.gov*), by telephone via a CPSC call center, or by email, fax, or mail using the incident report form (available for download or printing via the CPSC website). Reports may also originate as a free-form letter or email. Submitters must consent to including their report of harm in the publicly searchable Database.

Manufacturer Comments: Pursuant to the CPSIA, CPSC transmits a report of harm to the manufacturer or private labeler identified in the report, and the manufacturer or private labeler may then submit a comment to CPSC related to the report of harm (hereinafter ''manufacturer comment''). Manufacturer comments may be submitted through the business portal, by email, mail, or fax. The business portal is a feature of the Database that allows manufacturers and private labelers who register on the business portal to receive reports of harm and comment on such reports through the business portal. Use of the business portal expedites the receipt of reports of harm and business response times.

A manufacturer or private labeler may request that the CPSC designate information in a report of harm as confidential. Such a request may be made using the business portal, by email, by mail, or by fax. Additionally, any person or entity reviewing a report of harm or comment from a manufacturer or private labeler, either before or after publication in the Database, may request that the report or comment, or portions of the report or comment, be excluded from the

Database because it contains materially inaccurate information. Such a request may be made by manufacturers or private labelers using the business portal, by email, mail, or fax, and may be submitted by anyone else by email, mail, or fax.

Branding Information: Using the business portal, registered businesses may voluntarily submit branding information to assist CPSC in correctly and timely routing to them reports of harm involving their products. Brand names may be licensed to another entity for use in labeling consumer products manufactured by that entity. CPSC's understanding of licensing arrangements for consumer products helps to ensure that the correct manufacturer or private labeler is timely notified regarding a report of harm.

Small Batch Manufacturers Registry: The business portal also contains the SBMR, which is the online mechanism by which ''small batch manufacturers'' (as defined in the CPSA) can identify themselves to obtain relief from certain third-party testing requirements for children's products. To register as a small batch manufacturer, a business must attest that the company's income level, and the number of units of the covered product manufactured for which relief is sought, both fall within the statutory limits to receive relief from third party testing.

D. Estimated Burden

1. Estimated Annual Burden for Respondents

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN FOR REPORTS OF HARM

Collection type	Number of respondents	Response frequency [1]	Total annual responses	Minutes per response	Total burden, in hours [2]
Reports of Harm—submitted through website	4,498	1.45	6,522	12	1,304
Reports of Harm —submitted by phone	1,032	1.33	1,373	10	229
Reports of Harm—submitted by mail, e-mail, fax	296	3.71	1,098	20	366
Total	5,826		8,993		1,899

TABLE 2—ESTIMATED ANNUAL REPORTING BURDEN FOR MANUFACTURER SUBMISSIONS

Collection type	Number of respondents	Response frequency [1]	Total annual responses	Minutes per response	Total burden, in hours [2]
Manufacturer Comments—submitted through website	437	4.53	1,980	117	3,861
Manufacturer Comments—submitted by mail, email, fax	115	1.44	166	147	407
Requests to Treat Information as Confidential—submitted through website	1	1.00	1	42	1
Requests to Treat Information as Confidential—submitted by mail, email, fax	0	N/A	0	72	0
Requests to Treat Information as Materially Inaccurate—submitted through website	97	1.46	142	165	391
Requests to Treat Information as Materially Inaccurate—submitted by mail, email, fax	22	1.23	27	195	88
Voluntary Brand Identification	513	1.00	513	10	86
Small Batch Manufacturer Identification	1,747	1.00	1,747	10	291
Total	2,932		4,576		5,125

Based [1] [2] on the data set forth in Tables 1 and 2 above, the annual reporting cost is estimated to be $443,089. This estimate is based on the sum of two estimated total figures for reports of harm and manufacturer or private labeler submissions. The estimated number of respondents and responses are based on the actual responses received in FY 2022. We assume that the number of responses and respondents will be similar in future years.

Reports of Harm: Table 1 sets forth the data used to estimate the burden associated with submitting reports of harm. Since the previous renewal of the collection, the number of annual reports of harm submitted by mail, email or fax decreased from 15,314 to 1,098; reports of harm submitted by phone decreased from 1,418 to 1,373; and reports of harm submitted through the website increased from 6,023 to 6,522.

We had previously estimated the time associated with the electronic and telephone submission of reports of harm at 12 and 10 minutes, respectively; and because we have had no indication that these estimates are not appropriate or accurate, we used those figures for present purposes as well. We estimate that the time associated with a paper or PDF form would be 20 minutes, on average.

To estimate the costs for submitting reports of harm, we multiplied the estimated total burden hours associated with reports of harm (1,304 hours + 229 hours + 366 hours = 1,899 hours) by an estimated total compensation for all workers in private industry of $38.61 per hour,[3] which results in an estimated cost of $73,320 (1,899 hours × $38.61 per hour = $73,320 FY22).

Manufacturer Submissions: Tables 2 and 3 set forth the data used to estimate the burden associated with manufacturer and private labeler submissions to the Database. We observed that a large percentage of the general comments come from a few businesses, and we assumed that the experience of a business that submits many comments each year would be different from one that submits only a few. Accordingly, previously, we divided all responding businesses into three groups based on the number of

[1] Frequency of responses is calculated by dividing the number of responses by the number of respondents.

[2] Numbers have been rounded.

[3] U.S. Department of Labor, Bureau of Labor Statistics, Table 4 of the Employer Costs for Employee Compensation (ECEC), Private Industry workers, by occupational group, Mar 2022 (data extracted on 10/3/2022 from: *https://www.bls.gov/news.release/archives/ecec_06162022.pdf).*

general comments submitted, and then we selected several businesses to contact from each group. The first group contacted consisted of businesses that submitted 50 or more comments, accounting for 31 percent of all general comments received. The second group contacted included businesses that submitted 6 to 49 comments, accounting for 39 percent of all general comments received. The last group contacted included businesses that submitted no more than 5 comments, accounting for 30 percent of all general comments received. We asked each company how long it typically takes to research, compose, and enter a comment or a claim of materially inaccurate information.

To estimate the burden associated with submitting a general comment regarding a report of harm through the business portal, we averaged the burden provided by each company within each group, and then we calculated a weighted average from the three groups, weighting each group by the proportion of comments received from that group. We found that the average time to submit a general comment regarding a report of harm is 117 minutes, based on the data in Table 3 (((15 minutes + 45 minutes + 30 minutes + 15 minutes)/4 companies)*.31 + ((105 minutes + 45 minutes + 150 minutes + 15 minutes)/ 4 companies)*.39 + ((240 minutes + 60 minutes + 480 minutes)/3 companies)*.30 = 117 minutes).

TABLE 3—ESTIMATED BURDEN TO ENTER A GENERAL COMMENT IN THE DATABASE

Group	Company	General comments (minutes)
Group 1 (>=50 comments)	Company A	15
	Company B	45
	Company C	30
	Company D	15
Group 2 (6–49 comments)	Company A	105
	Company B	45
	Company C	150
	Company D	15
Group 3 (<=5 comments)	Company A	240
	Company B	60
	Company C	480

Registered businesses generally submit comments through the CPSC website. Unregistered businesses submit comments by mail, email, or fax. We estimate that submitting comments via mail, email, or fax takes a little longer because often, we must ask businesses to amend their submissions to include the required certifications. Thus, we estimated that, on average, comments submitted by mail, email, or fax take 30 minutes longer than comments submitted through the CPSC website (117 minutes + 30 minutes = 147 minutes).

The submission of a claim of materially inaccurate information is a relatively rare event for all respondents, so we averaged all responses together. Eight of the businesses contacted had submitted claims of materially inaccurate information. We found that the average time to submit a claim that a report of harm contains a material inaccuracy is 165 minutes ((30 minutes + 90 minutes + 45 minutes + 90 minutes + 60 minutes + 660 minutes + 45 minutes + 300 minutes)/8 companies = 165 minutes).

Registered businesses generally submit claims of materially inaccurate information through the business portal. Unregistered businesses submit such claims by mail, email, or fax. We estimate that submitting claims via mail, email, or fax takes a little longer because we often must ask businesses to amend their submission to include the required certifications. Thus, we estimate that, on average, claims submitted by mail, email, or fax take 30 minutes longer than those submitted through the CPSC website (165 minutes + 30 minutes = 195 minutes).

The submission of a claim of confidential information is another relatively rare event for all respondents, so we averaged all responses together. Five of the businesses contacted had submitted claims of confidential information. We found that the average time to submit a claim that a report of harm contains confidential information through the CPSC website is 42 minutes ((45 minutes + 15 minutes + 60 minutes + 30 minutes + 60 minutes)/5 companies = 42 minutes).

Registered businesses generally submit confidential information claims through the business portal. Unregistered businesses submit confidential information claims by mail, email, or fax. We estimate that submitting claims by mail, email, or fax takes a little longer because often, we must ask businesses to amend their submission to include the required certifications. Thus, we estimate that a confidential information claim submitted by mail, email, or fax would take 30 minutes longer than those submitted through the CPSC website (42 minutes + 30 minutes = 72 minutes).

For voluntary brand identification, we estimate that a response would take 10 minutes, on average. Most responses consist only of the brand name and a product description. In many cases, a business will submit multiple entries in a brief period of time, and we can see from the date and time stamps on these records that an entry often takes less than 2 minutes. CPSC staff enters the same data in a similar form, based on our own research, and that experience was also factored into our estimate.

For small batch manufacturer identification, we estimate that a response would take 10 minutes, on average. The form consists of three check boxes and the information should be readily accessible to the respondent.

The responses summarized in Table 2 are generally submitted by manufacturers. To avoid underestimating the cost associated with the collection of this data, we assigned the higher hourly wage associated with a manager or professional in goods-producing industries to these tasks. To estimate the cost of manufacturer submissions, we multiplied the estimated total burden hours in Table 2 (5,125 hours), by an estimated total compensation for a manager or professional in goods-producing industries of $72.15 per hour,[4] which results in an estimated

[4] U.S. Department of Labor, Bureau of Labor Statistics, Table 4 of the Employer Costs for Employee Compensation (ECEC), Private Industry workers, by occupational group, Mar 2022 (data extracted on 8/2/2022 from: *https://www.bls.gov/news.release/ecec.t04.htm).*

cost of $ 369,769 (5,125 hours × $72.15 per hour = $369,769).

Therefore, the total estimated annual cost to respondents is $443,089 ($73,320 burden for reports of harm + $369,769 burden for manufacturer submissions = $443,089).

2. Estimated Annual Burden on Government

We estimate the annualized cost to the CPSC to be $981,516. This figure is based on the costs for four categories of work for the Database: Reports of Harm, Materially Inaccurate Information Claims, Manufacturer Comments, and Small Batch Identification. Each category is described below. No government cost is associated with firms' voluntary brand identification because this information is entered directly into the Database by the manufacturer with no processing required by the government. The information assists the government in directing reports of harm to the correct manufacturer. Because we only have one request to treat information as confidential in FY 2022, we included the government's time to process this claim with the claims of materially inaccurate information.

Reports of Harm: The Reports of Harm category includes many different tasks. Some costs related to this category are from two data entry contracts. Tasks related to these contracts include clerical coding of the report, such as identifying the type of consumer product reported and the appropriate associated hazard, as well as performing quality control on the data in the report. Contractor A spends an estimated 4,940 hours per year performing these tasks. With an hourly rate of $34.53 for contractor services, the annual cost to the government of contract A is $170,578.

The Reports of Harm category also includes sending consent requests for reports when necessary, processing that consent when received, determining whether a product is out of CPSC's jurisdiction, and confirming that pictures and attachments do not have any personally identifiable information. The Reports of Harm category also entails notifying manufacturers or private labelers when one of their products is reported, completing a risk of harm determination form for every report eligible for publication, referring some reports to a subject matter expert within the CPSC for a determination whether the reports meet the requirement of having a risk of harm, and determining whether a report meets all the statutory and regulatory requirements for publication. Detailed costs are:

TABLE 4—ESTIMATED COSTS FOR REPORTS OF HARM TASK

Grade level	Number of hours (annual)	Total compensation per hour	Total annual cost
Contract A	4,940	$34.53	$170,578
7	2,912	40.44	117,761
9	1,456	49.47	72,028
12	3,328	71.74	238,751
13	1,248	85.31	106,467
14	832	100.81	83,874
Total	14,716	.....	789,459

Materially Inaccurate Information (MII) Claims: The MII claims category includes reviewing and responding to claims, participating in meetings where the claims are discussed, and completing a risk of harm determination on reports when a company alleges that a report does not describe a risk of harm.

TABLE 5—ESTIMATED COSTS FOR MII CLAIMS TASK

Grade level	Number of hours (annual)	Total compensation per hour	Total annual cost
12	312	$71.74	$22,383
13	208	85.31	17,744
14	312	100.81	31,453
15	21	118.57	2,490
SES	42	132.43	5,562
Total	895	.....	79,632

Manufacturer Comments: The Comments category includes reviewing and accepting or rejecting comments.

TABLE 6—ESTIMATED COSTS FOR MANUFACTURER COMMENTS TASK

Grade level	Number of hours (annual)	Total compensation per hour	Total annual cost
12	62	$71.74	$4,448

TABLE 6—ESTIMATED COSTS FOR MANUFACTURER COMMENTS TASK—Continued

Grade level	Number of hours (annual)	Total compensation per hour	Total annual cost
13	104	85.31	8,872
Total	166		13,320

Small Batch Manufacturer Identification: The Small Batch Manufacturer Identification category includes time spent posting the list of small batch registrations, as well as answering companies' questions on registering as a Small Batch Manufacturer and the implications of small batch registration.

TABLE 7—ESTIMATED COSTS FOR SMALL BATCH TASK

Grade level	Number of hours (annual)	Total compensation per hour	Total annual cost
15	642	$118.57	$76,122
Total	642		76,122

We estimate the annualized cost to the CPSC of $958,533, by adding the four categories of work related to the Database summarized in Tables 4 through 7 (Reports of Harm ($789,459) + MII Claims ($79,632) + Manufacturer Comments ($13,320) + Small Batch Identification ($76,122) = $958,533).

This information collection renewal request is based on an estimated 7,024 burden hours per year for the Database, which represents a decrease of 6,319 hours since this collection of information was last approved by OMB in 2019. Total burden from reports of harm decreased by 4,647 hours (from 6,546 to 1,899), and total burden for manufacturer's submission decreased by 1,672 hours, from 6,797 to 5,125.

Declines in total burden hours are attributed primarily to a decline in the number of reports of harm submitted by mail, email, and fax. In addition, CPSC staff has identified an error in the 2019 update for this control number that increased the estimated burden; the error involved inclusion of death certificates collected by CPSC staff in the number of reports of harm submitted for the Database by mail, email, and fax. Finally, for this update there was a decrease in small batch manufacturer activity.

Alberta E. Mills,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2023–03080 Filed 2–13–23; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 21–0I]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense (DoD).

ACTION: Arms sales notice.

SUMMARY: The DoD is publishing the unclassified text of an arms sales notification.

FOR FURTHER INFORMATION CONTACT: Neil Hedlund at *neil.g.hedlund.civ@mail.mil* or (703) 697–9214.

SUPPLEMENTARY INFORMATION: This 36(b)(5)(C) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 21–0I.

Dated: February 9, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

August 3, 2021

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(5)(C) of the Arms Export Control Act (AECA), as amended, we are forwarding Transmittal No. 21-0I. This notification relates to enhancements or upgrades from the level of sensitivity of technology or capability described in the Section 36(b)(1) AECA certification 17-19 of April 27, 2017.

Sincerely,

Heidi H. Grant
Director

Enclosures:
1. Transmittal

BILLING CODE 5001–06–C

Transmittal No. 21–0I

Report of Enhancement or Upgrade of Sensitivity of Technology or Capability (Sec. 36(b)(5)(C), AECA)

(i) *Purchaser:* NATO Support and Procurement Agency (NSPA).
(ii) *Sec. 36(b)(1), AECA Transmittal No.:* 17–19.
Date: April 27, 2017
Military Department: Air Force
Funding Source: Participants' National Funds

(iii) *Description:* On April 27, 2017, Congress was notified by Congressional certification transmittal number 17–19 of the possible sale, under Section 36(b)(1) of the Arms Export Control Act, of follow-on support for three (3) C–17 aircraft to include participation in the Global Reach Improvement Program, contract labor for Class I modifications and kits, in-country contractor support, alternate mission equipment, major modification and retrofit, software support, aircraft maintenance and technical support, support equipment, personnel training and training equipment, additional spare and repair parts, technical orders and publications, airworthiness certification support, engine logistics support, inspections, and other U.S. Government and contractor engineering, logistics and program support. The total estimated cost was $300 million. There was no Major Defense Equipment (MDE) associated with this sale.

This transmittal reports the addition of non-MDE follow-on support for the C–17 fleet to include aircraft and engine hardware and software modification and support; contractor logistics support, with further participation in the Globemaster III Integrated Sustainment Program (GISP), Globemaster III Sustainment Contract (G3SC), Material Improvement Program (MIP), and Over and Above (O&A).

The total value of new non-MDE follow-on support is $170 million. This results in a revised total non-MDE value of $470 million. The total case value will increase to $470 million.

(iv) *Significance:* This notification is provided as the additional non-MDE follow-on support was not enumerated in the original notification. The proposed articles and services will support the NATO Support and Procurement Agency to create appropriate line items to capture, execute, and easily reconcile the anticipated price increase of the upcoming C–17 sustainment contract. This program flies missions in and around Europe, Afghanistan, Iraq, the Levant, and North Africa.

(v) *Justification:* This proposed sale will support the foreign policy and national security of the United States by helping to improve the security of NATO allies and partner nations that are an important force for ensuring peace and stability in Europe.

(vi) *Date Report Delivered to Congress:* August 3, 2021.

[FR Doc. 2023–03120 Filed 2–13–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Notice of Intent To Grant an Exclusive License; Ad Astra Integrity Measurement Systems, Inc.

AGENCY: National Security Agency, Department of Defense (DoD).

ACTION: Notice of intent.

SUMMARY: The National Security Agency hereby gives notice of its intent to grant Ad Astra Integrity Measurement Systems, Inc. a revocable, non-assignable, exclusive, license to practice the following Government-Owned invention as described and claimed in United States Patent Number (USPN), 8,326,579, Method and system for program execution integrity measurement; and USPN, 7,904,278, Method and system for program execution integrity measurement.

DATES: Anyone wishing to object to the grant of this license has until March 1, 2023 to file written objections including evidence and argument that establish that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

ADDRESSES: Written objections are to be filed with the National Security Agency Technology Transfer Program, 9800 Savage Road, Suite 6843, Fort George G. Meade, MD 20755–6843.

FOR FURTHER INFORMATION CONTACT: Linda L. Burger, Director, Technology Transfer Program, 9800 Savage Road, Suite 6843, Fort George G. Meade, MD 20755–6843, telephone (443) 634–3518.

SUPPLEMENTARY INFORMATION: The prospective exclusive license will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The patent rights in these inventions have been assigned to the United States Government as represented by the National Security Agency.

Dated: February 8, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–03049 Filed 2–13–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 21–42]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense (DoD).

ACTION: Arms sales notice.

SUMMARY: The DoD is publishing the unclassified text of an arms sales notification.

FOR FURTHER INFORMATION CONTACT: Neil Hedlund at *neil.g.hedlund.civ@mail.mil* or (703) 697–9214.

SUPPLEMENTARY INFORMATION: This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 21–42 with attached Policy Justification and Sensitivity of Technology.

Dated: February 9, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

June 3, 2021

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 21-42, concerning the Army's proposed Letter(s) of Offer and Acceptance to the Government of Australia for defense articles and services estimated to cost $3.5 billion. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Heidi H. Grant
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

BILLING CODE 5001–06–C

Transmittal No. 21–42

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as Amended

(i) *Prospective Purchaser:* Government of Australia.

(ii) *Total Estimated Value:*

Major Defense Equipment * ..	$2.5 billion.
Other	$1.0 billion
Total	$3.5 billion.

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

Major Defense Equipment (MDE):

Twenty-nine (29) AH–64E Apache Attack Helicopters
Sixty-four (64) T700–GE 701D Engines (58 installed, 6 spares)
Twenty-nine (29) AN/ASQ–170 Modernized Target Acquisition and Designation Sight/ AN/AAR–11 Modernized Pilot Night Vision Sensors (M–TADS/PNVS)
Sixteen (16) AN/APG–78 Fire Control Radars (FCR) with Radar Electronic Units
Twenty-nine (29) AN/APR–48B Modernized Radar Frequency Interferometers (MRFI)
Seventy (70) Embedded Global Positioning Systems with Inertial Navigation Systems plus Multi-Mode Receiver (EGI+MMR) (58 installed, 12 spares)
Thirty-five (35) AAR–57 Common Missile Warning Systems (CMWS) (29 installed, 6 spares)

Seventy (70) AN/ARC–231A Very High Frequency/Ultra High Frequency (VHF/UHF) Radios (58 installed, 12 spares)
Eighty-five (85) AGM–114R Hellfire Missiles
Twenty-nine (29) M36E8 Hellfire Captive Air Training Missiles (CATM)
Two thousand (2,000) Advanced Precision Kill Weapon System Guidance Sections (APKWS–GS)

Non-MDE:

Also included are AN/APR–39 Radar Signal Detecting Sets; AN/AVR–2B Laser Detecting Sets; AN/APX–123A Identification Friend or Foe (IFF) transponders; IDM–401 Improved Data Modems; Link-16 Small Tactical Terminal KOR–24–A; Improved Countermeasure Dispensing System (ICMD); AN/ARN–149 (V)3 Automatic Direction Finders; Doppler ASN–157 Doppler Radar Velocity Sensors; AN/APN–209 Radar Altimeters Common Core (RACC); AN/ARN–153 Tactical Air Navigation Set (TACAN); AN/PYQ–10(C) Simple Key Loader; M230E1 + M139 AWS Automatic Gun; M261 Rocket Launchers; M299 missile launchers; 2.75 inch rockets; 30mm rounds; High Explosive Warhead for airborne 2.75 rockets, inert; MK66–4 2.75 inch rocket High Explosive warhead M151 fuze M423 motor; MK66–4 2.75 inch rocket warhead M274 motor; MK66–4 2.75 inch rocket motor; M151HE 2.75 inch warhead; Manned-Unmanned Teaming-2 (MUMT–X) video receivers; Manned-Unmanned Teaming-2 (MUMT–X) Air-Air-Ground kits; training devices; communication systems; helmets; simulators; generators; transportation and organization equipment; spare and repair parts; support equipment; tools and test equipment; technical data and publications; personnel training and training equipment; U.S. Government and contractor technical assistance; technical and logistics support services; and other related elements of program and logistical support.

(iv) *Military Department:* Army (AU–B–ULV).

(v) *Prior Related Cases, if any:* None.

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None.

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Attached Annex.

(viii) *Date Report Delivered to Congress:* June 3, 2021.

* As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Australia—AH–64E Apache Helicopters

The Government of Australia has requested to buy twenty-nine (29) AH–64E Apache attack helicopters; sixty-four (64) T700–GE 701D engines (58 installed, 6 spares); twenty-nine (29) AN/ASQ–170 Modernized Target Acquisition and Designation Sight/AN/AAR–11 Modernized Pilot Night Vision Sensors (M–TADS/PNVS); sixteen (16) AN/APG–78 Fire Control Radars (FCR) with Radar Electronic Units; twenty-nine (29) AN/APR–48B Modernized Radar Frequency Interferometers (MRFI); seventy (70) Embedded Global Positioning Systems with Inertial Navigation Systems plus Multi-Mode Receiver (EGI+MMR) (58 installed, 12 spares); thirty-five (35) AAR–57 Common Missile Warning Systems (CMWS) (29 installed, 6 spares); seventy (70) AN/ARC–231A Very High Frequency/Ultra High Frequency (VHF/UHF) radios (58 installed, 12 spares); eighty-five (85) AGM–114R Hellfire missiles; twenty-nine (29) M36E8 Hellfire Captive Air Training Missiles (CATM); and two thousand (2,000) Advanced Precision Kill Weapon System Guidance Sections (APKWS–GS). Also included are AN/APR–39 Radar Signal Detecting Sets; AN/AVR–2B Laser Detecting Sets; AN/APX–123A Identification Friend or Foe (IFF) transponders; IDM–401 Improved Data Modems; Link-16 Small Tactical Terminal KOR–24–A; Improved Countermeasure Dispensing System (ICMD); AN/ARN–149 (V)3 Automatic Direction Finders; Doppler ASN–157 Doppler Radar Velocity Sensors; AN/APN–209 Radar Altimeters Common Core (RACC); AN/ARN–153 Tactical Air Navigation Set (TACAN); AN/PYQ–10(C) Simple Key Loader; M230E1 + M139 AWS Automatic Gun; M261 Rocket Launchers; M299 missile launchers; 2.75 inch rockets; 30mm rounds; High Explosive Warhead for airborne 2.75 rockets, inert; MK66–4 2.75 inch rocket High Explosive warhead M151 fuze M423 motor; MK66–4 2.75 inch rocket warhead M274 motor; MK66–4 2.75 inch rocket motor; M151HE 2.75 inch warhead; Manned-Unmanned Teaming-2 (MUMT–X) video receivers; Manned-Unmanned Teaming-2 (MUMT–X) Air-Air-Ground kits; training devices; communication systems; helmets; simulators; generators; transportation and organization equipment; spare and repair parts; support equipment; tools and test equipment; technical data and publications; personnel training and training equipment; U.S. Government and contractor technical assistance; technical and logistics support services; and other related elements of program and logistical support. The total estimated value is $3.5 billion.

The proposed sale will improve Australia's capability to meet current and future threats, and will enhance interoperability with U.S. forces and other allied forces. Australia will use the enhanced capability to strengthen its homeland defense and provide greater security for its critical infrastructure. Australia will have no difficulty absorbing these Apache aircraft into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The prime contractors involved in this program will be Boeing, Mesa, AZ; and Lockheed Martin, Orlando, FL. The purchaser typically requests offsets. Any offset agreement will be defined in negotiations between the purchaser and the contractor(s).

Implementation of this proposed sale will require the assignment of eight (8) contractor representatives to Australia.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 21–42

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex Item No. vii

(vii) *Sensitivity of Technology:*

1. The AH–64E Apache Attack Helicopter is the Army's advanced attack helicopter equipped for performing close air support, anti-armor, and armed reconnaissance missions. The aircraft contains the following sensitive communications and target identification equipment, navigation equipment, aircraft survivability equipment, displays, and sensors:

a. The AN/ARC–231 Ultra High Frequency (UHF) radio is a software defined radio for military aircraft that provides two-way multi-mode voice and data communications. It provides joint service standard line of sight (LOS), HAVE QUICK, SATURN, and SINCGARS electronic counter-counter measures (ECCM), along with integrated waveform satellite communications (SATCOM).

b. The AN/APX–123A Identify Friend-or-Foe (IFF) digital transponder set provides pertinent platform information in response to an IFF interrogator. The digital transponder provides cooperative Mark XII IFF capability using full diversity selection, as well as Mode Select (Mode S) capability. In addition, transponder operation provides interface capability with the aircraft's Traffic Collision and Avoidance System (TCAS). The transponder receives pulsed radio frequency interrogation signals in any of six modes (1, 2, 3/A, S, and 5), decodes the signals, and transmits a pulsecoded reply. The Mark XII IFF operation includes Selective Identification Feature (SIF) Modes 1, 2, 3/A and C, as well as secure cryptographic Mode 5 operational capability.

c. Link 16 Datalink is a military tactical data link network. Link 16 provides aircrews with enhanced situational awareness and the ability to exchange target information to Command and Control (C2) assets via Tactical Digital Information Link-Joint (TADIL–J). Link 16 can provide a range of combat information in near-real time to U.S. and allies' combat aircraft and C2 centers. The AH–64E uses the Harris Small Tactical Terminal (SIT) KOR–24A to provide Airborne and Maritime/Fixed Station (AMF) Small Airborne Link 16 Terminal (SALT) capability. The SIT is the latest generation of small, two-channel, Link 16 and VHF/UHF radio terminals. While in flight, the SIT provides simultaneous communication, voice or data, on two key waveforms.

d. The AN/APR–39 Radar Warning Receiver Signal Detecting Set is a system that provides warning of a radar directed air defense threat and allows appropriate countermeasures. This is the 1553 databus compatible configuration.

e. The AN/AVR–2B Laser Warning Set is a passive laser warning system that receives, processes and displays threat information resulting from aircraft illumination by lasers on the aircraft's multi-functional display.

f. The AAR–57 Common Missile Warning System (CMWS) detects energy emitted by threat missile in-flight, evaluates potential

false alarm emitters in the environment, declares validity of threat and selects appropriate counter-measures for defeat. The CMWS consists of an Electronic Control Unit (ECU), Electro-Optic Missile Sensors (EOMSs), and Sequencer and Improved Countermeasures Dispenser (ICMD).

g. The AH–64E uses two EAGLE+MMR embedded GPS/Inertial navigation systems with Multi-Mode Receiver. The EAGLE+MMR is a self-contained, all-attitude navigation system with embedded GPS receiver, controlled via MIL–STD–1553B controller, providing output navigation and GPS timing data to support ADS–B out and other platform systems. The EAGLE's EGI unit houses a 24 channel GPS receiver which is capable of operating in either Standard Positioning Service (SPS) C/A-code (non-encrypted) or Precise Positioning Service (PPS) Y-code (encrypted). The Eagle + MMR is pending aircraft testing and air worthiness rating (AWR) approval, with flight tests anticipated to start in April 2021. AWR approval is expected prior to the proposed sale to Australia.

h. The AN/ASQ–170 Modernized Target Acquisition and Designation Sight/AN/AAQ–11 Pilot Night Vision Sensor (MTADS/PNVS) provides day, night, limited adverse weather target information, as well as night navigation capabilities. The PNVS provides thermal imaging that permits nap-of-the-earth flight to, from, and within the battle area, while TADS provides the co-pilot gunner with search, detection, recognition, and designation by means of Direct View Optics (DVO), television, and Forward Looking Infrared (FLIR) sighting systems that may be used singularly or in combinations.

i. The AN/APR–48B Modernized Radar Frequency Interferometer (M–RFI) is an updated version of the passive radar detection and direction finding system. It utilizes a detachable UDM on the M–RFI processor, which contains the Radar Frequency (RF) threat library.

j. The AN/APG–78 Longbow Fire Control Radar (FCR) with Radar Electronics Unit (REU) is an active, low-probability of intercept, millimeter wave radar. The active radar is combined with a passive Radar Frequency Interferometer (RFI) mounted on top of the helicopter mast. The FCR Ground Targeting Mode detects, locates, classifies and prioritizes stationary or moving armored vehicles, tanks and mobile air defense systems as well as hovering helicopters, helicopters, and fixed wing aircraft in normal flight. If desired, the radar data can be used to refer targets to the regular electro-optical Modernized Target Acquisition and Designation Sight (MTADS).

k. The Manned-Unmanned Teaming X (MUM-Tx) data link system provides cross-platform communication and teaming between Apache, unmanned aerial systems (UAS), and other interoperable aircraft and ground platforms. It provides the ability to display real-time UAS sensor information and MTADs full motion video feeds across MUM–T equipped platforms and ground stations.

l. The M299 Missile Launcher, commonly known as the Longbow Hellfire Launcher (LBHL), is a four rail launcher designed to carry the complete family of AGM–114 Hellfire missiles.

m. The AGM–114R Hellfire is a semi-active laser guided missile with a multi-purpose warhead that can engage and defeat both high and heavily armored targets, personnel, bunkers, caves and urban structures.

n. The Hellfire M36E9 Captive Air Training Missile (CATM) is a flight-training missile that consists of a functional guidance section coupled to an inert missile bus. It functions like a tactical missile during captive carry on the aircraft, absent launch capability, making it suitable for training the aircrew in simulated Hellfire missile target acquisition and lock.

o. The M261 2.75 Inch Rocket Launcher is a nineteen tube, three zone rocket launcher utilized on heavy attack aircraft. It is used to fire the Hydra 70 2.75 inch rocket, an unguided, fin-stabilized air-to-ground rocket that utilizes a variety of warhead and fuze combinations to achieve a range of effects.

p. The AGR–20A Advanced Precision Kill Weapons System (APWKS) is a conversion of the 2.75 inch Hydra 70 rocket which adds a laser guidance kit to enable precision targeting.

2. The highest level of classification of defense articles, components, and services included in this potential sale is SECRET.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

4. A determination has been made that the Government of Australia can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

5. All defense articles and services listed in this transmittal are authorized for release and export to the Government of Australia.

[FR Doc. 2023–03117 Filed 2–13–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Department of Defense Federal Advisory Committees—Defense Advisory Committee for the Prevention of Sexual Misconduct

AGENCY: Under Secretary of Defense for Personnel and Readiness, Department of Defense (DoD).

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The DoD is publishing this notice to announce that the following Federal Advisory Committee meeting of the Defense Advisory Committee for the Prevention of Sexual Misconduct (DAC–PSM) will take place.

DATES: DAC–PSM will hold a meeting open to the public on Thursday, March 2, 2023 from 1:00 p.m. to 5:00 p.m. (EST).

ADDRESSES: The meeting may be accessed by videoconference. Information for accessing the videoconference will be provided after registering. (Pre-meeting registration is required. See guidance in **SUPPLEMENTARY INFORMATION**, ''Meeting Accessibility''.)

FOR FURTHER INFORMATION CONTACT: Dr. Suzanne Holroyd, Designated Federal Officer (DFO), (571) 372–2652 (voice), *osd.mc-alex.ousd-p-r.mbx.DAC-PSM@mail.mil* (email). Website: *www.sapr.mil/DAC–PSM.* The most up-to-date changes to the meeting agenda can be found on the website.

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of chapter 10 of title 5 U.S.C. (commonly known as the Federal Advisory Committee Act (FACA) (5 U.S.C. app.)), section 552b(c) of title 5 U.S.C. (commonly known as the Government in the Sunshine Act), and sections 102–3.140 and 102–3.150 of 41 CFR.

Availability of Materials for the Meeting: Additional information, including the agenda or any updates to the agenda, is available on the DAC–PSM website (*www.sapr.mil/DAC–PSM*). Materials presented in the meeting may also be obtained on the DAC–PSM website.

Purpose of the Meeting: The purpose of the meeting is for the DAC–PSM to receive briefings and have discussions on topics related to the prevention of sexual misconduct within the Armed Forces of the United States.

Agenda: Thursday, March 2, 2023 from 1:00 p.m. to 5:00 p.m. (EST)—Meeting Open (Roll Call and Opening Remarks by Chair, The Honorable Gina Grosso); Panel Discussions with Services Representatives (Air Force, Army, Navy, Marine Corps, and National Guard Bureau) to discuss submissions in support of training study directed by FY22 NDAA; Committee Discussion on training study directed by FY22 NDAA.

Meeting Accessibility: Pursuant to section 1009(a)(1) of title 5 U.S.C. and 41 CFR 102–3.140 through 102–3.165, this meeting is open to the public from 1:00 p.m. to 5:00 p.m. (EST) on March 2, 2023. The meeting will be held by videoconference. All members of the public who wish to attend must register by contacting DAC–PSM at *osd.mc-alex.ousd-p-r.mbx.DAC-PSM@mail.mil* or by contacting Dr. Suzanne Holroyd at (571) 372–2652 no later than Monday,

February 27, 2023 (by 5:00 p.m. EST). Once registered, the web address and/or audio number will be provided.

Special Accommodations: Individuals requiring special accommodations to access the public meeting should contact Dr. Suzanne Holroyd at *osd.mc-alex.ousd-p-r.mbx.DAC-PSM@mail.mil* or (571) 372–2652 no later than Monday, February 27, 2023 (by 5:00 p.m. EST) so that appropriate arrangements can be made.

Written Statements: Pursuant to section 102–3.140 of 41 CFR, and section 1009(a)(3) of title 5 U.S.C., interested persons may submit a written statement to the DAC–PSM. Individuals submitting a statement must submit their statement no later than 5:00 p.m. EST, Monday, February 27, 2023 to Dr. Suzanne Holroyd at (571) 372–2652 (voice) or to *osd.mc-alex.ousd-p-r.mbx.DAC-PSM@mail.mil* (email). If a statement pertaining to a specific topic being discussed at the planned meeting is not received by Monday, February 27, 2023, prior to the meeting, then it may not be provided to, or considered by, the Committee during the March 2, 2023 meeting. The DFO will review all timely submissions with the DAC–PSM Chair and ensure such submissions are provided to the members of the DAC–PSM before the meeting. Any comments received by the DAC–PSM prior to the stated deadline will be posted on the DAC–PSM website (*www.sapr.mil/DAC–PSM*).

Dated: February 9, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–03129 Filed 2–13–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 21–53]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense (DoD).

ACTION: Arms sales notice.

SUMMARY: The DoD is publishing the unclassified text of an arms sales notification.

FOR FURTHER INFORMATION CONTACT: Neil Hedlund at *neil.g.hedlund.civ@mail.mil* or (703) 697–9214.

SUPPLEMENTARY INFORMATION: This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 21–53 with attached Policy Justification and Sensitivity of Technology.

Dated: February 9, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

July 30, 2021

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 21-53, concerning the Army's proposed Letter(s) of Offer and Acceptance to the Government of Thailand for defense articles and services estimated to cost $83.5 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Heidi H. Grant
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

BILLING CODE 5001–06–C

Transmittal No. 21–53

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as Amended

(i) *Prospective Purchaser:* Government of Thailand.

(ii) *Total Estimated Value:*

Major Defense Equipment *	$71.5 million.
Other	$12.0 million.
Total	$83.5 million.

Funding Source: National Funds.

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

Major Defense Equipment (MDE):

Three Hundred (300) Javelin FGM–148 Missiles

Fifty (50) Javelin Command Launch Units (CLU)

Non-MDE:

Also included are Enhanced Producibility Basic Skills Trainers; missile simulation rounds; Security Assistance Management Directorate (SAMD) Technical Assistance; Tactical Aviation and Ground Munitions (TAGM) Project Office Technical Assistance; contractor lifecycle support; spares manuals; batteries/chargers; gunner training; ammunition officer training; OCONUS Modified Level 2 Maintenance Training; System

Inspection and Check Out (SICO); and other related elements of logistical and program support.

(iv) *Military Department:* Army (TH–B–WHL, TH–B–WHI).

(v) *Prior Related Cases, if any:* None.

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None.

(vii) *Sensitivity of Technology Contained in the Defense Articles or Defense Services Proposed to be Sold:* See Attached Annex.

(viii) *Date Report Delivered to Congress:* July 30, 2021.

* As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Thailand—Javelin Missiles

The Government of Thailand has requested to buy three hundred (300) Javelin FGM–148 Missiles; and fifty (50) Javelin Command Launch Units (CLU). Also included are Enhanced Producibility Basic Skills Trainers; missile simulation rounds; Security Assistance Management Directorate (SAMD) Technical Assistance; Tactical Aviation and Ground Munitions (TAGM) Project Office Technical Assistance; contractor lifecycle support; spares manuals; batteries/chargers; gunner training; ammunition officer training; OCONUS Modified Level 2 Maintenance Training; System Inspection and Check Out (SICO); and other related elements of logistical and program support. The total estimated cost is $83.5 million.

This proposed sale will contribute to the foreign policy and national security objectives of the United States by improving the security of a Major Non-NATO Ally in Southeast Asia. The Javelin Weapon System will replace the obsolete 106mm Recoilless Rifles that the Royal Thai Army (RTA) acquired as part of the Military Assistance Program (MAP) from the Vietnam era. This proposed sale will allow the RTA to modernize their light anti-tank capability and maintain its current force posture, as well as enhance interoperability with the U.S. during operations and training exercises. Thailand is a strategic partner committed to contributing to regional security.

The proposed sale will improve Thailand's capability to meet current and future threats by improving Thailand's long-term defense capacity to defend its sovereignty and territorial integrity. Thailand will have no difficulty absorbing this equipment into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The prime contractors will be Raytheon/Lockheed Martin Javelin Joint Venture of Orlando, Florida, and Tucson, Arizona. Offsets have not been included. Any offset agreements will be defined in negotiations between the purchaser and the contractor(s).

Implementation of this proposed sale will not require the assignment of U.S. Government or contractor representatives to Thailand.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 21–53

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. The Javelin Weapon System is a medium-range, man portable, shoulder-launched, fire and forget, anti-tank system for infantry, scouts, and combat engineers. It may also be mounted on a variety of platforms including vehicles, aircraft and watercraft. The system weighs 49.5 pounds and has a maximum range in excess of 2,500 meters. The system is highly lethal against tanks and other systems with conventional and reactive armors. The system possesses a secondary capability against bunkers.

2. Javelin's key technical feature is the use of fire-and-forget technology, which allows the gunner to fire and immediately relocate or take cover. Additional special features are the top attack and/or direct fire modes, an advanced tandem warhead and imaging infrared seeker, target lock-on before launch, and soft launch from enclosures or covered fighting positions. The Javelin missile also has a minimum smoke motor, thus decreasing its detection on the battlefield.

3. The Javelin Weapon System is comprised of two major tactical components, which are a reusable Command Launch Unit (CLU) and a round contained in a disposable launch tube assembly. The CLU incorporates an integrated day-night sight that provides a target engagement capability in adverse weather and countermeasure environments. The CLU may also be used in a stand-alone mode for battlefield surveillance and target detection. The CLU's thermal sight is a second generation Forward Looking Infrared (FLIR) sensor. To facilitate initial loading and subsequent updating of software, all on-board missile software is uploaded via the CLU after mating and prior to launch.

4. The missile is autonomously guided to the target using an imaging infrared seeker and adaptive correlation tracking algorithms. This allows the gunner to take cover or reload and engage another target after firing a missile. The missile has an advanced tandem warhead and can be used in either the top attack or direct fire modes (for target undercover). An onboard flight computer guides the missile to the selected target.

5. The highest level of classification of defense articles, components, and services included in this potential sale is SECRET.

6. If a technologically advanced adversary were to obtain knowledge of the specific hardware or software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

7. A determination has been made that Thailand can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This proposed sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

8. All defense articles and services listed in this transmittal are authorized for release and export to the Government of Thailand.

[FR Doc. 2023–03107 Filed 2–13–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 21–37]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense (DoD).

ACTION: Arms sales notice.

SUMMARY: The DoD is publishing the unclassified text of an arms sales notification.

FOR FURTHER INFORMATION CONTACT: Neil Hedlund at *neil.g.hedlund.civ@mail.mil* or (703) 697–9214.

SUPPLEMENTARY INFORMATION: This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 21–37 with attached Policy Justification and Sensitivity of Technology.

Dated: February 9, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

August 2, 2021

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 21-37 concerning the Navy's proposed Letter(s) of Offer and Acceptance to the Government of India for defense articles and services estimated to cost $82 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Heidi H. Grant
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

BILLING CODE 5001–06–C

Transmittal No. 21–37

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as Amended

(i) *Prospective Purchaser:* Government of India

(ii) *Total Estimated Value:*

Major Defense Equipment * ..	$27 million.
Other	$55 million.
Total	$82 million.

Funding Source: National Funds.

(iii) *Description and Quantity or Quantities of Articles or Services Under Consideration for Purchase:*

Major Defense Equipment (MDE):

One (1) Harpoon Joint Common Test Set (JCTS)

Non-MDE:

Also included is one (1) Harpoon Intermediate Level maintenance station; spare and repair parts, support, and test equipment; publications and technical documentation; personnel training; U.S. Government and contractor technical, engineering, and logistics support services; and other related elements of logistics and program support.

(iv) *Military Department:* Navy (IN–P–LAX).

(v) *Prior Related Cases, if any:* IN–P–AAL, IN–P–AAP, IN–P–ABC.

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None.

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Attached Annex.

(viii) *Date Report Delivered to Congress:* August 2, 2021.

*As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

India—Harpoon Joint Common Test Set (JCTS)

The Government of India has requested to buy one (1) Harpoon Joint Common Test Set (JCTS). Also included is one (1) Harpoon Intermediate Level maintenance station; spare and repair parts, support, and test equipment; publications and technical documentation; personnel training; U.S. Government and contractor technical, engineering, and logistics support services; and other related elements of logistics and program support. The estimated total cost is $82 million.

This proposed sale will support the foreign policy and national security of the United States by helping to strengthen the U.S.-Indian strategic relationship and to improve the security of a major defensive partner, which continues to be an important force for political stability, peace, and economic progress in the Indo-Pacific and South Asia region.

This proposed sale will improve India's capability to meet current and future threats by providing India with flexible and efficient Harpoon missile maintenance capabilities to ensure maximum force readiness. India will have no difficulty absorbing this equipment into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractor will be The Boeing Company, St. Louis, MO. There are no known offset agreements proposed in connection with this potential sale. Any offset agreement required by India will be defined in negotiations between the purchaser and the contractor(s).

Implementation of this proposed sale will require the assignment of one (1) U.S. contractor representative to India for a duration of one (1) year to support technical reviews, support, and oversight.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 21–37

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex Item No. vii

(vii) *Sensitivity of Technology:*

1. The Harpoon Joint Common Test Set (JCTS) is used to maintain all configurations of the Harpoon missile. India seeks to establish a Harpoon Intermediate Level Weapon Station via an acquisition of a JCTS that can test their current inventory, as well as up to a BLK IIU Harpoon Missile. The elements listed below being conveyed by the proposed sale are considered sensitive. These elements are used to test and verify the ability of the Harpoon missile to engage hostile targets under a wide range of operations, tactical, and environmental conditions:

a. The Radar Seeker test capability
b. The Radar Altimeter test capability
c. The GPS/INS System test capability
d. Operational Flight Program Software
e. Missile operational characteristics and performance data

2. The highest level of classification of defense articles, components, and services included in this potential sale is CONFIDENTIAL.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

4. A determination has been made that India can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

5. All defense articles and services listed in this transmittal have been authorized for release and export to the Government of India.

[FR Doc. 2023–03102 Filed 2–13–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 21–48]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense (DoD).

ACTION: Arms sales notice.

SUMMARY: The DoD is publishing the unclassified text of an arms sales notification.

FOR FURTHER INFORMATION CONTACT: Neil Hedlund at *neil.g.hedlund.civ@mail.mil* or (703) 697–9214.

SUPPLEMENTARY INFORMATION: This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 21–48 with attached Policy Justification and Sensitivity of Technology.

Dated: February 9, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

August 3, 2021

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 21-48 concerning the Army's proposed Letter(s) of Offer and Acceptance to the Government of Georgia for defense articles and services estimated to cost $30 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Heidi H. Grant
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

BILLING CODE 5001–06–C

Transmittal No. 21–48

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as Amended

(i) *Prospective Purchaser:* Government of Georgia

(ii) *Total Estimated Value:*

Major Defense Equipment * ..	$25 million.
Other	$ 5 million.
Total	$30 million.

Funding Source: National Funds.

(iii) *Description and Quantity or Quantities of Articles or Services Under Consideration for Purchase:*

Major Defense Equipment (MDE):

Eighty-two (82) Javelin FGM–148 Missiles

Forty-six (46) Javelin Command Launch Units (CLU)

Non-MDE:

Also included are Enhanced Producibility Basic Skills Trainers; Missile Simulation Rounds; Security Assistance Management Directorate Technical Assistance; Tactical Aviation and Ground Munitions Project Office Technical Assistance; other associated equipment and services; and other related elements of logistical and program support.

(iv) *Military Department:* Army (GG–B–UDW).

(v) *Prior Related Cases, if any:* GG–B–ZZY.

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None.

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Attached Annex.

(viii) *Date Report Delivered to Congress:* August 3, 2021.

*As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Georgia—Javelin Missiles

The Government of Georgia has requested to buy eighty-two (82) Javelin FGM–148 Missiles; and forty-six (46) Javelin Command Launch Units (CLU). Also included are Enhanced Producibility Basic Skills Trainers; Missile Simulation Rounds; Security Assistance Management Directorate Technical Assistance; Tactical Aviation and Ground Munitions Project Office Technical Assistance; other associated equipment and services; and other related elements of logistical and program support. The estimated total cost is $30 million.

This proposed sale will support the foreign policy and national security of the United States by improving the security of Georgia which is a strategic partner and a key contributor to security and stability the region. The Javelin system will help Georgia build its long-term defense capacity to defend its sovereignty and territorial integrity in order to meet its national defense requirements.

The proposed sale will improve Georgia's capability to meet current and future threats by increasing its anti-armor capacity. Georgia will have no difficulty absorbing these weapons into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The prime contractors will be Raytheon/Lockheed Martin Javelin Joint Venture of Orlando, Florida, and Tucson, Arizona. However, these articles are being provided from U.S. Army stock. There are no known offset agreements proposed in conjunction with this potential sale.

Implementation of this proposed sale will not require the assignment of any U.S. Government or contractor representatives to Georgia.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 21–48

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex Item No. vii

(vii) *Sensitivity of Technology:*

1. The Javelin Weapon System is a medium-range, man portable, shoulder-launched, fire and forget, anti-tank system for infantry, scouts, and combat engineers. It may also be mounted on a variety of platforms including vehicles, aircraft and watercraft. The system weighs 49.5 pounds and has a maximum range in excess of 2,500 meters. The system is highly lethal against tanks and other systems with conventional and reactive armors. The system possesses a secondary capability against bunkers.

2. Javelin's key technical feature is the use of fire-and-forget technology, which allows the gunner to fire and immediately relocate or take cover. Additional special features are the top attack and/or direct fire modes, an advanced tandem warhead and imaging infrared seeker, target lock-on before launch, and soft launch from enclosures or covered fighting positions. The Javelin missile also has a minimum smoke motor, thus decreasing its detection on the battlefield.

3. The Javelin Weapon System is comprised of two major tactical components, which are a reusable Command Launch Unit (CLU) and a round contained in a disposable launch tube assembly. The CLU incorporates an integrated day-night sight that provides a target engagement capability in adverse weather and countermeasure environments. The CLU may also be used in a stand-alone mode for battlefield surveillance and target detection. The CLU's thermal sight is a second generation Forward Looking Infrared (FLIR) sensor. To facilitate initial loading and subsequent updating of software, all on-board missile software is uploaded via the CLU after mating and prior to launch.

4. The missile is autonomously guided to the target using an imaging infrared seeker and adaptive correlation tracking algorithms. This allows the gunner to take cover or reload and engage another target after firing a missile. The missile has an advanced tandem warhead and can be used in either the top attack or direct fire modes (for target undercover). An onboard flight computer guides the missile to the selected target.

5. The highest level of classification of defense articles, components, and services included in this potential sale is SECRET.

6. If a technologically advanced adversary obtains knowledge of the specific hardware and software elements, the information could be used to develop countermeasures or equivalent systems that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

7. A determination has been made that Georgia can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This proposed sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

8. All defense articles and services listed in this transmittal have been authorized for release and export to the Government of Georgia.

[FR Doc. 2023–03108 Filed 2–13–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0028]

Agency Information Collection Activities; Comment Request; Evaluation of Strategies To Address Unfinished Learning in Math (ReSolve Math Study)

AGENCY: Institute of Education Sciences (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a new information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before April 17, 2023.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2023–SCC–0028. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, the Department will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted

after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W203, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Thomas Wei, (646) 428–3892.

SUPPLEMENTARY INFORMATION: The Department, 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. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Evaluation of Strategies to Address Unfinished Learning in Math (ReSolve Math Study).

OMB Control Number: 1850–NEW.

Type of Review: New ICR.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 12,640.

Total Estimated Number of Annual Burden Hours: 2,559.

Abstract: The COVID–19 pandemic led to substantial unfinished learning in math and an important debate about how best to address it. Traditionally, policymakers and educators have advocated a ''broad foundation skill building'' approach, but an alternative ''just-in-time skill building'' approached has received more attention recently, including in the U.S. Department of Education's COVID–19 Handbook. But there is limited evidence comparing these approaches. This evaluation will examine the effectiveness of adaptive technology products that deliver these two catch-up strategies in elementary schools, where teachers often struggle with how to teach math well and the benefits of using technology supports are understudied. The findings will provide valuable evidence, especially for low-performing schools identified under the Every Student Succeeds Act and their most underserved students. This package requests approval for data collection activities to conduct the evaluation.

Dated: February 9, 2023.

Juliana Pearson,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–03093 Filed 2–13–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP23–14–000]

Wyoming Interstate Company, LLC; Notice of Schedule for the Preparation of an Environmental Assessment for the Diamond Mountain Abandonment Project

On November 10, 2022, Wyoming Interstate Company LLC. (WIC) filed an application in Docket No. CP23–14–000 requesting authorization pursuant to Section 7(b) of the Natural Gas Act to abandon certain natural gas pipeline facilities. The proposed project is known as the Diamond Mountain Abandonment Project (Project) and consists of WIC's proposal to abandon in-place a compressor station and associated equipment and facilities in Uintah County, Utah. According to WIC, the proposed abandonment is due to the decline of natural gas production in the Uintah basin, and the absence of bids submitted during open season. WIC would continue to operate the existing mainline block valve at the compressor station site after the abandonment.

On November 24, 2022, the Federal Energy Regulatory Commission (Commission or FERC) issued its Notice of Application for the Project. Among other things, that notice alerted agencies issuing federal authorizations of the requirement to complete all necessary reviews and to reach a final decision on a request for a federal authorization within 90 days of the date of issuance of the Commission staff's environmental document for the Project.

This notice identifies Commission staff's intention to prepare an environmental assessment (EA) for the Project and the planned schedule for the completion of the environmental review.[1]

Schedule for Environmental Review

Issuance of EA—May 19, 2023
90-day Federal Authorization Decision Deadline [2]—August 17, 2023

If a schedule change becomes necessary, additional notice will be provided so that the relevant agencies are kept informed of the Project's progress.

Project Description

The Project is located in Uintah County, Utah. Proposed work includes disconnecting piping from compressor units, draining oil and coolant from the turbines, draining water from the domestic and heating systems, disconnecting power, removing applicable station valves and the turbine surge valve. WIC would complete all work within the existing gravel station yard and would access the station from the existing facility access roads. No ground disturbing activities are proposed. WIC would remove and repurpose components of the abandoned facility for use at other Kinder Morgan affiliate pipelines.

Background

On January 27, 2023, the Commission issued a *Notice of Scoping Period Requesting Comments on Environmental Issues for the Proposed Diamond Mountain Abandonment Project and Notice of Public Scoping Session* (Notice of Scoping). The Notice of Scoping was sent to affected landowners; federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; other interested parties; and local libraries and newspapers. To date, the Commission has not received comments in response to the Notice of Scoping.

[1] 40 CFR 1501.10 (2020).

[2] The Commission's deadline applies to the decisions of other federal agencies, and state agencies acting under federally delegated authority, that are responsible for federal authorizations, permits, and other approvals necessary for proposed projects under the Natural Gas Act. Per 18 CFR 157.22(a), the Commission's deadline for other agency's decisions applies unless a schedule is otherwise established by federal law.

Any substantive comments received will be addressed in the EA.

To date, there are no cooperating agencies in the preparation of the EA.

Additional Information

In order to receive notification of the issuance of the EA and to keep track of formal issuances and submittals in specific dockets, the Commission offers a free service called eSubscription. This service provides automatic notification of filings made to subscribed dockets, document summaries, and direct links to the documents. Go to *https://www.ferc.gov/ferc-online/overview* to register for eSubscription.

Additional information about the Project is available from the Commission's Office of External Affairs at (866) 208–FERC or on the FERC website (*www.ferc.gov*). Using the ''eLibrary'' link, select ''General Search'' from the eLibrary menu, enter the selected date range and ''Docket Number'' excluding the last three digits (*i.e.,* CP23–14), and follow the instructions. For assistance with access to eLibrary, the helpline can be reached at (866) 208–3676, TTY (202) 502–8659, or at *FERCOnlineSupport@ferc.gov.* The eLibrary link on the FERC website also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

Dated: February 8, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–03106 Filed 2–13–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 5596–020]

Town of Bedford, Virginia; Notice Soliciting Scoping Comments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. Project No.: 5596–020.

c. *Date filed:* April 30, 2021.

d. *Applicant:* Town of Bedford, Virginia (Town of Bedford).

e. *Name of Project:* Bedford Hydroelectric Project (Bedford Project or project).

f. *Location:* The existing project is located on the James River in the Town of Bedford in Bedford and Amherst counties, Virginia. The project does not occupy any federal land.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* James Rowlett, Electric Systems Engineer, Town of Bedford Electric Department, 877 Monroe Street, Bedford, Virginia 24523; 540–587–6079 or *jrowlett@bedfordva.gov;* and Joe Peterson, Hydro Plant Engineer, Town of Bedford Electric Department, 877 Monroe Street, Bedford, Virginia 24523; 540–587–6071 or *JPeterson@bedfordva.gov.*

i. *FERC Contact:* Andy Bernick at (202) 502–8660, or *andrew.bernick@ferc.gov*.

j. *Deadline for filing scoping comments:* March 10, 2023.

The Commission strongly encourages electronic filing. Please file scoping comments using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy via U.S. Postal Service to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. All filings must clearly identify the project name and docket number on the first page: Bedford Hydroelectric Project (P–5596–020).

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application is not ready for environmental analysis at this time.

l. The current license for the Bedford Hydroelectric Project (Bedford Project) authorizes the following project facilities: (1) a 9- to 17-foot-high concrete gravity dam with a 1,680-foot-long concrete spillway; (2) a 57-acre impoundment with a storage capacity of 350 acre-feet at the normal maximum pool elevation of 627.7 feet North American Vertical Datum of 1988 (NAVD 88); (3) a 1,200-foot-long, 180-foot-wide, 16-foot-deep power canal; (4) a power canal headgate composed of three 21.6-foot-wide, 15.9-foot-high steel gates; (5) a 49.1-foot-wide, 29.47-foot-high steel trashrack with a clear bar spacing of 3.5 inches; (6) a 55-foot-long, 80-foot-wide powerhouse; (7) a 65-foot-long, 120-foot-wide tailrace; (8) two 2.5-megawatt (MW) turbine-generator units with a total capacity of 5.0 MW; (9) a 120-foot-long, 4-kilovolt (kV) transmission line; (10) one 4.16/23 kV, 5-megavolt-ampere (MVA) step-up transformer at the project substation, serving as the point of interconnection with the Town of Bedford's power grid; and (11) appurtenant facilities.

The Town of Bedford proposes to: (1) construct a new 45-foot by 55-foot maintenance shed within a previously disturbed area north of the powerhouse; and (2) modify the project boundary to remove 54.7 acres (including a 2,800-foot-long transmission line authorized in the current license that the Town of Bedford alleges is no longer part of the primary transmission system) and add 43.6 acres (to maintain the visual character of aesthetic resources within the current project boundary, including a Virginia scenic byway and an historic trail), for a total decrease of 11.1 acres.

The Bedford Project is operated in run-of-river mode. The average annual generation is estimated to be 113,377 megawatt-hours.

m. In addition to publishing the full text of this notice in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this notice, as well as other documents in the proceeding (*e.g.,* scoping document) via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number, excluding the last three digits, in the docket number field to access the document (P–5596). For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TYY, (202) 502–8659. 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 FERC at *FERCOnlineSupport@ferc.gov* or call toll free, (886) 208–3676 or TTY (202) 502–8659.

n. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

o. *Scoping Process:* Commission staff will prepare either an environmental assessment (EA) or an environmental impact statement (EIS) that describes and evaluates the probable effects, if any, of the licensee's proposed action and alternatives. The EA or EIS will consider environmental impacts and reasonable alternatives to the proposed action. The Commission's scoping process will help determine the required level of analysis and satisfy the National Environmental Policy Act (NEPA) scoping requirements, irrespective of whether the Commission prepares an EA or an EIS. At this time, we do not anticipate holding on-site scoping meetings. Instead, we are soliciting written comments and suggestions on the preliminary list of issues and alternatives to be addressed in the NEPA document, as described in scoping document 1 (SD1), issued February 8, 2023.

Copies of SD1 outlining the subject areas to be addressed in the NEPA document were distributed to the parties on the Commission's mailing list and the applicant's distribution list. Copies of SD1 may be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call 1–866–208–3676 or for TTY, (202) 502–8659.

Dated: February 8, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–03105 Filed 2–13–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. EG23–21–000,EG23–22–000,EG23–23–000,EG23–24–000,EG23–25–000,EG23–26–000,EG23–27–000,EG23–28–000,FC23–1–000]

Sandy Ridge Wind 2, LLC; Sandy Ridge Transco Interconnection, LLC; AES Kuihelani Solar, LLC; Oak Solar, LLC; Chaves County Solar II, LLC; Yellow Pine Solar Interconnect, LLC; Myrtle Solar, LLC; Prairie Switch Wind, LLC; Windpark Hoher Berg Dornstedt GmbH & Co. KG; Notice of Effectiveness of Exempt Wholesale Generator and Foreign Utility Company Status

Take notice that during the month of January 2023, the status of the above-captioned entities as Exempt Wholesale Generators or Foreign Utility Companies became effective by operation of the Commission's regulations. 18 CFR 366.7(a) (2021).

Dated: February 8, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–03100 Filed 2–13–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take noticey that the Commission received the following electric rate filings:

Docket Numbers: ER23–1063–000.

Applicants: Alabama Power Company, Georgia Power Company, Mississippi Power Company.

Description: § 205(d) Rate Filing: Alabama Power Company submits tariff filing per 35.13(a)(2)(iii: City of Hartford NITSA Rollover Filing to be effective 1/1/2023.

Filed Date: 2/7/23.

Accession Number: 20230207–5137.

Comment Date: 5 p.m. ET 2/28/23.

Docket Numbers: ER23–1064–000.

Applicants: Upper Missouri G. & T. Electric Cooperative, Inc.

Description: § 205(d) Rate Filing: Certificate of Concurrence—SPP Service Agreement No. 4043 to be effective 1/12/2023.

Filed Date: 2/7/23.

Accession Number: 20230207–5146.

Comment Date: 5 p.m. ET 2/28/23.

Docket Numbers: ER23–1066–000.

Applicants: Citadel Solar, LLC.

Description: Tariff Amendment: Citadel Solar, LLC Notice of Cancellation of MBR Tariff to be effective 2/9/2023.

Filed Date: 2/8/23.

Accession Number: 20230208–5044.

Comment Date: 5 p.m. ET 3/1/23.

Docket Numbers: ER23–1067–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Capacity Interconnection Rights in Effective Load Carrying Capability Construct to be effective 4/10/2023.

Filed Date: 2/8/23.

Accession Number: 20230208–5056.

Comment Date: 5 p.m. ET 3/1/23.

Docket Numbers: ER23–1068–000.

Applicants: Northwest Ohio IA, LLC.

Description: Baseline eTariff Filing: Shared Facilities Agrmt—w/Shortened Comment Period, Expedited Action & Waivers to be effective 2/8/2023.

Filed Date: 2/8/23.

Accession Number: 20230208–5058.

Comment Date: 5 p.m. ET 3/1/23.

Docket Numbers: ER23–1069–000.

Applicants: Northwest Ohio Solar, LLC.

Description: Baseline eTariff Filing: Certificate of Concurrence for Shared Facilities Agreement with Waiver to be effective 2/8/2023.

Filed Date: 2/8/23.

Accession Number: 20230208–5060.

Comment Date: 5 p.m. ET 3/1/23.

Docket Numbers: ER23–1070–000.

Applicants: Lockhart Transmission Holdings, LLC.

Description: § 205(d) Rate Filing: Facilities Use Agreements to be effective 2/9/2023.

Filed Date: 2/8/23.

Accession Number: 20230208–5063.

Comment Date: 5 p.m. ET 3/1/23.

Docket Numbers: ER23–1071–000.

Applicants: Northwest Ohio Wind, LLC.

Description: § 205(d) Rate Filing: Certificate of Concurrence for Shared Facilities Agreement with Waiver to be effective 2/8/2023.

Filed Date: 2/8/23.

Accession Number: 20230208–5064.

Comment Date: 5 p.m. ET 3/1/23.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES23–35–000.

Applicants: NextEra Energy Transmission MidAtlantic Indiana, Inc.

Description: Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of NextEra Energy Transmission MidAtlantic Indiana, Inc.

Filed Date: 2/7/23.

Accession Number: 20230207–5188.
Comment Date: 5 p.m. ET 2/28/23.

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: February 8, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–03101 Filed 2–13–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2011–0824; FRL–10651–01–OECA]

Proposed Information Collection Request; Comment Request; Application for Registration and Pesticide Report for Pesticide-Producing and Device-Producing Establishments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency is planning to submit an information collection request (ICR), ''Application for Registration and Pesticide Report for Pesticide-Producing and Device-Producing Establishments'' (EPA ICR No. 0160.12, OMB Control No. 2070–0078) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR, which is currently approved through September 30, 2023. 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.

DATES: Comments must be submitted on or before April 17, 2023.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OECA–2011–0824, online using *www.regulations.gov* (our preferred method) or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Michelle Yaras, Office of Compliance, Monitoring, Assistance, and Media Programs Division, Pesticides, Waste & Toxics Branch (2225A), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564–4153; email: *yaras.michelle@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) 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; (ii) 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; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) 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. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) Section 7(a) requires that any person who produces pesticides, active ingredients or devices subject to the Act must register with the Administrator of EPA the establishment in which the pesticide, active ingredient or device is produced. This section further requires that application for registration of any establishment shall include the name and address of the establishment and of the producer who operates such an establishment. EPA Form 3540–8, Application for Registration of Pesticide-Producing and Device-Producing Establishments, is used to collect the establishment registration information required by this section.

FIFRA Section 7(c) requires that any producer operating an establishment registered under Section 7 report to the Administrator within 30 days after it is registered, and annually thereafter by March 1st for certain pesticide or device production and sales or distribution information. The producers must report which types and amounts of pesticides, active ingredients, or devices are currently being produced, were produced during the past year, sold or distributed in the past year. The supporting regulations at 40 CFR part 167 provide the requirements and time schedules for submitting production information. EPA Form 3540–16, Pesticide Report for Pesticide-Producing and Device-Producing Establishments, is used to collect the pesticide production information required by Section 7(c) of FIFRA.

Establishment registration information, collected on EPA Form 3540–8, is a one-time requirement for all pesticide-producing and device-producing establishments. Pesticide and device production information, reported on EPA Form 3540–16, is required to be submitted within 30 days after the company is notified of their pesticide-producing or device-producing establishment number, and annually thereafter on or before March 1st. Pesticide-producing and device-producing establishments optionally can electronically enter and submit their establishment registration information and pesticide production information through EPA's Central Data Exchange (CDX).

Form Numbers: 3540–8 and 3540–16.

Respondents/affected entities: Establishments producing pesticides.

Respondent's obligation to respond: Mandatory (40 CFR part 167).

Estimated number of respondents: 19,114 (total).

Frequency of response: Annually.

Total estimated burden: 48,830.40 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $3,724,075.10 (per year), includes $0 annualized capital or operation & maintenance costs.

Changes in estimates: There is an increase of 5,993.68 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This increase is a result of the COVID–19 pandemic causing a 109.1 percent increase in the average number of new establishments (815 in 2019 to 1703 in 2023) and a 34.15% increase in the total number of establishments (14,248 in 2019 to 19,114 in 2023). Additional increases are due to the increase in the salary tables used in the calculations.

Elizabeth Vizard,

Acting Director, Office of Compliance/MAMPD.

[FR Doc. 2023–03050 Filed 2–13–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0823; FR ID 126744]

Information Collection Being Submitted for Review and Approval to Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Pursuant to the Small Business Paperwork Relief Act of 2002, the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.'' The Commission may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written comments and recommendations for the proposed information collection should be submitted on or before March 16, 2023.

ADDRESSES: Comments should be sent 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. Your comment must be submitted into *www.reginfo.gov* per the above instructions for it to be considered. In addition to submitting in *www.reginfo.gov* also send a copy of your comment on the proposed information collection to Nicole Ongele, FCC, via email to *PRA@fcc.gov* and to *Nicole.Ongele@fcc.gov.* Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** below.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection, contact Nicole Ongele at (202) 418–2991. To view a copy of this information collection request (ICR) submitted to OMB: (1) go to the web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the Title of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION: As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the FCC invited the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: (a) 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; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) 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. Pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

OMB Control Number: 3060–0823.

Title: Part 64, Pay Telephone Reclassification.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents and Responses: 400 respondents; 16,820 responses.

Estimated Time per Response: 2.66 hours (average).

Frequency of Response: On occasion, quarterly and monthly reporting requirements and third party disclosure requirements.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in *47 U.S.C. 151, 154, 201–205, 218, 226* and *276.*

Total Annual Burden: 44,700 hours.

Total Annual Cost: $768,000.

Privacy Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: Confidentiality concerns are not relevant to these types of disclosures. The Commission is not requesting carriers or providers to submit confidential information to the Commission. If the Commission requests that carriers or providers submit information which they believe is confidential, the carriers or providers may request confidential treatment of their information under *47 CFR 0.459* of the Commission's rules.

Needs and Uses: The Commission established a plan to ensure that payphone service providers (PSPs) were compensated for certain non-coin calls originated from their payphones. As part of this plan, the Commission required that by October 7, 1997, local exchange carriers were to provide payphone-specific coding digits to PSPs, and that PSPs were to provide those digits from their payphones to interexchange carriers. The provision of payphone-specific coding digits was a prerequisite to payphone per-call compensation payments by IXCs to PSPs for subscriber 800 and access code calls. The Commission's Wireline

Competition Bureau subsequently provided a waiver until March 9, 1998, for those payphones for which the necessary coding digits were not provided to identify calls. The Bureau also on that date clarified the requirements established in the Payphone Orders for the provision of payphone-specific coding digits and for tariffs that LECs must file pursuant to the Payphone Orders.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2023–03095 Filed 2–13–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL HOUSING FINANCE AGENCY

[No. 2023–N–2]

Privacy Act of 1974; System of Records

AGENCY: Federal Housing Finance Agency.

ACTION: Notice of a new system of records.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, as amended, (Privacy Act), the Federal Housing Finance Agency (FHFA or Agency) is establishing FHFA–30, ''Advisory Committee Manager System'' (System). This system of records allows FHFA to collect and maintain records submitted to or obtained by FHFA in connection with seeking, choosing, managing, or ending membership on FHFA advisory committees created pursuant to the Federal Advisory Committee Act (FACA).

DATES: In accordance with 5 U.S.C. 552a(e)(4) and (11), this system of records will go into effect without further notice on February 14, 2023, unless otherwise revised pursuant to comments received. Comments must be received on or before March 16, 2023. FHFA will publish a new notice if the effective date is delayed in order for the Agency to review the comments or if changes are made based on comments received.

ADDRESSES: Submit comments to FHFA, identified by ''No. 2023–N–2,'' using any one of the following methods:

- *Agency Website: www.fhfa.gov/open-for-comment-or-input.*
- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. If you submit your comments to the Federal eRulemaking Portal, please also send it by email to *FHFA at RegComments@fhfa.gov* to ensure timely receipt by FHFA. Please include ''Comments/No. 2023–N–2,'' in the subject line of the message.
- *Hand Delivered/Courier:* The hand delivery address is: Clinton Jones, General Counsel, Attention: Comments/No. 2023–N–2, Federal Housing Finance Agency, 400 Seventh Street SW, Washington, DC 20219. The package should be delivered to the Seventh Street entrance Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m., EST.
- *U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:* The mailing address for comments is: Clinton Jones, General Counsel, Attention: Comments/No. 2023–N–2, Federal Housing Finance Agency, 400 Seventh Street SW, Washington, DC 20219. *Please note that all mail sent to FHFA via the U.S. Postal Service is routed through a national irradiation facility, a process that may delay delivery by approximately two weeks. For any time-sensitive correspondence, please plan accordingly.* See **SUPPLEMENTARY INFORMATION** for additional information on submission and posting of comments.

FOR FURTHER INFORMATION CONTACT: Stacy Easter, Privacy Act Officer, *Privacy@FHFA.gov* or (202) 649–3803; or Tasha Cooper, Senior Agency Official for Privacy, *Privacy@FHFA.gov* or (202) 649–3091 (not toll-free numbers), Federal Housing Finance Agency, 400 Seventh Street SW, Washington, DC 20219. For TTY/TRS users with hearing and speech disabilities, dial 711 and ask to be connected to any of the contact numbers above.

SUPPLEMENTARY INFORMATION:

I. Comments

FHFA seeks public comments on a new system of records and will take all comments into consideration. *See* 5 U.S.C. 552a(e)(4) and (11). In addition to referencing ''Comments/No. 2023–N–2,'' please reference ''FHFA–30, Advisory Committee Manager System.''

FHFA will make all comments timely received available for examination by the public through the electronic comment docket for this notice, which is located on the FHFA website at *https://www.FHFA.gov.* All comments received will be posted without change and will include any personal information you provide, such as name, address (mailing and email), telephone numbers, and any other information you provide.

II. Introduction

This notice informs the public of FHFA's proposal to establish and maintain a new system of records. This notice satisfies the Privacy Act requirement that an agency publishes a system of records notice in the **Federal Register** when establishing a new or making a significant change to an agency's system of records. Congress has recognized that application of all requirements of the Privacy Act to certain categories of records may have an undesirable and often unacceptable effect upon agencies in the conduct of necessary public business. Consequently, Congress established general exemptions and specific exemptions that could be used to exempt records from provisions of the Privacy Act. Congress also required that exempting records from provisions of the Privacy Act would require the head of an agency to publish a determination to exempt a record from the Privacy Act as a rule in accordance with the Administrative Procedure Act. Records and information in this system of records are not exempt from the requirements of the Privacy Act.

As required by the Privacy Act, 5 U.S.C. 552a(r), and pursuant to section 7 of Office of Management and Budget (OMB) Circular No. A–108, ''*Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act*'', prior to publication of this notice, FHFA submitted a report describing the system of records covered by this notice to the OMB, the Committee on Oversight and Government Reform of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate.

In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, FHFA proposes two new routine uses for this system, in addition to the general routine uses applicable to this system and described below. First, FHFA may disclose information to the Library of Congress, OMB, Executive Office of the President, or General Services Administration, when necessary and relevant to FHFA's management of the advisory committee, including FHFA's consideration of applicants for membership on an advisory committee, or to comply with any obligations to report information about advisory committees. This use is compatible with the purpose of the collection, which is to administer advisory committees in accordance with the Federal Advisory Committee Act. Second, FHFA may disclose information from this system to the public to inform the public about the identity and qualifications of individuals selected to serve as members of advisory committees. As one of the purposes of the Federal Advisory Committee Act is

to ensure transparency to the public about advisory committee advice and activities, a routine use permitting disclosure of information about advisory committee members is compatible with the purpose of the collection.

III. New System of Records

The information in this system of records will be used by FHFA for storing and reviewing application materials submitted by applicants for membership on FHFA advisory committees/subcommittees, choosing members for FHFA advisory committees based on those application materials, managing membership on such FHFA committees, including but not limited to membership termination, and conducting required oversight and compliance over FHFA advisory committee appointments and actions. The new system of records is described in detail below.

SYSTEM NAME AND NUMBER:

Advisory Committee Manager System, FHFA–30.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Federal Housing Finance Agency, 400 Seventh Street SW, Washington, DC 20219, and any alternate work site used by employees of FHFA, including FHFA-authorized cloud service provider (Amazon Web Service, which is Federal Risk and Authorization Management Program (FedRAMP) authorized).

SYSTEM MANAGER(S):

Samuel Frumkin, Advisory Committee Management Officer, Division of Housing Mission and Goals, (202) 649–4108, Federal Housing Finance Agency, 400 Seventh Street SW, Washington, DC 20219.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C. chapter 10); 12 U.S.C. 4511(b)(2); 12 U.S.C. 4513(a)(2)(B); 44 U.S.C. 3101; 41 CFR part 102–3 (Federal Advisory Committee Management); and OMB Circular A–135, Management of Federal Advisory Committees (Oct. 5, 1994).

PURPOSE(S) OF THE SYSTEM:

1. To collect and maintain information on FHFA past, present, and proposed advisory committee/subcommittee members subject to the FACA.

2. To identify the most qualified applicants and ensure balanced advisory committees/subcommittees.

3. To advise, inform, and provide input and recommendations to the FHFA Director.

4. To conduct required oversight and compliance over FHFA advisory committee/subcommittee appointments and actions.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals covered by this System are:

1. Individuals who apply to be on a committee/subcommittee and will be considered for committee/subcommittee appointment;

2. Individuals currently serving on a committee/subcommittee;

3. Individuals selected or serving as alternate members on a committee/subcommittee; and

4. Individuals who previously served on a committee/subcommittee.

Note: Individuals may be appointed to serve on an advisory committee pursuant to 5 U.S.C. 3109 as a special government employee.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records maintained in this System may contain information from members of the general public who submit applications for membership on FHFA advisory committees/subcommittees, including but not limited to the following: names; places and dates of birth (DOBs); business and personal mailing addresses, email addresses, and telephone numbers; educational history, degrees, and certifications; affiliated companies or organizations; employment history and related information; any foreign activities or interests; and any other information collected to determine if an individual is qualified to serve on an advisory committee/subcommittee as well as to describe committee/subcommittee appointments, all activities, and any related expenses.

RECORD SOURCE CATEGORIES:

Information is obtained directly from the individual applicants or from other individuals or entities submitting information in support of, for, or on behalf of an applicant via the resumes and related materials submitted to FHFA in seeking membership on FHFA advisory committees/subcommittees.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records and information contained therein may specifically be disclosed outside of FHFA as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows, to the extent such disclosures are compatible with the purposes for which the information was collected:

(1) To appropriate agencies, entities, and persons when: (a) FHFA suspects or has confirmed that there has been a breach of the system of records; (b) FHFA has determined that as a result of a suspected or confirmed breach there is a risk of harm to individuals, FHFA (including its information systems, programs, and operations), the Federal Government, or national security; and (c) the disclosure made to such agencies, entities, and persons as reasonably necessary to assist with FHFA's efforts to (i) respond to a suspected or confirmed breach or (ii) prevent, minimize, or remedy harm caused by such breach.

(2) To a federal agency or federal entity, when FHFA determines information from this system of records is reasonably necessary to assist the recipient agency or entity in: (a) responding to a suspected or confirmed breach or (b) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or to national security, resulting from a suspected or confirmed breach.

(3) When there is an indication of a violation or potential violation of law (whether civil, criminal, or regulatory in nature, and whether arising by general statute or particular program statute or by regulation, rule or order issued pursuant thereto), the relevant records in the system of records may be referred, as a routine use, to the appropriate agency (*e.g.,* federal, state, local, tribal, foreign or a financial regulatory organization) charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing a statute, rule, regulation or order issued pursuant thereto.

(4) To any individual during the course of any inquiry or investigation conducted by FHFA, or in connection with civil litigation, if FHFA has reason to believe the individual to whom the record is disclosed may have further information about the matters related thereto, and those matters appeared to be relevant and necessary at the time to the subject matter of the inquiry.

(5) To a Congressional office in response to an inquiry from the Congressional office made at the request of and on behalf of the Congressional Offices' constituents included in the system.

(6) To the Office of Management and Budget, Department of Justice (DOJ), Department of Labor, Office of Personnel Management, Equal Employment Opportunity Commission, Office of Special Counsel, Merit Systems Protection Board, or other federal agencies to obtain advice regarding statutory, regulatory, policy, and other requirements related to fair lending oversight.

(7) To appropriate third parties contracted by FHFA to facilitate mediation or other dispute resolution procedures or programs.

(8) To outside counsel contracted by FHFA, the U.S. Department of Justice (DOJ), (including United States Attorney Offices), or other federal agencies conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is relevant and necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

a. FHFA;

b. Any employee of FHFA in their official capacity;

c. Any employee of FHFA in their individual capacity for whom DOJ or FHFA has agreed to represent the employee; or

d. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and FHFA determines that the records are both relevant and necessary to the litigation.

(9) To the National Archives and Records Administration or other federal agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

(10) To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as relevant and necessary to such audit or oversight functions.

(11) To federal agencies for fair lending and fair housing research, investigation, supervision, and enforcement purposes.

(12) To the Library of Congress, Executive Office of the President, Office of Management and Budget, or General Services Administration when necessary in the administration of FHFA's advisory committee(s), including complying with reporting obligations.

(13) To the public, when FHFA deems it necessary to inform the public of advisory committee membership qualifications or activities.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records are maintained in electronic format. Electronic records are stored on FHFA's secured network, FHFA-authorized cloud service providers and FHFA-authorized contractor networks located within the Continental United States; or in vendor Cloud Service Offerings certified under FedRAMP.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records will be retrieved by an individual's name.

POLICIES AND PRACTICIES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are retained and disposed of in accordance with FHFA's Comprehensive Records Schedule (CRS) Item 6.2.01–06, as applicable. Comprehensive Record Schedule, Item 6.2 (N1–543–11–1, approved on 01/11/2013).

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Electronic records are protected by controlled access procedures. Only FHFA staff who are permitted to perform the selection and review functions required for forming FHFA advisory committees or whose official duties otherwise require access, are allowed to view, administer, and control these records. Non-FHFA personnel will not have or be granted access to these records. Records will be stored on the FHFA General Support System (GSS) and protected by Microsoft Office 365 Multi-Tenant and Supporting Services and the Microsoft Azure Cloud, both of which are authorized by FedRAMP at the Moderate Impact Level.

RECORD ACCESS PROCEDURES:

See ''Notification Procedures'' Below.

CONTESTING RECORD PROCEDURES:

See ''Notification Procedures'' Below.

NOTIFICATION PROCEDURES:

Individuals seeking notification of any records about themselves contained in this System should address their inquiry to the Privacy Act Officer, via email to *Privacy@fhfa.gov* or by mail to the Federal Housing Finance Agency, 400 Seventh Street SW, Washington, DC 20219, or in accordance with the procedures set forth in 12 CFR part 1204. *Please note that all mail sent to FHFA via the U.S. Postal Service is routed through a national irradiation facility, a process that may delay delivery by approximately two weeks. For any time-sensitive correspondence, please plan accordingly.*

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

None.

Clinton Jones,

General Counsel, Federal Housing Finance Agency.

[FR Doc. 2023–03079 Filed 2–13–23; 8:45 am]

BILLING CODE 8070–01–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 March 1, 2023.

A. Federal Reserve Bank of Richmond (Brent B. Hassell, Assistant Vice President) 701 East Byrd Street, Richmond, Virginia 23219. Comments can also be sent electronically to or *Comments.applications@rich.frb.org:*

1. *Walter T. Hayslett, individually, and together with Susan Hayslett, both of Hurricane, West Virginia, and Roger T. Hayslett, Milton, West Virginia;* as a group acting in concert to retain voting shares of Putnam Bancshares, Inc., and thereby indirectly retain voting shares of Putnam County Bank, both of Hurricane, West Virginia.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–03124 Filed 2–13–23; 8:45 am]

BILLING CODE P

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–XXXX; Docket No. 2023–0001; Sequence No. 1]

Information Collection; Overseas Employment Agreement; GSA Form 5040

AGENCY: Office of Human Resource Management, Division of Human Capital Policy and Programs, General Services Administration (GSA).

ACTION: Notice of request for comments regarding a request for a new OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division will be submitting to the Office of Management and Budget (OMB) a request to review and approve a new information collection requirement.

DATES: Submit comments on or before April 17, 2023.

ADDRESSES: Submit comments identified by Information Collection 3090–XXXX; Overseas Employment Agreement; GSA Form 5040 to: *http://www.regulations.gov.*

Submit comments via the Federal eRulemaking portal by searching for ''Information Collection 3090–XXXX; Overseas Employment Agreement; GSA Form 5040''. Select the link ''Submit a Comment'' that corresponds with ''Information Collection 3090–XXXX; Overseas Employment Agreement; GSA Form 5040''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 3090–XXXX; Overseas Employment Agreement; GSA Form 5040'' on your attached document. If your comment cannot be submitted using *https://www.regulations.gov,* call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Instructions: Please submit comments only and cite Information Collection 3090–XXXX; Overseas Employment Agreement; GSA Form 5040, in all correspondence related to this collection. Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two-to-three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Colin C. Bennett, Human Resources Specialist, Office of Human Resources Management, Division of Human Capital Policy and Programs, at telephone 240–418–6822 or via email to *colin.bennett@gsa.gov* for clarification of content.

SUPPLEMENTARY INFORMATION:

A. Purpose

The General Services Administration routinely hires, reassigns, promotes or transfers Federal employees to duty stations in foreign areas (*i.e.,* outside of the United States and its territories and possessions). Under the Administrative Expenses Act of 1946 (60 Stat. 808), as amended, agencies are permitted to use appropriated funds to pay for the various costs incurred for permanent change of station (PCS) to the foreign area (see further 5 U.S.C. 5722 et. seq.). Such costs include: (1) travel expenses of the new appointee (or employee) and transportation expenses of his or her immediate family and his household goods and personal effects from the place of actual residence at the time of appointment to the place of employment outside the continental United States; (2) these expenses on the return of an employee from his post of duty outside the continental United States to the place of his actual residence at the time of assignment to duty outside the continental United States; and (3) the expenses of transporting a privately owned motor vehicle as authorized under 5 U.S.C. 5727(c). Under this authority, in return for this travel and transportation benefit, the appointee (or employee) must remain in the agency's service for 12 months (1 year). More information concerning this statutory requirement is found within the GSA Government Travel Regulations at 41 CFR part 302–3, subpart F.

In order to more effectively memorialize the agency costs incurred, and the appointee's (or employee's) resulting service obligation, GSA has re-developed its existing form GSA 5040. The intent is for this form to be used: (1) as an information collection device to memorialize compensation, foreign allowance, and travel and transportation benefits provided, and (2) as an enforceable service agreement for PCS travel and transportation costs, pursuant to the Federal Claims Collection Act of 1966 and the Debt Collection Act Amendments of 1996 (see further 31 U.S.C. 3711 et. seq.)

B. Annual Reporting Burden

Respondents: 25 per year.
Responses per Respondent: 1.
Total Annual Responses: 25.
Hours per Response: 1.
Total Burden Hours: 25.

C. Public Comments

Public comments are particularly invited on: Whether this collection of information is necessary, whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the Regulatory Secretariat Division by calling 202–501–4755 or emailing *GSARegSec@gsa.gov.* Please cite OMB Control No. 3090–XXXX, Overseas Employment Agreement; GSA Form 5040, in all correspondence.

Beth Anne Killoran,

Deputy Chief Information Officer.

[FR Doc. 2023–03131 Filed 2–13–23; 8:45 am]

BILLING CODE 6820–FM–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2013–N–0134; FDA–2016–D–2565; FDA–2013–N–0514; FDA–2015–N–0030; FDA–2021–N–0584; FDA–2021–N–1026; FDA–2013–N–0557; FDA–2014–N–0053; FDA–2013–N–0190; FDA–2019–N–0305; FDA–2019–N–2854; FDA–2019–N–5553; FDA–2017–D–0085; FDA–2016–N–2544; FDA–2019–N–2778; FDA–2012–N–0977; FDA–2010–D–0319; and FDA–2018–N–3728]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approvals

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is publishing a list of information collections that have been approved by the Office of

Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: JonnaLynn Capezzuto, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–3794, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: The following is a list of FDA information collections recently approved by OMB under section 3507 of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). The OMB control number and expiration date of OMB approval for each information collection are shown in table 1. Copies of the supporting statements for the information collections are available on the internet at *https://www.reginfo.gov/public/do/PRAMain.* 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.

TABLE 1—LIST OF INFORMATION COLLECTIONS APPROVED BY OMB

Title of collection	OMB control No.	Date approval expires
Mammography Standards Quality Act Requirements	0910–0309	11/30/2025
510(k) Third-Party Review Program	0910–0375	11/30/2025
Administrative Procedures for Clinical Laboratory Improvement Amendments of 1988 Categorization	0910–0607	11/30/2025
Human Drug Compounding Under Sections 503A and 503B of the Federal Food, Drug, and Cosmetic Act	0910–0800	11/30/2025
Pilot to Develop Standardized Reporting Forms for Federally Funded Public Health Projects and Agreements	0910–0909	11/30/2025
Text Analysis of Proprietary Drug Name Interpretations	0910–0910	11/30/2025
Postmarket Surveillance of Medical Devices	0910–0449	12/31/2025
Establishment, Maintenance, and Availability of Records; Additional Traceability Records for Certain Foods	0910–0560	12/31/2025
Warning Plans for Smokeless Tobacco Products	0910–0671	12/31/2025
Deeming Tobacco Products To Be Subject to the FD&C Act	0910–0768	12/31/2025
Premarket Tobacco Product Applications and Recordkeeping Requirements	0910–0879	12/31/2025
Right to Try Act: Reporting Requirements	0910–0893	12/31/2025
Substances Generally Recognized as Safe: Best Practices for Convening a GRAS Panel	0910–0911	12/31/2025
Medical Devices—Quality System Regulation; 21 CFR part 820	0910–0073	1/31/2026
Threshold of Regulation for Substances Used in Food-Contact Articles	0910–0298	1/31/2026
Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents	0910–0312	1/31/2026
Mailing of Important Information About Drugs	0910–0754	1/31/2026
Collection of Conflict of Interest Information for Participation in Food and Drug Administration Non-Employee Fellowship and Traineeship Programs	0910–0882	1/31/2026

Dated: February 8, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–03073 Filed 2–13–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2018–E–3051 and FDA–2018–E–3095]

Determination of Regulatory Review Period for Purposes of Patent Extension; ALIQOPA

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for ALIQOPA and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of applications to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human drug product.

DATES: Anyone with knowledge that any of the dates as published (see the **SUPPLEMENTARY INFORMATION** section) are incorrect may submit either electronic or written comments and ask for a redetermination by April 17, 2023. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by August 14, 2023. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of April 17, 2023. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets

Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket Nos. FDA–2018–E–3051 and FDA–2018–E–3095 for Determination of Regulatory Review Period for Purposes of Patent Extension; ALIQOPA. Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug or biologic product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: a testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human drug product, ALIQOPA (copanlisib dihydrochloride) indicated for treatment of adult patients with relapsed follicular lymphoma who have received at least two prior systemic therapies. Subsequent to this approval, the USPTO received patent term restoration applications for ALIQOPA (U.S. Patent Nos. 7,511,041 and RE46856) from Bayer Intellectual Property GmbH and the USPTO requested FDA's assistance in determining the patents' eligibility for patent term restoration. In a letter dated May 13, 2019, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of ALIQOPA represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for ALIQOPA is 3,004 days. Of this time, 2,821 days occurred during the testing phase of the regulatory review period, while 183 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(i)) became effective:* June 26, 2009. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on June 26, 2009.

2. *The date the application was initially submitted with respect to the human drug product under section 505 of the FD&C Act:* March 16, 2017. FDA has verified the applicant's claim that the new drug application (NDA) for ALIQOPA (NDA 209936) was initially submitted on March 16, 2017.

3. *The date the application was approved:* September 14, 2017. FDA has verified the applicant's claim that NDA 209936 was approved on September 14, 2017.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its applications for patent extension, this applicant seeks 1,594 or 692 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of 60.30, including but not limited to: must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA

investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: February 8, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–03070 Filed 2–13–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–N–1048]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Medical Device Labeling Requirements; Unique Device Identification

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written comments (including recommendations) on the collection of information by March 16, 2023.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be submitted to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. The OMB control number for this information collection is 0910–0485. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–5733, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Medical Device Labeling Requirements; Unique Device Identification

OMB Control Number 0910–0485—Revision

This information collection supports implementation of section 519(f) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360i(f)), requiring the establishment of a unique device identification (UDI) system by FDA. Medical device labeling requirements governed by section 502 of the FD&C Act (21 U.S.C. 352) provide that every medical device and every device package bear a unique device identifier. Implementing regulations are found in part 801, subpart B (21 CFR part 801, subpart B) (Labeling Requirements for UDI), including provisions for exceptions from UDI requirements (21 CFR 801.30). Applicable regulations are also found in part 821 (21 CFR part 821) (Medical Device Tracking Requirements); 21 CFR part 822 (Postmarket Surveillance); part 814 (21 CFR part 814) (Premarket Approval of Medical Devices); and part 820 (21 CFR part 820) (Quality System Regulations), as well as regulations pertaining to in vitro device labeling, biological device product labeling, or any article subject to the device labeling provisions in section 502 of the FD&C Act. Products not in compliance with requirements set forth in the applicable statutory and regulatory authorities may be subject to enforcement action by FDA.

For operational efficiency, we are revising the information collection to include burden that may be attributable to activities associated with provisions found in part 830 (21 CFR part 830), currently approved in OMB control number 0910–0720 and established through rulemaking on September 24, 2013 (0910–AG31). The regulations define relevant terms, identify specific data requirements, and incorporate global standards applicable to the use and discontinuation of a UDI. The regulations also provide for FDA accreditation of an issuing agency (21 CFR 830.110) and explain associated information collection activities including the establishment, maintenance, and disclosure of records. Finally, the regulations provide for administration of the Global UDI Database (GUDID) (part 830, subpart E), which specifies data that must be submitted to FDA to be made publicly available. Users of the GUDID will be able to use the device identifier portion of the UDI to query descriptive data about a specific device. The GUDID may be accessed on our website at *https://www.fda.gov/medical-devices/unique-device-identification-system-udi-system/global-unique-device-identification-database-gudid.*

In the **Federal Register** of August 24, 2022 (87 FR 51989), we published a 60-day notice soliciting comment on the proposed collection of information. No comments were received. However, upon further review and evaluation, we have made adjustments to our estimated burden for the collection of information, as follows:

TABLE 1—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

Part 801, subpart B: Labeling requirements for unique device identification	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
Requirements for a unique device identifier under part 830	6,199	51	316,149	1	316,149

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Our figures are based on economic analysis from previous Agency rulemaking. We assume most burden associated with activities applicable to satisfying UDI requirements as prescribed by part 830 is accounted for in currently approved information collections. For example, information collection associated with medical device tracking provisions in part 821 is currently approved in OMB control number 0910–0442; information collection associated with premarket approval of medical devices (part 814) is currently approved in OMB control number 0910–0231. Similarly, information collection associated with our quality system regulation (part 820)

and information collection associated with our medical device recall authority (21 CFR part 810) is approved in OMB control numbers 0910–0073 and 0910–0432, respectively. We assume burden respondents may have incurred as the result of any product relabeling, as well as one-time burden that respondents may have incurred resulting from integrating requirements into current tracking and labeling activities, has since been realized and is now accounted for among our currently approved inventory. Here, we are accounting for burden associated with UDI requirements prescribed by part 830 not otherwise included in currently approved collections and subject to general medical device labeling requirements established in part 801, subpart B. Because the PRA defines a recordkeeping requirement to include retained records, third-party notifications and disclosures, and reporting to the Federal government as well as the public, we have accounted for these activities cumulatively, characterizing them as recordkeeping activities.

Dated: February 8, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–03071 Filed 2–13–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection; Public Comment Request; Application and Other Forms Used by the National Health Service Corps Scholarship Program, the NHSC Students to Service Loan Repayment Program, and the Native Hawaiian Health Scholarship Program

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 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 April 17, 2023.

ADDRESSES: Submit your comments to *paperwork@hrsa.gov* or mail the HRSA Information Collection Clearance Officer, Room 14N136B, 5600 Fishers Lane, Rockville, Maryland 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 Samantha Miller, the acting HRSA Information Collection Clearance Officer, at 301–594–4394.

SUPPLEMENTARY INFORMATION:

Information Collection Request Title: Application and Other Forms Used by the National Health Service Corps (NHSC) Scholarship Program (SP), the NHSC Students to Service Loan Repayment Program (S2S LRP), and the Native Hawaiian Health Scholarship Program (NHHSP), OMB No. 0915–0146–Revision.

Abstract: Administered by HRSA's Bureau of Health Workforce, the NHSC SP, NHSC S2S LRP, and the NHHSP provide scholarships or loan repayment to qualified students who are pursuing primary care health professions education and training. In return, students agree to provide primary health care services in underserved communities located in federally designated Health Professional Shortage Areas once they are fully trained and licensed health professionals. Awards are made to applicants who demonstrate the greatest potential for successful completion of their education and training as well as commitment to provide primary health care services to communities of greatest need. The information from program applications, forms, and supporting documentation is used to select the best qualified candidates for these competitive awards, and to monitor program participants' enrollment in school, postgraduate training, and compliance with program requirements.

Although some program forms vary from program to program (see program-specific burden charts below), required forms generally include: a program application, academic and non-academic letters of recommendation, the authorization to release information, and the acceptance/verification of good academic standing report. The NHHSP is not seeking to change or add any forms or documentation.

Need and Proposed Use of the Information: The NHSC SP, S2S LRP, and NHHSP applications, forms, and supporting documentation are used to collect necessary information from applicants and schools that enable HRSA to make selection determinations for the competitive awards and monitor compliance (via training programs and sites) with program requirements.

Likely Respondents: Qualified students who are pursuing education and training in primary care health professions and are interested in working in health professional shortage areas and schools at which such students are enrolled.

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
NHSC Scholarship Program Application					
NHSC Scholarship Program Application	2,575	1	2,575	2.00	5150.00
Letters of Recommendation	2,575	2	5,150	1.00	5150.00
Authorization to Release Information	2,575	1	2,575	.10	257.50

TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS—Continued

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Acceptance/Verification of Good Standing Report	2,575	1	2,575	.25	643.75
Verification of Disadvantaged Background Status	615	1	615	.25	153.75
Total	*2,575		13,490		11,355.00
NHSC awardees/schools/post graduate training programs/sites					
Data Collection Worksheet	400	1	400	1.00	400
Post Graduate Training Verification Form	100	1	100	.50	50
Enrollment Verification Form	600	2	1,200	.50	600
Total	*600		1,700		1,050
NHSC Students to Service Loan Repayment Program Application					
NHSC Students to Service Loan Repayment Program Application	284	1	284	2.00	568.00
Letters of Recommendation	284	2	284	1.00	568.00
Authorization to Release Information	284	1	284	.10	28.40
Acceptance/Verification of Good Standing Report	284	1	284	.25	71.00
Verification of Disadvantaged Background Status	84	1	84	.25	21.00
Total	*284		1,220		1,256.40
Native Hawaiian Health Scholarship Program Application					
Native Hawaiian Health Scholarship Program Application	310	1.00	310	2.00	620.00
Letters of Recommendation	310	2.00	620	.25	155.00
Authorization to Release Information	310	1.00	310	.25	77.50
Acceptance/Verification of Good Standing Report	40	1.00	40	.25	10.00
Scholar Enrollment Verification Form	40	7.50	300	.50	150.00
Change in Program Curriculum Form	40	2.00	80	.25	20.00
NHHSP Graduation Documentation Form	40	1.00	40	.25	10.00
Total	*310		1700		1042.50

* Certain documents are submitted by a subset of respondents consistent with program requirements.
** Please note that the same group of respondents may complete each form as necessary.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2023–03109 Filed 2–13–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA–OD–22–027: Advanced Training in Artificial Intelligence for Precision Nutrition Science Research (AIPrN)—Institutional Research Training Programs (T32).

Date: March 13–14, 2023.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Allen B. Richon, Ph.D., BS, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6184, MSC 7892, Bethesda, MD 20892, (240) 760–0517, *allen.richon@nih.hhs.gov*.

Name of Committee: Infectious Diseases and Immunology B Integrated Review Group; HIV Comorbidities and Clinical Studies Study Section.

Date: March 14–15, 2023.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Melrose Hotel, 2430 Pennsylvania Ave. NW, Washington, DC 20037.

Contact Person: David C. Chang, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 451–0290, *changdac@mail.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Drug Discovery Involving the Nervous System.

Date: March 14–15, 2023.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Lai Yee Leung, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1011D, Bethesda, MD 20892, (301) 827–8106, *leungl2@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–20–117: Maximizing Investigators' Research

Award (MIRA) for Early Stage Investigators (R35—Clinical Trial Optional).

Date: March 14–15, 2023.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II 6701, Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Linda MacArthur, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4187, Bethesda, MD 20892, 301–537–9986, *macarthurlh@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Special Topics in Biomaterials, Nanotechnology, and Drug Delivery.

Date: March 14, 2023.

Time: 9:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: James J. Li, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5148, MSC 7849, Bethesda, MD 20892, 301–806–8065, *lijames@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Small Business Innovation Research/Small Business Technology Transfer.

Date: March 14–15, 2023.

Time: 9:30 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jennifer Di Noia, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1000E, Bethesda, MD 20892, (301) 594–0288, *dinoiaj2@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–20–117: Maximizing Investigators' Research Award (MIRA) for Early Stage Investigators.

Date: March 14–15, 2023.

Time: 10:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jingwu Xie, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 594–8625, *jingwu.xie@nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA: Role of Neuroimmune, Neuroinflammation, and Microbiome-Gut-Brain Axis in Alzheimer's Disease and its Related Dementias.

Date: March 14–15, 2023.

Time: 10:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: M. Catherine Bennett, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5182, MSC 7846, Bethesda, MD 20892, 301–435–1766, *bennettc3@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowship: Neurodevelopment, Synaptic Plasticity, and Neurodegeneration.

Date: March 14, 2023.

Time: 10:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Myongsoo Matthew Oh, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1011F, Bethesda, MD 20892, (301) 435–1042, *ohmm@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Musculoskeletal Sciences.

Date: March 14, 2023.

Time: 11:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Vanessa Dawn Sherk, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 801C, Bethesda, MD 20892, (301) 867–5309, *sherkv2@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: February 9, 2023.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–03127 Filed 2–13–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; 60-Day Comment Request; Generic Clearance for NIH Citizen Science and Crowdsourcing Projects (Office of the Director)

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995 to provide opportunity for public comment on proposed data collection projects, the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

DATES: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

FOR FURTHER INFORMATION CONTACT: To obtain a copy of the data collection plans and instruments, submit comments in writing, or request more information on the proposed project, contact: Mikia Currie, Chief, Project Clearance Branch (PCB), Office of Policy and Extramural Research Administration (OPERA), Office of the Director (OD), Office of Extramural Research (OER), NIH, 6705 Rockledge Drive, Bethesda, Maryland 20892, MSC 7980, or call non-toll-free number (301) 435–0941 or email your request, including your address to: *ProjectClearanceBranch@mail.nih.gov.*

SUPPLEMENTARY INFORMATION: Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires: written comments and/or suggestions from the public and affected agencies are invited to address one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Proposed Collection: Generic Clearance for NIH Citizen Science and Crowdsourcing Projects—0925–0766—exp., date 04/30/2023, EXTENSION, Project Clearance Branch (PCB), Office of Policy and Extramural Research Administration (OPERA), Office of the Director (OD), Office of Extramural Research (OER), National Institutes of Health (NIH).

Need and Use of Information Collection: Projects under this generic clearance will allow Agency researchers and program staff to test ideas more quickly, respond to the project's needs

as they evolve, and incorporate feedback from participants for flexible, innovative research methods. The purpose of this information collection is to:

- Accelerate scientific research
- Increase cost-effectiveness to maximize the return on taxpayer dollars
- Address societal needs
- Provide hands-on learning in STEM education
- Connect members of the public directly to federal science missions and each other
- Identify and disseminate resources more broadly to the public, on the Institutes' and Centers' websites, and/or
- Collect information for Agency internal use to improve scientific practices and/or assist in scientific reviews

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 18,584.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of collection	Number of respondents	Number of responses per respondent	Time per response (in hours)	Total hours
Call for Nominations/Resources	1,000	1	10/60	167
Recommendations of scientific reviewers	1,000	1	5/60	83
Request for Population Characteristics	20,000	1	5/60	1,667
Repository of Tools and Best Practices	100,000	1	10/60	16,667
Total		122,000		18,584

Dated: February 7, 2023.

Tara A. Schwetz,

Acting Principal Deputy Director, National Institutes of Health.

[FR Doc. 2023–03062 Filed 2–13–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; 60-Day Comment Request; Early Career Reviewer Program Online Application and Vetting System—Center for Scientific Review (CSR)

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995 to provide opportunity for public comment on proposed data collection projects, the Center for Scientific Review (CSR) National Institutes of Health will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

DATES: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

FOR FURTHER INFORMATION CONTACT: To obtain a copy of the data collection plans and instruments, submit comments in writing, or request more information on the proposed project, contact: Dr. Hope Cummings, Project Clearance Liaison, Center for Scientific Review, NIH, Room 907–M, 6701 Rockledge Drive, Bethesda, Maryland 20892 or call non-toll-free number (301) 402–4706 or Email your request, including your address to: *hope.cummings@nih.gov.* Formal requests for additional plans and instruments must be requested in writing.

SUPPLEMENTARY INFORMATION: Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires: written comments and/or suggestions from the public and affected agencies are invited to address one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Proposed Collection Title: Early Career Reviewer Program Online Application and Vetting System—Center for Scientific Review (CSR), 0925–0695, exp., date 06/30/2023—REVISION, Center for Scientific Review (CSR), National Institutes of Health (NIH).

Need and Use of Information Collection: The Center for Scientific Review (CSR) is the portal for NIH grant applications and their review for scientific merit. Our mission is to see that all NIH grant applications receive fair, independent, expert, and timely reviews—free from inappropriate influences—so NIH can fund the most promising research. To accomplish this goal, Scientific Review Officers (SRO) form study sections consisting of scientists who have the technical and scientific expertise to evaluate the merit of grant applications. Study section members are generally scientists who have established independent programs of research as demonstrated by their publications and their grant award experiences.

The CSR Early Career Reviewer program was developed to identify and train qualified scientists who are early in their scientific careers and who have not had prior CSR review experience. The goals of the program are to expose these early career scientists to the peer review experience so that they become more competitive as applicants as well as to enrich the existing pool of NIH reviewers. Currently, the online application software, the Early Career Reviewer Application and Vetting System, is accessed online by applicants to the Early Career Reviewer Program who provide information such as their name, contact information, a description of their areas of expertise, their study section preferences, and their professional Curriculum Vitae. This Information Collection Request (ICR) is to revise the Early Career Reviewer Application and Vetting System by removing several socio-demographic questions.

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total

estimated annualized burden hours are 555.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Number of respondents	Number of responses per respondent	Average time per response (in hours)	Total annual burden hours
Research scientists	1332	1	25/60	555
Total		1332		555

Hope M. Cummings,

Project Clearance Liaison, Center for Scientific Review (CSR), National Institutes of Health.

[FR Doc. 2023–03130 Filed 2–13–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–6366–N–01]

Request for Information Regarding Rehabilitation Mortgages

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, Department of Housing and Urban Development, HUD.

ACTION: Request for information.

SUMMARY: Through this Request for Information (RFI), the Federal Housing Administration (FHA) seeks public input regarding barriers to the use of the FHA 203(k) Rehabilitation Mortgage Insurance Program (203(k) Program) by lenders and consumers. Information provided in response to this RFI will allow FHA to identify barriers that limit the origination of 203(k) insured mortgages and lender participation in the program and consider opportunities to enhance the 203(k) Program to support HUD's goal of increasing the available supply of affordable housing in underserved communities.

DATES: Comments are requested on or before April 17, 2023. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Interested persons are invited to submit comments responsive to this RFI. Copies of all comments submitted are available for inspection and downloading at *www.regulations.gov.*

To receive consideration as public comments, comments must be submitted through one of the two methods specified below. All submissions must refer to the above docket number and title. Commenters are encouraged to identify the number of the specific question or questions to which they are responding. Responses should include the name(s) of the person(s) or organization(s) filing the comment; however, because any responses received by HUD will be publicly available, responses should not include any personally identifiable information or confidential commercial information.

1. Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.*

HUD strongly encourages commenters to submit their feedback and recommendations electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a response, ensures timely receipt by HUD, and enables HUD to make comments immediately available to the public. Comments submitted electronically through the *http://www.regulations.gov* website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

2. Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410–0500.

Public Inspection of Public Comments. All comments and communications properly submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at (202) 708–3055 (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit: *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.* Copies of all comments submitted are available for inspection and downloading at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Elissa Saunders, Director, Office of Single Family Program Development, Department of Housing and Urban Development, 451 7th Street SW, Room 9266, Washington, DC 20410–0500; telephone number 202–402–2378 (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit: *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.* **SUPPLEMENTARY INFORMATION:**

I. Background

The Department of Housing and Urban Development (HUD) is committed to the advancement of its mission [1] objectives to facilitate the provision of safe, affordable, and equitable housing for American households and communities.[2] A component of HUD's 2022–2026 Strategic Plan [3] is the integration of ''the customer perspective into everything the Department does to make its interactions feel easy, effective, positive, and equitable.'' The plan also seeks to ''Increase the Supply of Housing'' [4] ensuring all households have access to quality, affordable homes, and use any resources available to strengthen the national housing supply and preserve

[1] HUD Mission *at https://www.hud.gov/about/mission.*

[2] One of FHA's statutory operational goals for the Mutual Mortgage Insurance Fund is to ''to meet the housing needs of the borrowers that the single family mortgage insurance program . . . is designed to serve.'' 12 U.S.C. 1708(a)(7).

[3] FY2022–2026 HUD Strategic Plan *at https://www.hud.gov/sites/dfiles/CFO/documents/FY2022-2026HUDStrategicPlan.pdf.*

[4] *Id.*

existing housing. Removing barriers to HUD programs and enhancing HUD programs, such as the FHA 203(k) Program, can help support HUD's goal of increasing the available supply of affordable housing in underserved communities.

The 203(k) Program is used to finance the rehabilitation of an existing one-to-four unit structure [5] that will be used primarily for residential purposes. Mortgages insured through the 203(k) Program can be used to rehabilitate an eligible structure and refinance outstanding indebtedness on the structure and the real property on which it is located; purchase and rehabilitate a structure and purchase the real Property on which the structure is located; or rehabilitate the interior space of an eligible Condominium Unit excluding areas that are the responsibility of a Condominium Association.

The 203(k) Program is an important tool for community and neighborhood revitalization and the expansion of homeownership opportunities for owner-occupant homebuyers.

There are two types of 203(k) Rehabilitation Mortgages: Standard 203(k) Mortgage and the Limited 203(k) Mortgage. The Standard 203(k) Mortgage Insurance Program may be used for remodeling and major repairs, has a minimum repair cost of $5,000, and requires the use of a 203(k) Consultant. The Limited 203(k) Mortgage Insurance Program is used for minor remodeling and non-structural repairs, has a maximum repair cost of $35,000, except for properties located in Qualified Opportunity Zones [6] (QOZs) where the maximum repair cost is $50,000, and does not require the use of a 203(k) Consultant.

A 203(k) Mortgage may also be used in conjunction with any of FHA's energy efficient programs including the Energy Efficient Mortgages (EEM), Weatherization, and Solar and Wind Technologies programs to finance the costs of energy efficient improvements to an existing Property at the time of purchase or refinance, or to upgrade such energy efficient improvements to exceed the established residential building code for New Construction.

II. Purpose of This Request for Information

The purpose of this RFI is to solicit information regarding barriers to the origination of mortgages under the FHA 203(k) Program and to obtain feedback on ways FHA could improve its policies and programs to expand the preservation, renovation, and expansion of housing through its rehabilitation mortgage programs and policies.

III. Specific Information Requested

HUD welcomes all comments relevant to expanding the 203(k) Program. HUD is particularly interested in receiving input from interested parties on the questions below.

1. What information can you provide regarding ways in which the FHA 203(k) Program does or does not meet the needs of borrowers seeking to renovate or rehabilitate their homes?

2. What policies or processes governing the 203(k) Program could be streamlined, modified, or eliminated to enhance your experience with the 203(k) Program?

3. How could FHA increase participation in the 203(k) Program?

4. The Standard 203(k) Program relies on a 203(k) Consultant to determine if a property meets the requirements of the program. What changes would you recommend to FHA's 203(k) Consultant requirements to enhance the program while ensuring a subject property would, after improvements, meet FHA's Minimum Property Requirements (MPR) or Minimum Property Standards (MPS)?

5. What methods would you recommend HUD use to increase stakeholders' awareness about FHA's 203(k) Program?

6. Supporting local authorities' efforts to preserve and expand single-family housing is an important goal of HUD's strategic plan. Please describe how HUD could better support local authorities' efforts to increase the stock of available and affordable single family housing using the 203(k) Program, especially in underserved communities. What role could the program play in improving the supply of available housing in underserved communities?

7. How can the 203(k) Program or other energy efficiency programs (Weatherization, Solar and Wind Technologies, and FHA's EEM) better align with existing federal, state, or local energy efficiency programs?

8. What state or local regulations impact the use of FHA's 203(k) Program?

9. The 203(k) Program parameters limit the types of eligible properties and improvements. Please describe any rehabilitation needs not served or underserved due to the existing program requirements and how could the 203(k) Program be enhanced to address those needs.

10. The 203(k) Program is currently underutilized by nonprofits and governmental entities. What type of changes would encourage more nonprofits and governmental entities to increase their participation in the program?

11. What are the benefits or drawbacks to re-opening the 203(k) Program to other parties that acquire and rehabilitate distressed single-family properties in underserved communities?

12. What technology solutions could improve the availability of, or facilitate, the 203(k) Program?

13. Currently, HUD-approved housing counseling agencies provide advice about FHA-insured loans to potential and current homeowners. Should housing counseling agencies play a more significant role in educating consumers about the FHA 203(k) program?

14. What are the advantages and disadvantages of the 203(k) Program compared to other sources of rehabilitation financing? Are there changes to the program you recommend in light of these?

15. Are there any requirements of the 203(k) program that might restrict utilization by any underserved groups of borrowers and what changes could HUD make to the program to encourage more utilization by these groups?

Julia R. Gordon,

Assistant Secretary for Housing—FHA Commissioner.

[FR Doc. 2023–03089 Filed 2–13–23; 8:45 am]

BILLING CODE 4210–67–P

[5] This type of structure refers to a building that has a roof and walls, stands permanently in one place, and contains single or multiple housing units that are used for human habitation.

[6] QOZ only applies to the first 15,000 Mortgages per calendar year from 2019 to 2028. See HUD Handbook 4000.1, Section II.A.8.(a)(i)(A)(2).

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7076–N–02]

60-Day Notice of Proposed Information Collection: Public Housing Capital Fund Program; OMB Control No.: 2577–0157

AGENCY: Office of the Assistant Secretary for Public and Indian Housing (PIH), HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* April 17, 2023.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal.

Written comments and recommendations for the proposed information collection can be sent within 60 days of publication of this notice to *OIRA_submission@omb.eop.gov* or *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 60-day Review—Open for Public Comments'' or by using the search function.

Interested persons are also invited to submit comments regarding this proposal by name and/or OMB Control Number and can be sent to: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 4176, Washington, DC 20410–5000; telephone 202–402–3400 (this is not a toll-free number) or email at *Colette.Pollard@hud.gov* for a copy of the proposed forms or other available information.

FOR FURTHER INFORMATION CONTACT: Erica Mahoney, Office of Policy, Programs and Legislative Initiatives, PIH, Department of Housing and Urban Development, 451 7th Street SW, (L'Enfant Plaza, Room 2206), Washington, DC 20410; telephone 202–402–4109, (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.* Copies of available documents submitted to OMB may be obtained from Ms. Mahoney.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in section A.

A. Overview of Information Collection

Title of Information Collection: Public Housing Capital Fund Program.

OMB Approval Number: 2577–0157.

Type of Request: Extension of currently approved collection.

Form Numbers: HUD Form 50075.1, HUD–5084, HUD–5087, HUD–51000, HUD–51001, HUD–51002, HUD–51003, HUD–5104, HUD–51915, HUD–51915–A, HUD–51971–I–II, HUD–52396, HUD–52427, HUD–52482, HUD–52483–A, HUD–52484, HUD–52485, HUD–52651–A, HUD–52829, HUD–52830, HUD–52833, HUD–52845, HUD–52846, HUD–52847, HUD–52849, HUD–53001, HUD–53015, HUD–5370, HUD–5370EZ, HUD–5370C, HUD–5372, HUD–5378, HUD–5460, HUD–52828, 50071, 5370–C1, 5370–C2.

Description of the need for the information and proposed use: Each year Congress appropriates funds to approximately 3,015 Public Housing Authorities (PHAs) for modernization, development, financing, and management improvements. The funds are allocated based on a complex formula. The forms in this collection are used to appropriately disburse and utilize the funds provided to PHAs. Additionally, these forms provide the information necessary to approve a financing transaction in addition to any Capital Fund Financing transactions. Respondents include the approximately 3,015 PHA receiving Capital Funds and any other PHAs wishing to pursue financing.

Respondents: Public Housing Authorities.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
HUD–5084	3,015	1	3,015	1.5	4,522.50	$34	$153,765
HUD–5087	50	1	50	3	150	56	8,400
HUD–50071	10	1	10	0.5	5	56	280
HUD–50075.1	300	1	300	2.2	660	34	204,600
HUD–51000	590	1	590	1	590	34	20,600
HUD–51001	2,550	12	30,600	3.5	107,100	34	3,641,000
HUD–51002	1,600	5	8,000	1	8,000	34	272,000
HUD–51003	500	2	1,000	1.5	1,500	34	51,000
HUD–51004	500	2	1,000	2.5	2,500	34	85,000
HUD–51915 and HUD–51915–A	2,630	1	2,630	3	7,890	34	268,260
HUD–51971–I, II	80	1	80	1.5	120	34	4,080
HUD–52396	96	1	96	2	192	34	6,528
HUD–52427	88	1	88	0.5	44	34	1,496
HUD–52482	40	1	40	2	80	34	2,720
HUD–52483–A	40	1	40	2	80	34	2,720
HUD–52484	532	4	2,128	10	21,280	34	723,520
HUD–52485	40	1	40	1	40	34	1,360
HUD–52651–A	40	1	40	2.5	100	34	3,400
HUD–52829	25	1	25	40	1000	56	56,000
HUD–52830	25	1	25	16	400	56	22,400
HUD–52833	3,015	1	3,015	13	30,915	34	1,332,630
HUD–52836	10	1	10	0.5	.....	56	280
HUD–52845	25	1	25	8	200	56	11,200
HUD–52846	25	1	25	16	400	56	22,400
HUD–52847	25	1	25	8	200	56	11,200
HUD–52849	25	1	25	1	25	56	1,400
HUD–53001	3,015	1	3,015	2.5	7,537	34	256,275
HUD–53015	40	1	40	3	120	34	4,080
HUD–5370, 5370EZ	2,694	1	2,694	1	2,694	34	91,596
HUD–5370C	2,694	1	2,694	1	2,694	34	91,596
HUD–5372	590	1	590	1	590	34	20,060
HUD–5378	158	24	3,792	0.25	948	34	32,232
HUD–5460	40	1	40	1	40	34	1,360
Public Housing Information Center Certification of Accuracy	3,015	1	3,015	2	6,030.00	34	186,000

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
HUD–52828 Physical Needs Assessment form	3,015	1	3,015	15.4	46,431	56	2,600,136
Broadband Feasibility determination	3,015	1	3,015	10	30,150	56	1,688,400
Totals					−293,593.00		11,716,694

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(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;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Steven Durham,

Acting Chief, Office of Policy, Programs and Legislative Initiatives.

[FR Doc. 2023–03087 Filed 2–13–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–HQ–FAC–2023–0002; FXFR131109WFHS0–234–FF09F12000; OMB Control Number 1018–0078]

Agency Information Collection Activities; Injurious Wildlife; Importation Certification for Live Fish and Fish Eggs

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the U.S. Fish and Wildlife Service (Service), are proposing to renew an information collection with revisions.

DATES: Interested persons are invited to submit comments on or before April 17, 2023.

ADDRESSES: Send your comments on the information collection request (ICR) by one of the following methods (please reference 1018–0078 in the subject line of your comments):

- *Internet (preferred): https://www.regulations.gov.* Follow the instructions for submitting comments on Docket No. FWS–HQ–FAC–2023–0002.
- *Email: Info_Coll@fws.gov.*
- *U.S. mail:* Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, MS: PRB (JAO/3W), Falls Church, VA 22041–3803.

FOR FURTHER INFORMATION CONTACT: Madonna L. Baucum, Service Information Collection Clearance Officer, by email at *Info_Coll@fws.gov,* or by telephone at (703) 358–2503. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act (PRA, 44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR 1320.8(d)(1), all information collections require approval under the PRA. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies 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.

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. 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 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 Lacey Act (Act; 18 U.S.C. 42) prohibits the importation of any animal deemed to be and prescribed by regulation to be injurious to:

- Human beings;
- The interests of agriculture, horticulture, and forestry; or
- Wildlife or the wildlife resources of the United States.

Implementation and enforcement of the Lacey Act are the responsibility of

the Department of the Interior. The implementing regulations at 50 CFR 16.13 allow for the importation of dead uneviscerated salmonids (family Salmonidae), live salmonids, live fertilized eggs, or gametes of salmonid fish into the United States. To effectively carry out our responsibilities and protect the aquatic resources of the United States, we must collect information regarding the source, destination, and health status of salmonid fish and their reproductive parts. Moreover, in order to evaluate import requests, we must be able to ascertain that the collected information is accurate. Individuals who provide the fish health data and sign the health certificates must demonstrate professional qualifications and be approved as Title 50 Certifiers by the Fish and Wildlife Service through an application process.

We use three forms to collect this Title 50 Certifier application information:

- FWS Form 3–2273 (Title 50 Certifying Official Form)—New applicants and those seeking recertification as a title 50 certifying official provide information so that we can assess their qualifications.
- FWS Form 3–2274 (Title 50 Certification Form)—Certifying officials use this form to affirm the health status of the fish or fish reproductive products to be imported.
- FWS Form 3–2275 (Title 50 Importation Request Form)—We use the information on this form to track and control importations and to ensure the safety of shipments.

Proposed Revisions

With this renewal, we propose to modify Forms 3–2274 and 3–2275 to add fields to collect email addresses and contact numbers with each submission. We do not plan to revise Form 3–2273, which already collects this information. We also plan to begin publishing, with OMB approval, the results of this information collection for Form 3–2273 on a publicly accessible, Service-managed web page to inform importers of Certified Signing Officials by country of origin.

The public may request copies of any form contained in this information collection by sending a request to the Service Information Collection Clearance Officer (see **ADDRESSES**).

Title of Collection: Injurious Wildlife; Importation Certification for Live Fish and Fish Eggs (50 CFR 16.13).

OMB Control Number: 1018–0078.

Form Numbers: FWS Forms 3–2273, 3–2274, and 3–2275.

Type of Review: Revision of a currently approved collection.

Respondents/Affected Public: Aquatic animal health professionals seeking to be certified title 50 inspectors; certified title 50 inspectors who perform health certifications on live salmonids; and any entity wishing to import live salmonids or salmonid reproductive products into the United States.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: None.

Requirement	Annual number of respondents	Total annual responses	Completion time per response	Total annual burden hours
FWS Form 3–2273 (Title 50 Certifying Official Form)				
Private Sector	20	20	1 hour	20
Government	7	7	1 hour	7
FWS Form 3–2274 (U.S. Title 50 Health Certification Form)				
Private Sector	20	40	30 minutes	20
Government	15	30	30 minutes	15
FWS Form 3–2275 (Title 50 Importation Request Form)				
Private Sector	20	40	15 minutes	10
Government	15	30	15 minutes	8
Totals	97	167		80

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.*).

Madonna Baucum,

Information Collection Clearance Officer, U.S. Fish and Wildlife Service.

[FR Doc. 2023–03090 Filed 2–13–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–HQ–IA–2022–0142; FXIA167109CWT01/234/FF09A40000; OMB Control Number 1018-New]

Agency Information Collection Activities; CITES Masters Course

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the U.S. Fish and Wildlife Service (Service), are proposing a new information collection in use without Office of Management and Budget (OMB) approval.

DATES: Interested persons are invited to submit comments on or before April 17, 2023.

ADDRESSES: Send your comments on the information collection request (ICR) by one of the following methods (please reference 1018–CITES in the subject line of your comments):

- *internet (preferred): https://www.regulations.gov.* Follow the instructions for submitting comments on Docket No. FWS–HQ–IA–2022–0142.
- *Email: Info_Coll@fws.gov.*
- *U.S. mail:* Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, 5275 Leesburg

Pike, MS: PRB (JAO/3W), Falls Church, VA 22041–3803.

FOR FURTHER INFORMATION CONTACT: Madonna L. Baucum, Service Information Collection Clearance Officer, by email at *Info_Coll@fws.gov,* or by telephone at (703) 358–2503. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act (PRA, 44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR 1320.8(d)(1), all information collections require approval under the PRA. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies 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.

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. 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 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: Wildlife trafficking ranks as the second greatest threat to species survival after habitat destruction. The United States (U.S.) recognizes wildlife trafficking as a serious transnational crime that threatens thousands of plant and animal species and undermines U.S. priorities, including national security, human health, and economic growth. The Service employs a science-based approach to counter wildlife trafficking, including through the implementation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). CITES is the sole global treaty dedicated to preventing the unsustainable trade in plants and animals and is an essential component to counter illegal wildlife trade as it provides mechanisms and incentives to effectively manage natural resources. The U.S. has been a Party to the Convention since 1973. Under the Endangered Species Act, the Service has been designated to carry out the provision of CITES for the U.S.

As one of the largest and oldest environmental treaties in the world, CITES is a key conservation tool for the protection of 35,000 plant and animal species. Currently 183 countries have agreed to implement the Convention. However, realizing the full conservation impact of CITES remains challenging and is highly dependent on each country's financial and technical capacity. Even when a Party has the political will and desire to implement CITES, it may not have the resources, systems, or personnel to effectively follow the Conventions' mandate, such as evaluating permit applications or enforcing laws. This creates inequity between countries in how the Convention is implemented, with serious downstream impacts such as the degradation of wild populations and ecosystems, often resulting in negative implications for communities living among wildlife.

To help develop the technical expertise necessary to effectively implement CITES, the International University of Andalucía (UNIA) has offered a unique master's degree program entitled ''The Management and Conservation of Species in Trade: The International Framework'' (also known as the ''CITES Master's Course''). The program, which was established in 1997, provides high-quality training focusing on the scientific foundations, techniques and mechanisms of CITES implementation. Approximately 400 students have graduated from the program, many becoming leaders in CITES and global policy.

Recognizing the important potential offered through UNIA's CITES Master's Course, the Service provides scholarships to support wildlife professionals interested in furthering their CITES expertise by partaking in the CITES Master's Course, with a focus on countries most vulnerable to illegal and unsustainable wildlife trade. The competitive scholarships cover costs for tuition, lodging, and supplies, provide an opportunity for the scholars to participate in the CITES Conference of the Parties, and offer technical and financial research support.

The Service collaborates with the Department of Interior's International Technical Assistance Program (DOI–ITAP) through an interagency agreement to manage the numerous logistics associated with the scholarships. Scholarships support cohorts of students from Latin America, the Caribbean, and Central and East Africa. The Service and DOI–ITAP staff solicit recommendations from relevant CITES authorities, NGOs, and U.S. Government agencies working in those countries to select top candidates for the scholarships. Recommendations are provided through direct communication with project leads, most often via email communication. Project leads review application packages submitted by candidates for the program.

We choose candidates based on certain criteria such as the quality of their application, their present or future contribution to their country's CITES work, and their demonstration of a lasting commitment to wildlife conservation and CITES implementation. Selected candidates then follow a separate application process for acceptance into the International University of Andalucía CITES Master's Course. Although scholarship activities aid the candidates to assemble and submit application materials the University, the U.S. Government does not influence who is accepted into the graduate program.

We ask the successful scholars accepted into the master's program to assist in project monitoring and evaluation by responding to periodic assessment surveys throughout the

course of their one-year graduate experience so project officers can gauge the impact and effectiveness of the training. After graduating, the scholars are requested to fill out an assessment to further our understanding of the course's impact. We also ask students to help develop communication and outreach materials to share the impacts of the scholarships with partners and the public.

Course enrollees are asked to complete pre- and post-training assessments which collects the following information:

- Trainee information, to include:

—Name,
—Gender,
—Age range,
—Institution represented,
—Job title/position,
—Contact information such as their include complete address, phone numbers, and email, and
—Country.

- Trainee's assessment of training—Questions provide participants an opportunity to offer feedback on their training to help inform how we can improve project activities and goals.
- Potential effect of training on the trainee's job—Questions provide an opportunity for participants to share how the technical training provided through the scholarships may open professional opportunities.
- Knowledge of biodiversity and CITES—Questions are designed to measure the impact of training by quantifying changes in each participant's knowledge of biodiversity and CITES between pre- and post-training assessments.
- Capacity to apply knowledge on biodiversity and CITES—Questions are designed to measure the impact in training by quantifying changes in knowledge between pre- and post-training assessments.

The Service will use the information collected to ensure project activities are meeting high project standards and are achieving intended outcomes. In addition, information collected for project outreach and communication will be used to inform the public on project outcomes and to garner interest in future scholarship opportunities.

The public may request copies of the application form contained in this information collection by sending a request to the Service Information Collection Clearance Officer in **ADDRESSES**, above.

Title of Collection: CITES Masters Course.

OMB Control Number: 1018–New.

Form Number: None.

Type of Review: Existing information collection in use without OMB approval.

Respondents/Affected Public: Program participants from foreign public sector and foreign government entities.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: Annually.

Total Estimated Annual Nonhour Burden Cost: None.

Requirement	Average number of annual respondents	Average number of responses each	Average number of annual responses	Average completion time per response	Estimated annual burden hours *
Nomination/Application:					
Private Sector	3	1	3	1 hour	3
Government	30	1	30	1 hour	30
Pre-Assessment Questionnaire:					
Private Sector	1	1	1	20 minutes	0
Government	14	1	14	20 minutes	5
Post-Assessment Questionnaire:					
Private Sector	1	1	1	20 minutes	0
Government	14	1	14	20 minutes	5
Totals	*63*		*63*		*43*

* Rounded.

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.*).

Madonna Baucum,

Information Collection Clearance Officer, U.S. Fish and Wildlife Service.

[FR Doc. 2023–03092 Filed 2–13–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–HQ–NWRS–2022–N079; FF09R23000–223–FXRS126109WH000; OMB Control Number 1018–New]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; U.S. Fish and Wildlife Service Bison Donations Request Program

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the U.S. Fish and Wildlife Service (Service), are proposing a new information collection in use without Office of Management and Budget (OMB) approval.

DATES: Interested persons are invited to submit comments on or before March 16, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. Please provide a copy of your comments to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS: PRB (JAO/3W), 5275 Leesburg Pike, Falls Church, VA 22041–3803 (mail); or by email to *Info_Coll@fws.gov.* Please reference ''1018-Bison'' in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: Madonna L. Baucum, Service Information Collection Clearance Officer, by email at *Info_Coll@fws.gov,* or by telephone at (703) 358–2503. You may review the ICR online at *http://www.reginfo.gov.* Follow the instructions to review Department of the Interior collections under review by OMB. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act (PRA, 44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR 1320.8(d)(1), all information collections require approval under the PRA. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

On August 12, 2022, we published in the **Federal Register** (87 FR 49878) a notice of our intent to request that OMB approve this information collection. In that notice, we solicited comments for 60 days, ending on October 11, 2022. In an effort to increase public awareness of, and participation in, our public commenting processes associated with information collection requests, the Service also published the **Federal Register** notice on *Regulations.gov* (Docket No. FWS–HQ–NWRS–2022–0087) to provide the public with an additional method to submit comments (in addition to the typical *Info_Coll@fws.gov* email and U.S. mail submission methods). We received the following comments in response to that notice:

Comment 1: Electronic comment received via *Regulations.gov* (FWS–HQ–NWRS–2022–0087–0002) from Jean Publiee on August 13, 2022. The comment did not address the information collection requirements.

Agency Response to Comment 1: The comment did not address the information collection requirements. No response required.

Comment 2: Anonymous electronic comment received via *Regulations.gov* (FWS–HQ–NWRS–2022–0087–0003) on September 1, 2022. The comment did not address the information collection requirements.

Agency Response to Comment 2: The comment did not address the information collection requirements. No response required.

Comment 3: Anonymous electronic comment received via *Regulations.gov* (FWS–HQ–NWRS–2022–0087–0004) on October 10, 2022. The comment did not address the information collection requirements.

Agency Response to Comment 3: The comment did not address the information collection requirements. No response required.

Comment 4: Electronic comment received via *Regulations.gov* (FWS–HQ–NWRS–2022–0087–0005) from Troy Heinert, as representative of InterTribal Buffalo Council (ITBC), on October 11, 2022. The comment provided background information for ITBC as an organization serving 78 member Tribes in 20 States, serving over 1 million enrolled Tribal members. The comment referenced past successful collaboration with the Service to restore buffalo to Tribal lands and affirmed the commitment of ITBC to seek future collaborations. While the comment stated that the form does not fully articulate what many Tribes are doing with the donated animals, it acknowledges that it is difficult to put a number on animals that may be intended for multiple purposes. The comment identifies ITBC's capacity to facilitate and implement bison donations from Service-managed herds.

Agency Response to Comment 4: ITBC's internal Surplus Buffalo Program Request for Proposals process helps facilitate bison donations from Service-managed herds through requests from member Tribes, and we incorporated ITBC comments provided in past years into the form. The Service looks forward to continuing our successful collaboration with ITBC to help restore bison as native North American wildlife to Tribal lands.

Comment 5: Email comment submitted to Bison Donation Request Form Outreach Coordinator on October 6, 2022, from Joshua Wiese, Range Manager of the Crane Trust. The comment states the questions and validations are warranted, and the form only takes about 10 minutes to read through and fill out completely. The comment suggested that additional clarification be added for bison use categories, and that an online platform/survey/questionnaire alternative might provide additional accessibility and speed up the process.

Agency Response to Comment 5: Comment validated the minimal time investment to complete the form. Descriptions of bison use categories are included in the text of the form, followed by a clear definition prefaced in bold font. Many donation requestors do not utilize electronic web-based platforms or the electronic fillable PDF with electronic signatures. Transitioning to a fully online system would likely exclude many applicants with less reliable internet access and would limit access to many of the communities which the form currently serves.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies 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.

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. 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 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 Service's ''*Bison Donations Transfer Protocol*'' (protocol) describes the process for the donation of the available surplus bison from the Service to eligible organizations, Tribes, or intertribal organizations as outlined in regulations at 50 CFR 30.1, as well as in Service Manual chapters 701 FW 5 and 701 FW 8. Surplus bison are

offspring that exceed the ecological carrying capacity of the Service bison metapopulation. The primary purposes of donating these bison are to support conservation of the species as native North American wildlife and to assist in the restoration of bison herds on conservation partner lands, with special emphasis on restoring conservation herds to Tribal lands. Our authorities governing the Protocol include:

- National Wildlife Refuge System Administration Act (16 U.S.C. 668dd and 668ee, as amended);
- American Indian Religious Freedom Act (Public Law 95–341);
- Indian Self-Determination and Education Assistance Act (Public Law 93–638, as amended);
- Surplus Range Animals (50 CFR 30.1);
- Disposition of Surplus Range Animals (50 CFR 30.2);
- Native American Policy of the U.S. Fish and Wildlife Service (510 FW 1);
- Fenced Animal Management policy (701 FW 8); and
- Collections, Donations, and Disposals policy (701 FW 5).

In 2020, the U.S. Department of the Interior (DOI) Bison Working Group published the *Department of the Interior Bison Conservation Initiative 2020* (initiative), recognizing bison as a wildlife species in need of conservation. Consistent with this initiative, Service policy identifies the ecological and cultural values of bison as nationally and/or historically significant animals.

The *Bison Conservation Genetics Workshop: Report and Recommendations* (2010 report) identifies DOI bison herds as a valuable source with which to start new conservation herds proposed by other Federal, State/provincial, or Tribal governments. The *DOI Bison Report: Looking Forward* (2014 report) acknowledges the challenges to achieving bison restoration on DOI lands and emphasizes the importance of partnerships for achieving bison conservation and ecological restoration. Both the 2010 and 2014 reports also identify the potential for bison herds maintained by Indian Tribes to contribute to species conservation, and the Service recognizes that such bison may also support Tribal cultural rights and practices.

Periodic reduction in the size of Service bison herds is required to remain within the ecological carrying capacity of Service lands. Live bison capture and removal assist in the restoration of bison to Tribal lands, support the efforts of States and other conservation organizations, and ensure that the ecological needs of other species are met on refuges of limited size. To support maximum conservation of genetic diversity within and across Service herds, selection of young bison available for donation is coordinated across all refuges. From the surplus bison made available for donation from refuges, requests will be prioritized for bison restoration and conservation purposes.

We propose Form 3–2555, ''Bison Donations Request Form,'' to request surplus bison. Respondents will generally be from Tribal governments and intertribal organizations, although we do expect to receive a small number of requests from States and private sector organizations (nonprofit and educational/research organizations). The request form provides details governing the protocol and collects the following information:

- Name of requesting Tribe, intertribal organization, State, or private sector organization.
- Documentation that the proposed project or program meets the definition of a conservation herd.
- Demonstration of the educational contribution of the donation to increasing public knowledge and appreciation of the wildlife values of bison (for educational and research organizations only).
- Total number (or percentage of total donation request) of bison and purpose of request:

—Establish a free-ranging conservation herd;
—Supplement or augment a free-ranging conservation herd;
—Establish a self-sustaining herd for non-conservation purposes;
—Supplement or augment a self-sustaining herd for non-conservation purposes;
—Public display, educational purposes and/or research;
—Tribal spiritual or cultural purposes; or
—A description if ''Other'' purpose.

- Signature of requesting Tribe, intertribal organization, State, or private sector organization official.

In addition to completion of Form 3–2555, recipients of donated bison must inform the Service of the destination State for donated bison no fewer than 30 days prior to a scheduled bison capture operation, to allow the Service time to meet interstate transport regulatory testing requirements. Recipients of donated bison must also inform the Service of the destination physical address for donated bison no fewer than 10 days prior to scheduled bison loadout, to facilitate timely completion of required interstate veterinary permit applications and veterinary inspection certificates.

The public may download a copy of the proposed Form 3–2555 from the ICR on at *http://www.reginfo.gov.* Follow the instructions to review Department of the Interior collections under review by OMB.

Title of Collection: U.S. Fish and Wildlife Service Bison Donations Request Program.

OMB Control Number: 1018–New.

Form Number: 3–2555.

Type of Review: Existing collection in use without an OMB control number.

Respondents/Affected Public: Private sector organizations and State/local/Tribal governments.

Respondent's Obligation: Voluntary.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: There is no cost associated with the Protocol.

Requirement	Average number of annual respondents	Average number of responses each	Average number of annual responses *	Average completion time per response (hour)	Estimated annual burden hours *
Submission of Form 3–2555:					
Private Sector	2	1	2	1	2
Government	18	1	18	1	18
Required Notifications:					
Private Sector	2	2	4	.5	2
Government	18	2	36	.5	18
Totals	*40*		*60*		*40*

* Rounded.

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.*).

Madonna Baucum,

Information Collection Clearance Officer, U.S. Fish and Wildlife Service.

[FR Doc. 2023–03091 Filed 2–13–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

[23XD4523WS/DWSN00000.000000/DS61500000/DP.61501]

Notice of Public Meeting of the Invasive Species Advisory Committee

AGENCY: National Invasive Species Council, Interior.

ACTION: Notice of public meeting.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act, notice is hereby given that the Invasive Species Advisory Committee (ISAC) will meet as indicated below.

DATES: The Invasive Species Advisory Committee will convene by Zoom virtual platform on Monday, March 6, 2023, 1:00 p.m.–3:00 p.m.; Tuesday, March 7, 2023, 1:00 p.m.–5:00 p.m.; and Wednesday, March 8, 2023, 1:00 p.m.–5:00 p.m.

ADDRESSES: The final agenda will be available on the National Invasive Species Council (NISC) website at least 48 hours in advance of the meeting at *https://www.invasivespecies.gov.* Registration is required (see **SUPPLEMENTARY INFORMATION**).

FOR FURTHER INFORMATION CONTACT: For information concerning attending the ISAC meeting, submitting written comments to the ISAC, or requesting to address the ISAC, contact Kelsey Brantley, NISC Operations Director and ISAC Coordinator, National Invasive Species Council Staff, telephone (202) 577–7012; fax: (202) 208–4118, or email *kelsey_brantley@ios.doi.gov.*

Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: The purpose of the ISAC is to provide advice to the NISC, as authorized by Executive Orders 13112 and 13751, on a broad array of issues related to preventing the introduction of invasive species and providing for their control and minimizing the economic, ecological, and human health impacts that invasive species cause. NISC is co-chaired by the Secretary of the Interior, the Secretary of Agriculture, and the Secretary of Commerce. The duty of NISC is to provide national leadership regarding invasive species issues.

The purpose of the virtual meetings is to convene the full ISAC to orient new members to NISC and their role in ISAC, receive updates from NISC member agencies regarding ongoing priority activities; and start deliberations on select issues warranting ISAC advice to NISC.

Meeting Registration: Due to the limited number of connections available, individuals must register no later than Friday, March 3, 2023; 3:00 p.m. ET at: *https://forms.office.com/g/dna7MJd8Mn.*

Meeting Agenda. The meeting will be conducted as follows: Monday, March 6, 2023 (1:00 p.m.–3:00 p.m. ET): Opening remarks, Member introductions; Tuesday, March 7, 2023 (1:00 p.m.–5:00 p.m. ET): NISC Agency Updates, Committee deliberations and selection of Committee officers, Public Comment; Wednesday, March 8, 2023 (1:00 p.m.–5:00 p.m. ET): Continued deliberations, Public Comment.

The final agenda, records, and other reference documents for discussion during the meeting will be available for public viewing as they become available, but no later than 48 hours prior to the start of the meeting at *https://www.invasivespecies.gov.*

Interested members of the public may provide either oral or written comments to ISAC for consideration. Oral comments may be given during designated times as specified in the meeting agenda. Written comments must be submitted by email to Kelsey Brantley (see **FOR FURTHER INFORMATION CONTACT**), no later than Friday, March 3, 2023, 3:00 p.m. (ET). All written comments will be provided to members of the ISAC. Due to time constraints during the virtual meeting, written public statements will be submitted directly into the record.

Depending on the number of people who want to comment during the time available, the length of individual oral comments may be limited. Requests to address the ISAC during the meeting will be accommodated in the order the requests are received. Individuals who wish to expand upon their oral statements, or those who had wished to speak but could not be accommodated on the agenda, may submit written comments to Kelsey Brantley (see **FOR FURTHER INFORMATION CONTACT**), up to 30 days following the meeting.

All comments will be made part of the public record and will be electronically distributed to all ISAC members. Detailed minutes of the meeting will be available for public inspection within 90 days of the meeting.

Meeting Accessibility/Special Accommodations: The meeting is open to the public. Registration is required (see *Meeting Registration* above). Please make requests in advance for sign language interpreter services, assistive listening devices, or other reasonable accommodations. We ask that you contact Kelsey Brantley (see **FOR FURTHER INFORMATION CONTACT**), at least seven (7) business days prior to the meeting to give the Department of the Interior sufficient time to process your request. All reasonable accommodation requests are managed on a case-by-case basis.

Public Disclosure of Comments: Before including your address, phone number, email address, or other personal identifying information in your written comments, you should be aware that your entire comment including your personal identifying information will be made publicly available. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 5 U.S.C. 10.

Stanley W. Burgiel,

Executive Director, National Invasive Species Council.

[FR Doc. 2023–03122 Filed 2–13–23; 8:45 am]

BILLING CODE 4334–63–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNVW01000.L14400000.EQ0000.241A; N–98541, MO# 4500163159]

Notice of Realty Action: Recreation and Public Purposes Act Classification of Public Lands in Humboldt County, Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action.

SUMMARY: The Bureau of Land Management (BLM), Humboldt River Field Office, has examined certain public lands in Humboldt County,

Nevada, and has found them suitable for classification for conveyance to Humboldt County under the provisions of the Recreation and Public Purposes (R&PP) Act, as amended. Humboldt County currently operates a public shooting range that was patented pursuant to the Act of September 19, 1964, and recently applied for approximately 240 acres of adjoining public lands to expand the operation. The expansion would add a rifle range up to 1,000-yards, a buffer area, and an extended safety zone.

DATES: Submit written comments regarding this R&PP application and proposed classification on or before March 31, 2023. Comments may be mailed, or hand delivered to the BLM office address below, or faxed to (775) 623–1740. The BLM will not consider comments received via telephone calls or email.

ADDRESSES: Mail written comments to: Kathleen Rehberg, 5100 East Winnemucca Boulevard, Winnemucca, NV 89445. Detailed information including but not limited to, a proposed development and management plan and documentation relating to compliance with applicable environmental and cultural resource laws, is available for review during business hours, (7:30 a.m. to 4:30 p.m. Mountain Time), Monday through Friday, except during Federal holidays, at the Humboldt River Field Office, 5100 East Winnemucca Boulevard, Winnemucca, NV 89445 or online at *https://eplanning.blm.gov/eplanning-ui/project/2014203/510.*

FOR FURTHER INFORMATION CONTACT: Jenifer Barnett, Realty Specialist, Humboldt River Field Office, telephone at 775–623–1500, email at *jbarnett@blm.gov;* or you may contact the Humboldt River Field Office at the earlier-listed address. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: Humboldt County currently operates a public shooting range that was patented pursuant to the Act of September 19, 1964 (43 U.S.C. 1421–1427) and recently applied for approximately 240 acres of adjoining public lands to expand the operation. The expansion would add a rifle range up to 1,000-yards, a buffer area, and an extended safety zone. The R&PP patent will include provisions consistent with 43 U.S.C. 869–2(b)(6), 43 CFR 2743.2–1(e), and BLM IM 2008–074, all of which require that under no circumstances will the land revert to the U.S. if it has ''been used for solid waste disposal or for any other purpose . . . that may result in the disposal, placement, or release of any hazardous substance.''

The lands examined and identified as suitable for conveyance under the R&PP Act are legally described as:

Mount Diablo Meridian, Nevada

T. 37 N., R. 37 E.,
sec. 36, NE1/4 and N1/2SE1/4.

The area described contains 240 acres, according to the official plats of the surveys on file with the BLM.

Humboldt County is a political subdivision of the State of Nevada, and is, therefore, a qualified applicant under the R&PP Act. Humboldt County has not applied for more than the 6,400-acre limitation for recreation uses in a year. Humboldt County has submitted a statement describing the proposed use of the land in compliance with the regulations at 43 CFR 2741.4(b).

The lands are not needed for any Federal purposes. Conveyance of the lands for recreational or public purposes use is consistent (or in conformance) with the Winnemucca District Resource Management Plan (2015), as amended, and would be in the national interest.

All interested parties will receive a copy of this notice once it is published in the **Federal Register**. A copy of the **Federal Register** notice with information about this proposed realty action will be published in the newspaper of local circulation once a week for three consecutive weeks. In accordance with regulations at 43 CFR 2741, which addresses requirements and procedures for conveyances under the R&PP Act, this project does not require a public meeting.

Upon publication of this notice in the **Federal Register**, the lands will be segregated from all other forms of appropriation under the public land laws, including locations under the mining laws, except for lease or conveyance under the R&PP Act and leasing under the mineral leasing laws.

The conveyance of the land, when issued, will be subject to the following terms, conditions, and reservations:

1. A right-of-way thereon for ditches and canals constructed by the authority of the United States Act of August 30, 1890 (43 U.S.C. 945).

2. Provisions of the R&PP Act and to all applicable regulations of the Secretary of the Interior, including 43 U.S.C. 869–2(b)(6), 43 CFR 2743.2–1(e), and BLM IM 2008–074, all of which require that under no circumstances will the land revert to the U.S. if it has ''been used for solid waste disposal or for any other purpose . . . that may result in the disposal, placement, or release of any hazardous substance.''

3. A limited reverter clause that may cause the land to revert to the United States if, at the end of 5 years after the date of conveyance, the land is not being used in accordance with the approved plan of development.

4. All mineral deposits in the land so patented, and the right to prospect for, mine, and remove such deposits from the same under applicable law and regulations as established by the Secretary of the Interior are reserved to the United States, together with all necessary access and exit rights.

5. Lease or conveyance of the parcel is subject to valid existing rights.

6. An appropriate indemnification clause protecting the United States from claims arising out of the lessee's/patentee's use, occupancy, or occupations on the leased/patented lands.

7. Any other reservations that the authorized officer determines appropriate to ensure public access and proper management of Federal lands and interests therein.

Interested persons may submit comments involving the suitability of the land for development of a shooting range. Comments on the classification are restricted to whether the land is physically suited for the proposal, whether the use will maximize the future use or uses of the land, whether the use is consistent with local planning and zoning, or if the use is consistent with State and Federal programs.

Interested persons may submit comments regarding the specific use and management proposed in the application and plan of development, whether the BLM followed proper administrative procedures in reaching the decision, or any other factor not directly related to the suitability of the lands for a shooting range.

Any adverse comments will be reviewed as protests by the BLM Nevada State Director who may sustain, vacate, or modify this realty action. In the absence of any adverse comments, the classification will become effective on April 17, 2023. The lands will not be offered for conveyance until after the classification becomes effective.

Before including your address, phone number, email address, or other personal identifying information in your comment, be advised 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 from public review your personal identifying information, we cannot guarantee that we will be able to do so.

(Authority: 43 CFR 2741.5)

Kathleen Rehberg,

Field Manager, Winnemucca District, Humboldt River Field Office.

[FR Doc. 2023–03121 Filed 2–13–23; 8:45 am]

BILLING CODE 4331–21–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–562 and 731–TA–1329 (Review)]

Ammonium Sulfate From China

Determination

On the basis of the record [1] developed in the subject five-year reviews, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that revocation of the countervailing and antidumping duty orders on ammonium sulfate from China would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission instituted these reviews on February 1, 2022 (87 FR 5503) and determined on May 9, 2022, that it would conduct full reviews (87 FR 29878, May 17, 2022). Notice of the scheduling of the Commission's reviews and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on August 3, 2022 (87 FR 47463). Since no party to the reviews requested a hearing, the public hearing in connection with the reviews, originally scheduled for December 6, 2022, was cancelled (87 FR 79352, December 27, 2022).

The Commission made these determinations pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)). It completed and filed its determinations in these reviews on February 8, 2022. The views of the Commission are contained in USITC Publication 5402 (February 2023), entitled *Ammonium Sulfate from China: Investigation Nos. 701–TA–562 and 731–TA–1329 (Review).*

By order of the Commission.

Issued: February 8, 2023.

Katherine Hiner,

Acting Secretary to the Commission.

[FR Doc. 2023–03067 Filed 2–13–23; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

NATIONAL CREDIT UNION ADMINISTRATION

Sunshine Act Meetings

TIME AND DATE: 10:00 a.m., February 16, 2023.

PLACE: Board Room, 7th Floor, Room 7B, 1775 Duke Street (All visitors must use Diagonal Road Entrance), Alexandria, VA 22314–3428.

STATUS: This meeting will be open to the public.

MATTERS TO BE CONSIDERED:

1. Federal Credit Union Loan Interest Rate Ceiling.
2. NCUA Rules and Regulations, Chartering and Field of Membership.
3. NCUA Rules and Regulations, Cyber Incident Notification Requirements for Federally Insured Credit Unions.

CONTACT PERSON FOR MORE INFORMATION: Melane Conyers-Ausbrooks, Secretary of the Board, Telephone: 703–518–6304.

Melane Conyers-Ausbrooks,

Secretary of the Board.

[FR Doc. 2023–03180 Filed 2–10–23; 11:15 am]

BILLING CODE 7535–01–P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request; NSF's Computer and Information Science and Engineering (CISE) Broadening Participation in Computing (BPC) Pilot Survey

AGENCY: National Science Foundation.

ACTION: Submission for OMB review; comment request.

SUMMARY: The National Science Foundation (NSF) has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995. This is the second notice for public comment; the first was published in the **Federal Register**, and one comment requesting a copy of the proposed survey was received. NSF is forwarding the proposed submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice.

DATES: 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: Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, Virginia 22314; telephone (703) 292–7556; or send email to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including Federal holidays).

Comments: Comments regarding (a) whether the proposed collection of information is necessary for the proper performance of the functions of the NSF, including whether the information shall have practical utility; (b) the accuracy of the NSF's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, use, and clarity of the information on respondents; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to the points of contact in the **FOR FURTHER INFORMATION CONTACT** section.

Copies of the submission may be obtained by calling 703–292–7556. NSF 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.

SUPPLEMENTARY INFORMATION:

Title of Collection: Information collection for evaluating NSF partnership activities.

OMB Number: 3145–NEW.

Type of Request: Intent to seek approval to establish an information collection.

Abstract: Building partnerships is a high priority for NSF, as evidenced by

two consecutive Agency Priority Goals (APGs for FY 2018 and FY 2020) focused on developing a partnerships strategy. The importance of partnerships is also echoed in the recent National Science Board's Vision 2030 report and reflected in the new Directorate for Technology, Innovation and Partnerships (TIP). Partnerships are hypothesized to accelerate discovery in several ways: they can enable access to expertise, resources, and infrastructure; accelerate the flow of knowledge and expertise; and expand communities of researchers. NSF direct partnerships are established by NSF with other federal agencies, industry, private foundations, non-governmental organizations, and foreign science agencies.

NSF is requesting OMB approval for the NSF to collect information from past and present participants and partners in NSF partnership programs. The information collection will enable the Evaluation and Assessment Capability (EAC) Section within NSF to garner quantitative and qualitative information that will be used to inform programmatic improvements related to partnership models at NSF including partnerships between NSF and other entities and funding opportunities that require or encourage partnerships between grantees. This information collection, which entails collecting information from relevant NSF grantees and partners, is in accordance with the Agency's commitment to improving service delivery as well as the Agency's strategic goal to ''advance the capability of the Nation to meet current and future challenges.''

Use of the Information: The data collected will be used for NSF internal and external reports related to partnerships, program level studies, and evaluations. These outputs will inform decisions NSF makes regarding future activities.

Respondents: Participants in NSF grants (principal investigators, partners, research personnel, etc.). Partners involved in NSF partnership programs.

Estimated Number of Respondents: 300.

Estimate Burden on the Public: Estimated at 450 hours for a one-time collection.

Comments: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; 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.

Please submit one copy of your comments by only one method. All submissions received must include the agency name and collection name identified above for this information collection. Commenters are strongly encouraged to transmit their comments electronically via email. Comments, including any personal information provided become a matter of public record. They will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request.

Dated: February 8, 2023.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2023–03047 Filed 2–13–23; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2022–0133]

Information Collection: NRC Form 212, ''Qualifications Investigation Professional, Technical, and Administrative Positions''

AGENCY: Nuclear Regulatory Commission.

ACTION: Renewal of existing information collection; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) invites public comment on the renewal of Office of Management and Budget (OMB) approval for an existing collection of information. The information collection is entitled, NRC Form 212, ''Qualifications Investigation Professional, Technical, and Administrative Positions.''

DATES: Submit comments by April 17, 2023. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods; 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–2022–0133. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* David C. Cullison, Office of the Chief Information Officer, Mail Stop: T–6 A10M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

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: David C. Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2022–0133 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–2022–0133. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC–2022–0133 on this website.
- *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.* A copy of the collection of information and related instructions may be obtained without charge by accessing ADAMS Accession No. ML22348A261. The supporting statement is available in ADAMS under Accession No. ML22269A538.
- *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an

appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

• *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David C. Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2022–0133, in your comment submission.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *https://www.regulations.gov* and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the OMB, 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 comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the NRC is requesting public comment on its intention to request the OMB's approval for the information collection summarized below.

1. *The title of the information collection:* NRC Form 212, ''Qualifications Investigation Professional, Technical, and Administrative Positions.''

2. *OMB approval number:* 3150–0033.

3. *Type of submission:* Extension.

4. *The form number, if applicable:* Form 212.

5. *How often the collection is required or requested:* The form is collected for every new hire to the NRC.

6. *Who will be required or asked to respond:* Former employers, supervisors, and other references indicated on the job application are asked to complete the NRC Form 212.

7. *The estimated number of annual responses:* 1000 forms.

8. *The estimated number of annual respondents:* 1000 respondents.

9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 500 hours.

10. *Abstract:* Information requested on NRC Form 212 is used to determine the qualifications and suitability of applicants for employment in professional, technical, and administrative positions with the NRC. The completed form may be used to examine, rate and/or assess the prospective employee's qualifications. The information regarding the qualifications of applicants for employment is reviewed by professional personnel in Office of the Chief Human Capital Officer (OCHCO), in conjunction with other information in the NRC files, to determine the qualifications of the applicant for appointment to the position under consideration.

III. Specific Requests for Comments

The NRC is seeking comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility? Please explain your answer.

2. Is the estimate of the burden of the information collection accurate? Please explain your answer.

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection on respondents be minimized, including the use of automated collection techniques or other forms of information technology?

Dated: February 8, 2023.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2023–03054 Filed 2–13–23; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

703rd Meeting of the Advisory Committee on Reactor Safeguards

In accordance with the purposes of Sections 29 and 182b of the Atomic Energy Act (42 U.S.C. 2039, 2232(b)), the Advisory Committee on Reactor Safeguards (ACRS) will hold meetings on March 2–3, 2023. The Committee will be conducting meetings that will include some Members being physically present at the NRC while other Members participate remotely. Interested members of the public are encouraged to participate remotely in any open sessions via MS Teams or via phone at 301–576–2978, passcode 112492970#. A more detailed agenda including the MSTeams link may be found at the ACRS public website at *https://www.nrc.gov/reading-rm/doc-collections/acrs/agenda/index.html.* If you would like the MSTeams link forwarded to you, please contact the Designated Federal Officer as follows: *Quynh.Nguyen@nrc.gov,* or *Lawrence.Burkhart@nrc.gov.*

Thursday, March 2, 2023

8:30 a.m.–8:35 a.m.: Opening Remarks by the ACRS Chairman (Open)—The ACRS Chairman will make opening remarks regarding the conduct of the meeting.

8:35 a.m.–10 a.m.: Framatome Topical Report, ANP–10353, Increased Enrichment for Pressurized Water Reactors (PWRs) (Open/Closed)—The Committee will deliberate regarding the subject topic. [*Note:* Pursuant to 5 U.S.C. 552b(c)(4), a portion of this session may be closed in order to discuss and protect information designated as proprietary.]

10 a.m.–1 p.m.: Committee Deliberation on ANP–10353, Increased Enrichment for PWRs (Open/Closed)—The Committee will deliberate regarding the subject topic. [*Note:* Pursuant to 5 U.S.C. 552b(c)(4), a portion of this session may be closed in order to discuss and protect information designated as proprietary.]

1 p.m.–3:30 p.m.: Future ACRS Activities/Report of the Planning and Procedures Subcommittee and Reconciliation of ACRS Comments and Recommendations/Preparation of Reports (Open/Closed)—The Committee will hear discussion of the recommendations of the Planning and Procedures Subcommittee regarding items proposed for consideration by the Full Committee during future ACRS meetings, and/or proceed to preparation of reports as determined by the Chairman. [*Note:* Pursuant to 5 U.S.C. 552b(c)(4), a portion of this session may be closed in order to discuss and protect information designated as proprietary.]. [*Note:* Pursuant to 5 U.S.C. 552b(c)(2), a portion of this meeting may be closed to discuss organizational and personnel matters that relate solely to internal

personnel rules and practices of the ACRS.]

3:30 p.m.–6 p.m.: Preparation of Reports (Open/Closed)—The Committee will continue its discussion of proposed ACRS reports. [*Note:* Pursuant to 5 U.S.C. 552b(c)(4), a portion of this session may be closed in order to discuss and protect information designated as proprietary.]

Friday, March 3, 2023

1 p.m.–6 p.m.: Preparation of Reports (Open/Closed)—The Committee will continue its discussion of proposed ACRS reports. [*Note:* Pursuant to 5 U.S.C. 552b(c)(4), a portion of this session may be closed in order to discuss and protect information designated as proprietary.]

Procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on June 13, 2019 (84 FR 27662). In accordance with those procedures, oral or written views may be presented by members of the public, including representatives of the nuclear industry. Persons desiring to make oral statements should notify Quynh Nguyen, Cognizant ACRS Staff and the Designated Federal Officer (DFO) (Telephone: 301–415–5844, Email: *Quynh.Nguyen@nrc.gov*), 5 days before the meeting, if possible, so that appropriate arrangements can be made to allow necessary time during the meeting for such statements. In view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with the cognizant ACRS staff if such rescheduling would result in major inconvenience.

An electronic copy of each presentation should be emailed to the cognizant ACRS staff at least one day before the meeting.

In accordance with Subsection 10(d) of Public Law 92–463 and 5 U.S.C. 552b(c), certain portions of this meeting may be closed, as specifically noted above. Use of still, motion picture, and television cameras during the meeting may be limited to selected portions of the meeting as determined by the Chairman. Electronic recordings will be permitted only during the open portions of the meeting.

ACRS meeting agendas, meeting transcripts, and letter reports are available through the NRC Public Document Room (PDR) at *pdr.resource@nrc.gov,* or by calling the PDR at 1–800–397–4209, or from the Publicly Available Records System component of NRC's Agencywide Documents Access and Management System, which is accessible from the NRC website at *http://www.nrc.gov/reading-rm/adams.html* or *http://www.nrc.gov/reading-rm/doc-collections/#ACRS/.*

Dated: February 8, 2023.

Russell E. Chazell,

Federal Advisory Committee Management Officer, Office of the Secretary.

[FR Doc. 2023–03051 Filed 2–13–23; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–445–LR and 50–446–LR; ASLBP No. 23–978–01–LR–BD01]

Establishment of Atomic Safety and Licensing Board; Vistra Operations Company LLC

Pursuant to the Commission's regulations, *see, e.g.,* 10 CFR 2.104, 2.105, 2.300, 2.309, 2.313, 2.318, 2.321, notice is hereby given that an Atomic Safety and Licensing Board (Board) is being established to preside over the following proceeding:

Vistra Operations Company LLC, (Comanche Peak Nuclear Power Plant, Units 1 and 2)

This proceeding involves an application seeking a twenty-year license renewal of Facility Operating License Nos. NPF–87 and NPF–89, which currently authorize Vistra Operations Company LLC to operate Comanche Peak Nuclear Power Plant, Units 1 and 2, until, respectively, February 8, 2030, and February 2, 2033. In response to a notice published in the **Federal Register** announcing the opportunity to request a hearing, *see* 87 FR 73,798 (Dec. 1, 2022), a hearing request was filed on January 30, 2023, on behalf of the Citizens for Fair Utility Regulation.

The Board is comprised of the following Administrative Judges:

G. Paul Bollwerk, III, Chairman, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001

Dr. Sue H. Abreu, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001

Dr. Gary S. Arnold, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001

All correspondence, documents, and other materials shall be filed in accordance with the NRC E-Filing rule. *See* 10 CFR 2.302.

Dated: February 7, 2023.

Edward R. Hawkens,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. 2023–03082 Filed 2–13–23; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96837; File No. SR–PEARL–2023–01]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 531, Reports and Market Data Products, To Provide for the New ''Liquidity Taker Event Report—Resting Simple Orders''

February 8, 2023.

Pursuant to the provisions of 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 January 25, 2023, MIAX PEARL, LLC (''MIAX Pearl'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend Exchange Rule 531 to provide for the new ''Liquidity Taker Event Report—Resting Simple Orders''.

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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 Exchange Rule 531 to provide for the new ''Liquidity Taker Event Report—Resting Simple Orders'' (the ''Report'').[3] The proposed Report will be an optional product[4] available to Members.[5] Currently, the Exchange provides two types of Liquidity Taker Event Reports, one including information about incoming orders seeking to remove liquidity from the Simple Order Book[6] described under Exchange Rule 531(a), and a second including the same information but about incoming Complex Orders that seek to remove Complex Orders resting on the Strategy Book[7] described under Exchange Rule 531(b). Both of these existing reports provide data for executions and contra-side responses that occurred within 200 microseconds of the time the resting order was received by the Exchange. But for the modified timeframe and one difference described below, the proposed Report would include the same data as the Liquidity Taker Event Report for Simple Orders but would focus on executions and contra-side responses that occurred after 200 microseconds of the time the resting order was received by the Exchange and within 200 microseconds of receipt of the first attempt to execute against the resting order after the initial 200 microsecond time period has expired as described further below.

Like for the existing reports, the Exchange believes the additional data points from the matching engine outlined below for the proposed Report may also help Members gain a better understanding about their interactions with the Exchange. The Exchange believes the proposed Report will provide Members with an opportunity to learn more about better opportunities to access liquidity and receive better execution rates. The proposed Report will increase transparency and democratize information so that all firms that subscribe to the Report have access to the same information on an equal basis, even for firms that do not have the appropriate resources to generate a similar report regarding interactions with the Exchange. Like the existing reports, none of the components of the proposed Report include real-time market data.

Members generally would use a liquidity accessing order if there is a high probability that it will execute against an order resting on the Simple Order Book. Like the existing reports, the proposed Report would identify by how much time an order that may have been marketable missed an execution but would focus on a later timeframe than the existing reports. The proposed Report will provide greater visibility into the missed trading execution, which will allow Members to optimize their models and trading patterns to yield better execution results.

Like the existing reports, the proposed Report will be a Member-specific report and will help Members to better understand by how much time a particular order missed executing against a specific resting order, thus allowing that Member to determine whether it wants to invest in the necessary resources and technology to mitigate missed executions against certain resting orders on the Simple Order Book. Like the existing reports, the Exchange proposes to provide the Report on a T+1 basis. As further described below, the proposed Report will be specific and tailored to the Member that is subscribed to the Report and any data included in the Report that relates to a Member other than the Member receiving the Report will be anonymized.

The Exchange proposes to provide the proposed Report in response to additional Member demand for data concerning the timeliness of their incoming orders and executions against certain resting orders that have been resting on the Simple Order Book for at least 200 microseconds and within 200 microseconds of receipt of the first attempt to execute against the resting order after the initial 200 microsecond time period has expired. Certain Members that subscribe to the existing reports have requested the same information as the Simple Order report but for the later timeframe described herein so that they can better understand the timeliness of their incoming orders and efficacy of their attempts to execute against resting liquidity on the Exchange's Simple Order Book. The purpose of the proposed Report is to provide Members the necessary data in a standardized format on a T+1 basis to those that subscribe to the Report on an equal basis.

Proposed Exchange Rule 531(c) would provide that the Report is a daily report that provides a Member (''Recipient Member'') with its liquidity response time details for executions of an order resting on the Book, where that Recipient Member attempted to execute against such resting order within an extended timeframe that meets certain criteria described below.[8]

Report Content

The content of the proposed Report is basically identical to that of the existing Liquidity Taker Event Report for Simple Orders described under Exchange Rule 531(a) with two differences. The first difference is the timeframe of the proposed Report mentioned above and described in more detail below. The second difference is that, unlike the existing Liquidity Taker Event Report for Simple Orders, the proposed Report would not include the time difference between the time the resting order was received by the Exchange and the time the first response that executes against the resting order was received by the Exchange. Each of these differences are described below. All other aspects of the proposed Report are identical to the existing Liquidity Taker Event Report for Simple Orders described under Exchange Rule 531(a).

Like current paragraph (a)(1) of Exchange Rule 531 for the existing Liquidity Taker Event Report for Simple Orders, proposed paragraph (c)(1) of Rule 531 would describe the content of the proposed Report and delineate which information would be provided regarding the resting order,[9] the

[3] The proposed rule change is identical to proposal to adopt the same report by the Exchange's affiliate, MIAX Emerald, LLC recently filed with the Commission for immediate effectiveness. *See* SR–EMERALD–2023–02 (filed January 18, 2023).

[4] The Exchange intends to submit a separate filing with the Commission pursuant to Section 19(b)(1) to propose fees for the Liquidity Taker Event Report—Resting Simple Orders.

[5] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[6] The term ''Simple Order Book'' means ''the Exchange's regular electronic book of orders and quotes.'' *See* Exchange Rule 518(a)(15).

[7] The term ''Complex Strategy'' means ''a particular combination of components and their ratios to one another. New complex strategies can be created as the result of the receipt of a complex order or by the Exchange for a complex strategy that is not currently in the System.'' *See* Exchange Rule 518(a)(6). The term ''Strategy Book'' means the Exchange's electronic book of complex orders and complex quotes. *See* Exchange Rule 518(a)(17). The Strategy Book is organized by Complex Strategy in that individual orders for a defined Complex Strategy are organized together in a book that is separate from the orders for a different Complex Strategy.

[8] The Exchange proposes to renumber current Exchange Rule 531(c), Market Data Products, as Exchange Rule 531(d). The Exchange does not propose to amend the rule text of this rule.

[9] Only displayed orders will be included in the Report. The Exchange notes that it does not

response that successfully executed against the resting order, and the response submitted by the Recipient Member that missed executing against the resting order. It is important to note that the content of the Report will be specific to the Recipient Member and the Report will not include any information related to any Member other than the Recipient Member, other than certain information about the resting order described below. The Exchange will restrict all other market participants, including the Recipient Member, from receiving another market participant's data.

Resting Order Information. Like current paragraph (a)(1)(i) of Exchange Rule 531 for the existing Liquidity Taker Event Report for Simple Orders, proposed Exchange Rule 531(c)(1)(i) would provide that the following information would be included in the Report regarding the resting order: (A) the time the resting order was received by the Exchange; [10] (B) symbol; (C) order reference number, which is a unique reference number assigned to a new order at the time of receipt; (D) whether the Recipient Member is an Affiliate [11] of the Member that entered the resting order; [12] (E) origin type (*e.g.,* Priority Customer,[13] Market Maker); [14] (F) side (buy or sell); and (G) displayed price and size of the resting order.[15]

Execution Information. Like current paragraph (a)(1)(ii) of Exchange Rule 531 for the existing Liquidity Taker Event Report for Simple Orders, proposed Exchange Rule 531(c)(1)(ii) would provide that the following information would be included in the Report regarding the execution of the resting order: (A) the PBBO [16] at the time of execution; [17] (B) the ABBO [18] at the time of execution; [19] (C) the time first response that executes against the resting order was received by the Exchange and the size of the execution and type of the response; [20] and (D) whether the response was entered by the Recipient Member. If the resting order executes against multiple contra-side responses, only the PBBO and ABBO at the time of the execution against the first response will be included.

Exchange Rule 531(a)(1)(ii)(D) provides that the existing Liquidity Taker Event Report for Simple Orders also includes the time difference between the time the resting order was received by the Exchange and the time the first response that executes against the resting order was received by the Exchange. The proposed Report would not include the same information because that timeframe could be for an extended period of time since the proposed Report focuses on orders that have been resting on the Simple Order Book for longer than 200 microseconds and, therefore, the Exchange believes is less likely to be valuable to the Recipient Member.

Recipient Member's Response Information. Like current paragraph (a)(1)(iii) of Exchange Rule 531 for the existing Liquidity Taker Event Report for Simple Orders, proposed Rule 531(c)(1)(iii) would provide that the following information would be included in the Report regarding response(s) sent by the Recipient Member: (A) Recipient Member identifier; (B) the time difference between the time the first response that executes against the resting order was received by the Exchange and the time of each response sent by the Recipient Member, regardless of whether it executed or not; [21] (C) size and type of each response submitted by Recipient Member; and (D) response reference number, which is a unique reference number attached to the response by the Recipient Member.

Timeframe for Data Included in Report

The timeframe covered by the proposed Report is the primary difference between it and the existing Liquidity Taker Event Report for Simple Orders. The existing Liquidity Taker Event Report for Simple Orders provides data for executions and contra-side responses that occurred within 200 microseconds of the time the resting order was received by the Exchange. Meanwhile, the proposed Report would include the same data as the Liquidity Taker Event Report for Simple Orders but would focus on executions and contra-side responses that occurred after 200 microseconds of the time the resting order was received by the Exchange, and within 200 microseconds of receipt of any Member's first attempt to execute against the resting order after the initial 200 microsecond time period has expired. More specifically, the resting order must rest on the Simple Order Book for at least 200 microseconds and once that initial 200 microsecond period has passed, a Member must then submits an order to attempt to execute against that resting order. This event starts a second 200 microsecond period within which the proposed Report would include data on executions and contra-side responses submitted by the Recipient Member to execute against that resting order.

For example, Member A submits an order that is posted to the Simple Order Book. 200 microseconds passes and Member A's order remains posted to the Simple Order Book. Then Member B enters a marketable order to execute against Member A's resting order, starting the second 200 microsecond window. Within this next 200 microsecond window, Member C sends a marketable order to execute against Member A's resting Order. Because Member B's order is received by the Exchange before Member C's order, Member B's order executes against

currently offer any non-displayed orders types on its options trading platform.

[10] The time the Exchange received the resting order would be in nanoseconds and is the time the resting order was received by the Exchange's System.

[11] The term ''affiliate'' of or person ''affiliated with'' another person means a person who, directly, or indirectly, controls, is controlled by, or is under common control with, such other person. *See* Exchange Rule 100.

[12] The Report will simply indicate whether the Recipient Member is an Affiliate of the Member that entered the resting order and not include any other information that may indicate the identity of the Member that entered the resting order.

[13] The term ''Priority Customer'' means a person or entity that (i) is not a broker or dealer in securities, and (ii) does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). The number of orders shall be counted in accordance with Interpretation and Policy .01 to Exchange Rule 100. *See* Exchange Rule 100.

[14] The term ''Market Maker'' refers to ''Lead Market Makers'', ''Primary Lead Market Makers'' and ''Registered Market Makers'' collectively. *See* Exchange Rule 100.

[15] The Exchange notes that the displayed price and size are also disseminated via the Exchange's proprietary data feeds and the Options Price Reporting Authority (''OPRA''). The Exchange also notes that the displayed price of the resting order may be different than the ultimate execution price. This may occur when a resting order is displayed and ranked at different prices upon entry to avoid a locked or crossed market.

[16] The term ''PBBO'' means the best bid or offer on the Exchange. *See* Exchange Rule 100.

[17] Exchange Rule 531(c)(1)(ii)(A) would further provide that if the resting order executes against multiple contra-side responses, only the PBBO at the time of the execution against the first response will be included.

[18] The term ''ABBO'' or ''Away Best Bid or Offer'' means the best bid(s) or offer(s) disseminated by other Eligible Exchanges (defined in Exchange Rule 1400(g)) and calculated by the Exchange based on market information received by the Exchange from OPRA. *See* Exchange Rule 100.

[19] Exchange Rule 531(c)(1)(ii)(B) would further provide that if the resting order executes against multiple contra-side responses, only the ABBO at the time of the execution against the first response will be included.

[20] The time the Exchange received the response order would be in nanoseconds and would be the time the response was received by the Exchange's network, which is before the time the response would be received by the System.

[21] For purposes of calculating this duration of time, the Exchange will use the time the resting order and the Recipient Member's response(s) is received by the Exchange's network, both of which would be before the order and response(s) would be received by the System. This time difference would be provided in nanoseconds.

Member A's resting order. The proposed Report would provide Member C the data points necessary for that firm to calculate by how much time they missed executing against Member A's resting order.

The above timeframe would be codified under proposed paragraph (c)(2) of Rule 531 which would provide that the proposed Report would include the data set forth under Rule 531(c)(1) described above for executions and contra-side responses that occurred (i) after 200 microseconds of the time the resting order was received by the Exchange and (ii) within 200 microseconds of receipt of the first attempt to execute against the resting order after the initial 200 microsecond time period under (c)(2)(i) of this paragraph has expired.

Scope of Data Included in the Report

Like current paragraph (a)(3) of Exchange Rule 531 for the existing Liquidity Taker Event Report for Simple Orders, proposed paragraph (c)(3) of Exchange Rule 531 would provide that the proposed Report will only include trading data related to the Recipient Member and, subject to the proposed paragraph (4) of Rule 531(c) described below, will not include any other Member's trading data other than that listed in paragraphs (1)(i) and (ii) of Exchange Rule 531(c) described above.

Historical Data

Like current paragraph (a)(4) of Exchange Rule 531 for the existing Liquidity Taker Event Report for Simple Orders, proposed paragraph (c)(4) of Rule 531 would specify that the proposed Report will contain historical data from the prior trading day and will be available after the end of the trading day, generally on a T+1 basis.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[22] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[23] 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. This proposal is in keeping with those principles in that it promotes increased transparency through the dissemination of the optional Report to those interested in subscribing to receive the data. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[24] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The timeframe covered by the proposed Report is the primary difference between it and the existing Liquidity Taker Event Report for Simple Orders. However, this difference only pertains to the timeframe covered by each report, with each report containing the exact same data fields with one exception described here. The existing Liquidity Taker Event Report for Simple Orders provides data for executions and contra-side responses that occurred within 200 microseconds of the time the resting order was received by the Exchange. Meanwhile, the proposed Report would basically include the same data as the Liquidity Taker Event Report for Simple Orders but would focus on executions and contra-side responses that occurred after 200 microseconds of the time the resting order was received by the Exchange and one additional difference. The one difference is that unlike the existing Liquidity Taker Event Report for Simple Orders, the proposed Report would not include the time difference between the time the resting order and first response that executes against the resting order are received by the Exchange. Each report focuses on 200 microsecond windows with the existing Report's window starting at the time of receipt of the resting order and the proposed Report's window starting with the first attempt to execute against the resting order after the order was resting on the Simple Order Book for at least 200 microseconds.

The Exchange believes the proposed Report will serve to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general protect investors and the public interest because it will benefit investors by facilitating their prompt access to the value added information that is included in the proposed Report. The proposed Report will allow Members to access information regarding their trading activity that they may utilize to evaluate their own trading behavior and order interactions.

Like the existing Liquidity Taker Event Report for Simple Orders, the proposed Report is designed for Members that are interested in gaining insight into latency in connection with orders that failed to execute against an order resting on the Exchange's Simple Order Book by providing those Members data to analyze by how much time their order may have missed an execution against a contra-side order resting on the Book. The Exchange believes that providing this optional latency data to interested Members is consistent with facilitating transactions in securities, removing impediments to and perfecting the mechanism of a free and open market and a national market system, and, in general, protecting investors and the public interest because it provides greater visibility into the latency of Members' incoming orders. Members may use this data to optimize their models and trading patterns in an effort to yield better execution results by calculating by how much time their order may have missed an execution.

Like the existing Liquidity Taker Event Report for Simple Orders, the proposed Report is designed to offer latency information in a systematized way and standardized format to any Member that chooses to subscribe to the proposed Report. As a result, the proposal will make latency information for liquidity-seeking orders available in an equalized manner and will increase transparency, particularly for Recipient Members that may not have the expertise to generate the same information on their own. The proposed Report may better enable Recipient Members to increase the fill rates for their liquidity-seeking orders. At the same time, as is also discussed above, the Report is designed to prevent a Recipient Member from learning other Members' sensitive trading information. The Report would not be a real-time market data product, as it would provide only historical trading data for the previous trading day, generally on a T+1 basis. In addition, the data in the Report regarding incoming orders that failed to execute would be specific to the Recipient Member's orders, and other information in the proposed Report regarding resting orders and executions would be anonymized if it relates to a Member other than the Recipient Member.

The proposed Report generally contains three buckets of information,

[22] 15 U.S.C. 78f(b).

[23] 15 U.S.C. 78f(b)(5).

[24] *Id.*

each of which are identical to the same buckets of information contained in the existing Liquidity Taker Event Report for Simple Orders, with one exception discussed herein and again below. The first two buckets include information about the resting order and the execution of the resting order. This information is generally available from other public sources, such as OPRA and the Exchange's proprietary data feeds, or is similar to information included in a report offered by another exchange. For example, OPRA provides bids, offers, and consolidated last sale and quotation information for options trading on all national securities exchanges, including the Exchange. In addition, the Exchange offers the Top of Market (''ToM'') feed which provides real-time quote and last sale information for all displayed orders on the Book.[25]

Specifically, the first bucket of information contained in the Report for the resting order includes the time the resting order was received by the Exchange, the symbol, unique reference number assigned at the time of receipt, side (buy or sell), and the displayed price and size of the resting order. Further, the symbol, origin type, side (buy or sell), and displayed price and size are also available either via OPRA or the Exchange's proprietary data feeds. The first bucket of information also indicates whether the Recipient Member is an Affiliate of the Member that entered the resting order. This data field will not indicate the identity of the Member that entered the resting order and would simply allow the Recipient Member to better understand the scenarios in which it may execute against the orders of its Affiliates.[26]

The second bucket of information contained in the Report regards the execution of the resting order and includes the PBBO and ABBO at the time of execution. These data points are also available either via OPRA or the Exchange's proprietary data feeds. The second bucket of information will also indicate whether the response was entered by the Recipient Member. This data point is simply provided as a convenience. If not entered by the Recipient Member, this data point will be left blank so as not to include any identifying information about other Member activity. The second bucket of information also includes the size, as well as the time and type of first response that executes against the resting order. These data points would assist the Recipient Member in analyzing by how much time their order may have missed an execution against a contra-side order resting on the Book. Unlike the existing Liquidity Taker Event Report for Simple Orders, the proposed Report would not include the time difference between the time the resting order and first response that executes against the resting order are received by the Exchange. The proposed Report would not include this data point because the Exchange understands Recipient Members may not find it useful due to the fact that the proposed Report focuses on orders that have been resting on the Simple Order Book for longer than 200 microseconds. Therefore, the Exchange does not propose to include this data point as a means to streamline the proposed Report and remove unnecessary data.

The third bucket of information is about the Recipient Member's response(s) and the time their response(s) is received by the Exchange. This includes the time difference between the time the first response that executes against the resting order was received by the Exchange and the time of each response sent by the Recipient Member, regardless of whether it executed or not. As above, this data point would assist the Recipient Member in analyzing by how much time their order may have missed an execution against a contra-side order resting on the Book. This bucket would also include the size and type of each response submitted by the Recipient Member, the Recipient Member identifier, and a response reference number which is selected by the Recipient Member. Each of these data points are unique to the Recipient Member and should already be known by Recipient Member even if not included in the Report.

Like the existing Liquidity Taker Event Report for Simple Orders, the Exchange proposes to provide the Report on a voluntary basis and no Member will be required to subscribe to the Report. The Exchange notes that there is no rule or regulation that requires the Exchange to produce, or that a Member elect to receive, the Report. It is entirely a business decision of each Member to subscribe to the Report. The Exchange proposes to offer the Report as a convenience to Members to provide them with additional information regarding trading activity on the Exchange on a delayed basis after the close of regular trading hours. A Member that chooses to subscribe to the Report may discontinue receiving the Report at any time if that Member determines that the information contained in the Report is no longer useful.

In summary, the proposed Report will help to protect a free and open market by providing additional data (offered on an optional basis) to the marketplace and by providing investors with greater choices.[27] Additionally, the proposal would not permit unfair discrimination because the proposed Report will be available to all Exchange Members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The Exchange believes that the proposed Report will enhance competition[28] by providing a new option for receiving market data to Members. The proposed Report will also further enhance competition between exchanges by allowing the Exchange to expand its product offerings to include an additional report to provide latency information requested by Members.

In this instance, the proposed rule change to offer the optional Report is in response to Member interest and requests for such information, including from some Members that subscribe to the existing Liquidity Taker Event Report for Simple Orders. The Exchange does not believe the proposed Report will have an inappropriate burden on intra-market competition between Recipient Members and other Members who do not receive the Report. As discussed above, the first two buckets of information included in the Report contain information about the resting order and the execution of the resting order, both of which are generally available to Members that choose not to receive the Report from other public sources, such as OPRA and the Exchange's proprietary data feeds. The third bucket of information is about the Recipient Member's response and the time their response is received by the Exchange, information which the Recipient Member would be able to obtain without receiving the Report. Additionally, some Members may already be able to derive a substantial amount of the same data that is provided by some of the components based on their own executions and algorithms.

[25] *See* Section 6(a) of the Exchange's fee schedule.

[26] The Exchange's surveils to monitor for abhorrent behavior related to internalized trades and identify potential wash sales.

[27] *See* Sec. Indus. Fin. Mkts. Ass'n (SIFMA), Initial Decision Release No. 1015, 2016 SEC LEXIS 2278 (ALJ June 1, 2016) (finding the existence of vigorous competition with respect to non-core market data).

[28] *Id.*

In sum, if the proposed Report is unattractive to Members, Members will opt not to receive it. Accordingly, the Exchange does not believe that the proposed change will impair the ability of Members or competing order execution venues to maintain their competitive standing in the financial markets.

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 after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A) of the Act [29] and Rule 19b–4(f)(6) [30] 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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–PEARL–2023–01 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–PEARL–2023–01. 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–PEARL–2023–01, and should be submitted on or before March 7, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[31]

Sherry R. Haywood,

Assistant Secretary.

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[29] 15 U.S.C. 78s(b)(3)(A).

[30] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[31] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96844; File No. SR–CBOE–2023–010]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Exchange's Fee Schedule for the Cboe Silexx Platform

February 8, 2023.

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 February 2, 2023 Cboe Exchange, Inc. (''Cboe Options'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') proposes to amend fees for the Cboe Silexx platform. 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend fees for the Cboe Silexx platform (''Cboe Silexx''), effective February 1, 2023. By way of background, the Silexx platform consists of a ''front-end'' order entry and management trading platform (also referred to as the ''Silexx terminal'') for listed stocks and options that supports both simple and complex orders, and a ''back-end'' platform which provides a connection to the infrastructure network. From the Silexx platform (*i.e.,* the collective front-end and back-end platform), a Silexx user has the capability to send option orders to U.S. options exchanges, send stock orders to U.S. stock exchanges (and other trading centers), input parameters to control the size, timing, and other variables of their trades, and also includes access to real-time options and stock market data, as well as access to certain historical data. The Silexx platform is designed so that a user may enter orders into the platform to send to an executing broker (including Trading Permit Holders (''TPHs'')) of its choice with connectivity to the platform, which broker will then send the orders to Cboe Options (if the broker is a TPH) or other U.S. exchanges (and trading centers) in accordance with the user's instructions.

In 2020, the Exchange made a new version of the Silexx platform available, Cboe Silexx, which supports the trading of non-FLEX Options [3] and allows authorized Users with direct access to the Exchange.[4] The Silexx front-end and back-end platforms are a software application that is installed locally on a user's desktop. Silexx grants users licenses to use the platform, and a firm or individual does not need to be a TPH to license the platform. Use of any version of the Silexx platform is completely optional.

The Exchange has established a fee structure for Cboe Silexx, based on Login IDs and set forth in the Silexx Fees Schedule.[5] Currently, there is a monthly fee of $275 per Login ID for the first 8 Login IDs (*i.e.,* Logins Ids 1–8), a fee of $100 per each additional Login ID for the next 8 Login IDs (*i.e.,* Login IDs 9–16), and each Login ID thereafter is free (*i.e.,* 17+ Login IDs).

The Exchange proposes to amend the fees for Cboe Silexx and update the Silexx Fees Schedule to reflect the new fees. Particularly, the Exchange proposes to adopt a monthly fee of $399 per Login ID for the first 8 Login IDs (*i.e.,* Login IDs 1–8), a fee of $299 per each additional Login ID for the next 8 Login IDs (*i.e.,* Login IDs 9–16), and a fee of $199 per each additional Login ID thereafter (*i.e.,* 17+ Login IDs). The fee will continue to be waived for the first month for any new individual user; the waiver will apply to the month the Login ID is first purchased.[6]

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.[7] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [8] 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) [9] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Additionally, the Exchange also believes the proposed rule change is consistent with Section 6(b)(4) of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

The Exchange believes that its proposed fees are reasonable and appropriate, because even as amended, they remain competitive with similar products available throughout the market, including other available platform versions on Silexx and a similar front-end order entry system offered by Nasdaq ISE (*i.e.,* ISE's PrecISE terminals).[10] The Exchange understands that the proposed pricing is also competitive with, and in some instances even lower than, similar unregulated products (for which there is no requirement for fees related to those products to be public). Additionally, use of Cboe Silexx is discretionary and not compulsory, as users can choose to route orders, including to Cboe Options, without the use of the platform. The Exchange makes the platform available as a convenience to market participants, who will continue to have the option to use any order entry and management system available in the marketplace to send orders to the Exchange and other exchanges; the platform is merely an alternative offered by the Exchange. The Exchange believes the proposed fees amendments are equitable and not unfairly discriminatory because they apply to all market participants uniformly.

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 proposed change will not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because it relates to an optional platform. The proposed fee amendments will apply to similarly situated participants uniformly, as described in detail above. As discussed, the use of the platform continues to be completely voluntary and market participants will continue to have the flexibility to use any entry and management tool that is proprietary or from third-party vendors, and/or market participants may choose any executing brokers to enter their orders. The Cboe Silexx platform is not an exclusive means of trading, and if market participants believe that other products, vendors, front-end builds, etc. available in the marketplace are more beneficial than the Cboe Silexx platform, they may simply use those

[3] In 2019, the Exchange made available an additional version of the Silexx platform, Silexx FLEX, which supports the trading of FLEX Options and allows authorized Users with direct access to the Exchange. *See* Securities Exchange Act Release No. 87028 (September 19, 2019) 84 FR 50529 (September 25, 2019) (SR–CBOE–2019–061).

[4] *See* Securities Exchange Act Release No. 88741 (April 24, 2020) 85 FR 24045 (April 30, 2020) (SR–CBOE–2020–040).

[5] *See* Securities Exchange Act Release No. 89830 (September 11, 2020) 85 FR 58093 (September 17, 2020) (SR–CBOE–2020–085).

[6] For example, if an individual User subscribes to a Cboe Silexx Login ID on February 15th, the Login ID fee would be waived for the month of February only.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] *Id.*

[10] *See* Silexx Fees Schedule, which assesses between $200–$600 per month for the remaining Silexx platforms, other than FLEX which is assessed no fee. *See also* Nasdaq ISE's Pricing Schedule, Section 7, which provides for a PrecISE Trade Terminal monthly fee of $350 per user for each of the 1st 10 users and $100 per month for each additional user.

products instead. Use of the functionality is completely voluntary.

The Exchange does not believe that the proposed rule changes will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed change applies only to Cboe Options. Additionally, Cboe Silexx is similar to types of products that are widely available throughout the industry, including from some exchanges, at similar prices. To the extent that the proposed changes make Cboe Options a more attractive marketplace for market participants at other exchanges, such market participants are welcome to become Cboe Options market participants.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [11] and Rule 19b–4(f)(2) [12] 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. 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–CBOE–2023–010 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–2023–010. 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–2023–010 and should be submitted on or before March 7, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03061 Filed 2–13–23; 8:45 am]

BILLING CODE 8011–01–P

[11] 15 U.S.C. 78s(b)(3)(A)(ii).

[12] 17 CFR 240.19b–4(f)(2).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96839; File No. SR–MIAX–2023–02]

Self-Regulatory Organizations; Miami International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 531, Reports and Market Data Products, To Provide for the New ''Liquidity Taker Event Report—Resting Simple Orders''

February 8, 2023.

Pursuant to the provisions of 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 January 25, 2023, Miami International Securities Exchange, LLC (''MIAX Options'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend Exchange Rule 531 to provide for the new ''Liquidity Taker Event Report—Resting Simple Orders''.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/* at MIAX Options' principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Exchange Rule 531 to provide for the new ''Liquidity Taker Event Report—Resting Simple Orders'' (the ''Report'').[3] The proposed Report will be an optional product[4] available to Members.[5] Currently, the Exchange provides two types of Liquidity Taker Event Reports, one including information about incoming orders seeking to remove liquidity from the Simple Order Book[6] described under Exchange Rule 531(a), and a second including the same information but about incoming Complex Orders that seek to remove Complex Orders resting on the Strategy Book[7] described under Exchange Rule 531(b). Both of these existing reports provide data for executions and contra-side responses that occurred within 200 microseconds of the time the resting order was received by the Exchange. But for the modified timeframe and one difference described below, the proposed Report would include the same data as the Liquidity Taker Event Report for Simple Orders but would focus on executions and contra-side responses that occurred after 200 microseconds of the time the resting order was received by the Exchange and within 200 microseconds of receipt of the first attempt to execute against the resting order after the initial 200 microsecond time period has expired as described further below.

Like for the existing reports, the Exchange believes the additional data points from the matching engine outlined below for the proposed Report may also help Members gain a better understanding about their interactions with the Exchange. The Exchange believes the proposed Report will provide Members with an opportunity to learn more about better opportunities to access liquidity and receive better execution rates. The proposed Report will increase transparency and democratize information so that all firms that subscribe to the Report have access to the same information on an equal basis, even for firms that do not have the appropriate resources to generate a similar report regarding interactions with the Exchange. Like the existing reports, none of the components of the proposed Report include real-time market data.

Members generally would use a liquidity accessing order if there is a high probability that it will execute against an order resting on the Simple Order Book. Like the existing reports, the proposed Report would identify by how much time an order that may have been marketable missed an execution but would focus on a later timeframe than the existing reports. The proposed Report will provide greater visibility into the missed trading execution, which will allow Members to optimize their models and trading patterns to yield better execution results.

Like the existing reports, the proposed Report will be a Member-specific report and will help Members to better understand by how much time a particular order missed executing against a specific resting order, thus allowing that Member to determine whether it wants to invest in the necessary resources and technology to mitigate missed executions against certain resting orders on the Simple Order Book. Like the existing reports, the Exchange proposes to provide the Report on a T+1 basis. As further described below, the proposed Report will be specific and tailored to the Member that is subscribed to the Report and any data included in the Report that relates to a Member other than the Member receiving the Report will be anonymized.

The Exchange proposes to provide the proposed Report in response to additional Member demand for data concerning the timeliness of their incoming orders and executions against certain resting orders that have been resting on the Simple Order Book for at least 200 microseconds and within 200 microseconds of receipt of the first attempt to execute against the resting order after the initial 200 microsecond time period has expired. Certain Members that subscribe to the existing reports have requested the same information as the Simple Order report but for the later timeframe described herein so that they can better understand the timeliness of their incoming orders and efficacy of their attempts to execute against resting liquidity on the Exchange's Simple Order Book. The purpose of the proposed Report is to provide Members the necessary data in a standardized format on a T+1 basis to those that subscribe to the Report on an equal basis.

Proposed Exchange Rule 531(c) would provide that the Report is a daily report that provides a Member (''Recipient Member'') with its liquidity response time details for executions of an order resting on the Book, where that Recipient Member attempted to execute against such resting order within an extended timeframe that meets certain criteria described below.[8]

Report Content

The content of the proposed Report is basically identical to that of the existing Liquidity Taker Event Report for Simple Orders described under Exchange Rule 531(a) with two differences. The first difference is the timeframe of the proposed Report mentioned above and described in more detail below. The second difference is that, unlike the existing Liquidity Taker Event Report for Simple Orders, the proposed Report would not include the time difference between the time the resting order was received by the Exchange and the time the first response that executes against the resting order was received by the Exchange. Each of these differences are described below. All other aspects of the proposed Report are identical to the existing Liquidity Taker Event Report for Simple Orders described under Exchange Rule 531(a).

Like current paragraph (a)(1) of Exchange Rule 531 for the existing Liquidity Taker Event Report for Simple Orders, proposed paragraph (c)(1) of Rule 531 would describe the content of the proposed Report and delineate which information would be provided regarding the resting order,[9] the response that successfully executed against the resting order, and the

[3] The proposed rule change is identical to proposal to adopt the same report by the Exchange's affiliate, MIAX Emerald, LLC recently filed with the Commission for immediate effectiveness. *See* SR–EMERALD–2023–02 (filed January 18, 2023).

[4] The Exchange intends to submit a separate filing with the Commission pursuant to section 19(b)(1) to propose fees for the Liquidity Taker Event Report—Resting Simple Orders.

[5] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[6] The term ''Simple Order Book'' means ''the Exchange's regular electronic book of orders and quotes.'' *See* Exchange Rule 518(a)(15).

[7] The term ''Complex Strategy'' means ''a particular combination of components and their ratios to one another. New complex strategies can be created as the result of the receipt of a complex order or by the Exchange for a complex strategy that is not currently in the System.'' *See* Exchange Rule 518(a)(6). The term ''Strategy Book'' means the Exchange's electronic book of complex orders and complex quotes. *See* Exchange Rule 518(a)(17). The Strategy Book is organized by Complex Strategy in that individual orders for a defined Complex Strategy are organized together in a book that is separate from the orders for a different Complex Strategy.

[8] The Exchange proposes to renumber current Exchange Rule 531(c), Market Data Products, as Exchange Rule 531(d). The Exchange does not propose to amend the rule text of this rule.

[9] Only displayed orders will be included in the Report. The Exchange notes that it does not currently offer any non-displayed orders types on its options trading platform.

response submitted by the Recipient Member that missed executing against the resting order. It is important to note that the content of the Report will be specific to the Recipient Member and the Report will not include any information related to any Member other than the Recipient Member, other than certain information about the resting order described below. The Exchange will restrict all other market participants, including the Recipient Member, from receiving another market participant's data.

Resting Order Information. Like current paragraph (a)(1)(i) of Exchange Rule 531 for the existing Liquidity Taker Event Report for Simple Orders, proposed Exchange Rule 531(c)(1)(i) would provide that the following information would be included in the Report regarding the resting order: (A) the time the resting order was received by the Exchange; [10] (B) symbol; (C) order reference number, which is a unique reference number assigned to a new order at the time of receipt; (D) whether the Recipient Member is an Affiliate [11] of the Member that entered the resting order; [12] (E) origin type (*e.g.,* Priority Customer,[13] Market Maker [14]); (F) side (buy or sell); and (G) displayed price and size of the resting order.[15]

Execution Information. Like current paragraph (a)(1)(ii) of Exchange Rule 531 for the existing Liquidity Taker Event Report for Simple Orders, proposed Exchange Rule 531(c)(1)(ii) would provide that the following information would be included in the Report regarding the execution of the resting order: (A) the MBBO [16] at the time of execution; [17] (B) the ABBO [18] at the time of execution; [19] (C) the time first response that executes against the resting order was received by the Exchange and the size of the execution and type of the response; [20] and (D) whether the response was entered by the Recipient Member. If the resting order executes against multiple contra-side responses, only the MBBO and ABBO at the time of the execution against the first response will be included.

Exchange Rule 531(a)(1)(ii)(D) provides that the existing Liquidity Taker Event Report for Simple Orders also includes the time difference between the time the resting order was received by the Exchange and the time the first response that executes against the resting order was received by the Exchange. The proposed Report would not include the same information because that timeframe could be for an extended period of time since the proposed Report focuses on orders that have been resting on the Simple Order Book for longer than 200 microseconds and, therefore, the Exchange believes is less likely to be valuable to the Recipient Member.

Recipient Member's Response Information. Like current paragraph (a)(1)(iii) of Exchange Rule 531 for the existing Liquidity Taker Event Report for Simple Orders, proposed Rule 531(c)(1)(iii) would provide that the following information would be included in the Report regarding response(s) sent by the Recipient Member: (A) Recipient Member identifier; (B) the time difference between the time the first response that executes against the resting order was received by the Exchange and the time of each response sent by the Recipient Member, regardless of whether it executed or not; [21] (C) size and type of each response submitted by Recipient Member; and (D) response reference number, which is a unique reference number attached to the response by the Recipient Member.

Timeframe for Data Included in Report

The timeframe covered by the proposed Report is the primary difference between it and the existing Liquidity Taker Event Report for Simple Orders. The existing Liquidity Taker Event Report for Simple Orders provides data for executions and contra-side responses that occurred within 200 microseconds of the time the resting order was received by the Exchange. Meanwhile, the proposed Report would include the same data as the Liquidity Taker Event Report for Simple Orders but would focus on executions and contra-side responses that occurred after 200 microseconds of the time the resting order was received by the Exchange, and within 200 microseconds of receipt of any Member's first attempt to execute against the resting order after the initial 200 microsecond time period has expired. More specifically, the resting order must rest on the Simple Order Book for at least 200 microseconds and once that initial 200 microsecond period has passed, a Member must then submits an order to attempt to execute against that resting order. This event starts a second 200 microsecond period within which the proposed Report would include data on executions and contra-side responses submitted by the Recipient Member to execute against that resting order.

For example, Member A submits an order that is posted to the Simple Order Book. 200 microseconds passes and Member A's order remains posted to the Simple Order Book. Then Member B enters a marketable order to execute against Member A's resting order, starting the second 200 microsecond window. Within this next 200 microsecond window, Member C sends a marketable order to execute against Member A's resting Order. Because Member B's order is received by the Exchange before Member C's order, Member B's order executes against Member A's resting order. The proposed Report would provide Member C the data points necessary for that firm to calculate by how much time they

[10] The time the Exchange received the resting order would be in nanoseconds and is the time the resting order was received by the Exchange's System.

[11] The term ''affiliate'' of or person ''affiliated with'' another person means a person who, directly, or indirectly, controls, is controlled by, or is under common control with, such other person. *See* Exchange Rule 100.

[12] The Report will simply indicate whether the Recipient Member is an Affiliate of the Member that entered the resting order and not include any other information that may indicate the identity of the Member that entered the resting order.

[13] The term ''Priority Customer'' means a person or entity that (i) is not a broker or dealer in securities, and (ii) does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). The number of orders shall be counted in accordance with Interpretation and Policy .01 to Exchange Rule 100. *See* Exchange Rule 100.

[14] The term ''Market Maker'' refers to ''Lead Market Makers'', ''Primary Lead Market Makers'' and ''Registered Market Makers'' collectively. *See* Exchange Rule 100.

[15] The Exchange notes that the displayed price and size are also disseminated via the Exchange's proprietary data feeds and the Options Price Reporting Authority (''OPRA''). The Exchange also notes that the displayed price of the resting order may be different than the ultimate execution price. This may occur when a resting order is displayed and ranked at different prices upon entry to avoid a locked or crossed market.

[16] The term ''MBBO'' means the best bid or offer on the Exchange. *See* Exchange Rule 100.

[17] Exchange Rule 531(c)(1)(ii)(A) would further provide that if the resting order executes against multiple contra-side responses, only the MBBO at the time of the execution against the first response will be included.

[18] The term ''ABBO'' or ''Away Best Bid or Offer'' means the best bid(s) or offer(s) disseminated by other Eligible Exchanges (defined in Exchange Rule 1400(g)) and calculated by the Exchange based on market information received by the Exchange from OPRA. *See* Exchange Rule 100.

[19] Exchange Rule 531(c)(1)(ii)(B) would further provide that if the resting order executes against multiple contra-side responses, only the ABBO at the time of the execution against the first response will be included.

[20] The time the Exchange received the response order would be in nanoseconds and would be the time the response was received by the Exchange's network, which is before the time the response would be received by the System.

[21] For purposes of calculating this duration of time, the Exchange will use the time the resting order and the Recipient Member's response(s) is received by the Exchange's network, both of which would be before the order and response(s) would be received by the System. This time difference would be provided in nanoseconds.

missed executing against Member A's resting order.

The above timeframe would be codified under proposed paragraph (c)(2) of Rule 531 which would provide that the proposed Report would include the data set forth under Rule 531(c)(1) described above for executions and contra-side responses that occurred (i) after 200 microseconds of the time the resting order was received by the Exchange and (ii) within 200 microseconds of receipt of the first attempt to execute against the resting order after the initial 200 microsecond time period under (c)(2)(i) of this paragraph has expired.

Scope of Data Included in the Report

Like current paragraph (a)(3) of Exchange Rule 531 for the existing Liquidity Taker Event Report for Simple Orders, proposed paragraph (c)(3) of Exchange Rule 531 would provide that the proposed Report will only include trading data related to the Recipient Member and, subject to the proposed paragraph (4) of Rule 531(c) described below, will not include any other Member's trading data other than that listed in paragraphs (1)(i) and (ii) of Exchange Rule 531(c) described above.

Historical Data

Like current paragraph (a)(4) of Exchange Rule 531 for the existing Liquidity Taker Event Report for Simple Orders, proposed paragraph (c)(4) of Rule 531 would specify that the proposed Report will contain historical data from the prior trading day and will be available after the end of the trading day, generally on a T+1 basis.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.[22] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[23] 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. This proposal is in keeping with those principles in that it promotes increased transparency through the dissemination of the optional Report to those interested in subscribing to receive the data. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[24] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The timeframe covered by the proposed Report is the primary difference between it and the existing Liquidity Taker Event Report for Simple Orders. However, this difference only pertains to the timeframe covered by each report, with each report containing the exact same data fields with one exception described here. The existing Liquidity Taker Event Report for Simple Orders provides data for executions and contra-side responses that occurred within 200 microseconds of the time the resting order was received by the Exchange. Meanwhile, the proposed Report would basically include the same data as the Liquidity Taker Event Report for Simple Orders but would focus on executions and contra-side responses that occurred after 200 microseconds of the time the resting order was received by the Exchange and one additional difference. The one difference is that unlike the existing Liquidity Taker Event Report for Simple Orders, the proposed Report would not include the time difference between the time the resting order and first response that executes against the resting order are received by the Exchange. Each report focuses on 200 microsecond windows with the existing Report's window starting at the time of receipt of the resting order and the proposed Report's window starting with the first attempt to execute against the resting order after the order was resting on the Simple Order Book for at least 200 microseconds.

The Exchange believes the proposed Report will serve to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general protect investors and the public interest because it will benefit investors by facilitating their prompt access to the value added information that is included in the proposed Report. The proposed Report will allow Members to access information regarding their trading activity that they may utilize to evaluate their own trading behavior and order interactions.

Like the existing Liquidity Taker Event Report for Simple Orders, the proposed Report is designed for Members that are interested in gaining insight into latency in connection with orders that failed to execute against an order resting on the Exchange's Simple Order Book by providing those Members data to analyze by how much time their order may have missed an execution against a contra-side order resting on the Book. The Exchange believes that providing this optional latency data to interested Members is consistent with facilitating transactions in securities, removing impediments to and perfecting the mechanism of a free and open market and a national market system, and, in general, protecting investors and the public interest because it provides greater visibility into the latency of Members' incoming orders. Members may use this data to optimize their models and trading patterns in an effort to yield better execution results by calculating by how much time their order may have missed an execution.

Like the existing Liquidity Taker Event Report for Simple Orders, the proposed Report is designed to offer latency information in a systematized way and standardized format to any Member that chooses to subscribe to the proposed Report. As a result, the proposal will make latency information for liquidity-seeking orders available in an equalized manner and will increase transparency, particularly for Recipient Members that may not have the expertise to generate the same information on their own. The proposed Report may better enable Recipient Members to increase the fill rates for their liquidity-seeking orders. At the same time, as is also discussed above, the Report is designed to prevent a Recipient Member from learning other Members' sensitive trading information. The Report would not be a real-time market data product, as it would provide only historical trading data for the previous trading day, generally on a T+1 basis. In addition, the data in the Report regarding incoming orders that failed to execute would be specific to the Recipient Member's orders, and other information in the proposed Report regarding resting orders and executions would be anonymized if it relates to a Member other than the Recipient Member.

The proposed Report generally contains three buckets of information, each of which are identical to the same buckets of information contained in the existing Liquidity Taker Event Report

[22] 15 U.S.C. 78f(b).

[23] 15 U.S.C. 78f(b)(5).

[24] *Id.*

for Simple Orders, with one exception discussed herein and again below. The first two buckets include information about the resting order and the execution of the resting order. This information is generally available from other public sources, such as OPRA and the Exchange's proprietary data feeds, or is similar to information included in a report offered by another exchange. For example, OPRA provides bids, offers, and consolidated last sale and quotation information for options trading on all national securities exchanges, including the Exchange. In addition, the Exchange offers the Top of Market (''ToM'') feed which provides real-time quote and last sale information for all displayed orders on the Book.[25]

Specifically, the first bucket of information contained in the Report for the resting order includes the time the resting order was received by the Exchange, the symbol, unique reference number assigned at the time of receipt, side (buy or sell), and the displayed price and size of the resting order. Further, the symbol, origin type, side (buy or sell), and displayed price and size are also available either via OPRA or the Exchange's proprietary data feeds. The first bucket of information also indicates whether the Recipient Member is an Affiliate of the Member that entered the resting order. This data field will not indicate the identity of the Member that entered the resting order and would simply allow the Recipient Member to better understand the scenarios in which it may execute against the orders of its Affiliates.[26]

The second bucket of information contained in the Report regards the execution of the resting order and includes the MBBO and ABBO at the time of execution. These data points are also available either via OPRA or the Exchange's proprietary data feeds. The second bucket of information will also indicate whether the response was entered by the Recipient Member. This data point is simply provided as a convenience. If not entered by the Recipient Member, this data point will be left blank so as not to include any identifying information about other Member activity. The second bucket of information also includes the size, as well as the time and type of first response that executes against the resting order. These data points would assist the Recipient Member in analyzing by how much time their order may have missed an execution against a contra-side order resting on the Book. Unlike the existing Liquidity Taker Event Report for Simple Orders, the proposed Report would not include the time difference between the time the resting order and first response that executes against the resting order are received by the Exchange. The proposed Report would not include this data point because the Exchange understands Recipient Members may not find it useful due to the fact that the proposed Report focuses on orders that have been resting on the Simple Order Book for longer than 200 microseconds. Therefore, the Exchange does not propose to include this data point as a means to streamline the proposed Report and remove unnecessary data.

The third bucket of information is about the Recipient Member's response(s) and the time their response(s) is received by the Exchange. This includes the time difference between the time the first response that executes against the resting order was received by the Exchange and the time of each response sent by the Recipient Member, regardless of whether it executed or not. As above, this data point would assist the Recipient Member in analyzing by how much time their order may have missed an execution against a contra-side order resting on the Book. This bucket would also include the size and type of each response submitted by the Recipient Member, the Recipient Member identifier, and a response reference number which is selected by the Recipient Member. Each of these data points are unique to the Recipient Member and should already be known by Recipient Member even if not included in the Report.

Like the existing Liquidity Taker Event Report for Simple Orders, the Exchange proposes to provide the Report on a voluntary basis and no Member will be required to subscribe to the Report. The Exchange notes that there is no rule or regulation that requires the Exchange to produce, or that a Member elect to receive, the Report. It is entirely a business decision of each Member to subscribe to the Report. The Exchange proposes to offer the Report as a convenience to Members to provide them with additional information regarding trading activity on the Exchange on a delayed basis after the close of regular trading hours. A Member that chooses to subscribe to the Report may discontinue receiving the Report at any time if that Member determines that the information contained in the Report is no longer useful.

In summary, the proposed Report will help to protect a free and open market by providing additional data (offered on an optional basis) to the marketplace and by providing investors with greater choices.[27] Additionally, the proposal would not permit unfair discrimination because the proposed Report will be available to all Exchange Members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The Exchange believes that the proposed Report will enhance competition[28] by providing a new option for receiving market data to Members. The proposed Report will also further enhance competition between exchanges by allowing the Exchange to expand its product offerings to include an additional report to provide latency information requested by Members.

In this instance, the proposed rule change to offer the optional Report is in response to Member interest and requests for such information, including from some Members that subscribe to the existing Liquidity Taker Event Report for Simple Orders. The Exchange does not believe the proposed Report will have an inappropriate burden on intra-market competition between Recipient Members and other Members who do not receive the Report. As discussed above, the first two buckets of information included in the Report contain information about the resting order and the execution of the resting order, both of which are generally available to Members that choose not to receive the Report from other public sources, such as OPRA and the Exchange's proprietary data feeds. The third bucket of information is about the Recipient Member's response and the time their response is received by the Exchange, information which the Recipient Member would be able to obtain without receiving the Report. Additionally, some Members may already be able to derive a substantial amount of the same data that is provided by some of the components based on their own executions and algorithms.

In sum, if the proposed Report is unattractive to Members, Members will opt not to receive it. Accordingly, the

[25] *See* section 6)a) of the Exchange's fee schedule.

[26] The Exchange's surveils to monitor for abhorrent behavior related to internalized trades and identify potential wash sales.

[27] *See* Sec. Indus. Fin. Mkts. Ass'n (SIFMA), Initial Decision Release No. 1015, 2016 SEC LEXIS 2278 (ALJ June 1, 2016) (finding the existence of vigorous competition with respect to non-core market data).

[28] *Id.*

Exchange does not believe that the proposed change will impair the ability of Members or competing order execution venues to maintain their competitive standing in the financial markets.

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 after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A) of the Act [29] and Rule 19b–4(f)(6) [30] 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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–MIAX–2023–02 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–MIAX–2023–02. 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–MIAX–2023–02, and should be submitted on or before March 7, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[31]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03058 Filed 2–13–23; 8:45 am]

BILLING CODE 8011–01–P

[29] 15 U.S.C. 78s(b)(3)(A).

[30] 17 CFR 240.19b-4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[31] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96835; File No. SR–MIAX–2023–03]

Self-Regulatory Organizations: Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by Miami International Securities Exchange LLC To Amend Its Fee Schedule

February 8, 2023.

Pursuant to the provisions of 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 January 31, 2023, Miami International Securities Exchange LLC (''MIAX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Fee Schedule (the ''Fee Schedule'').

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Section 1)a)iii) of the Fee Schedule to modify the Priority Customer Rebate Program (''PCRP'') [3] to (i) reduce the per contract credit for Simple Orders [4] in MIAX Select Symbols in Tier 3 of the PCRP; [5] (ii) modify the PCRP table to reflect that the per contract credit for cPRIME Agency Orders will be based upon the per Contract Credit for cPRIME Agency Order table (to be renamed the ''cPRIME Agency Order Break-up Table''); (iii) modify the Per Contract Credit for cPRIME Agency Order table to remove the maximum leg size requirement; and (iv) rename the Per Contract Credit for cPRIME Agency Order table to the cPRIME Agency Order Break-up Table.

The proposed changes will be effective on February 1, 2023.

Background

Priority Customer Rebate Program

The Exchange's Fee Schedule provides for a Priority Customer Rebate Program, under which a Priority Customer [6] rebate payment is calculated from the first executed contract at the applicable threshold per contract credit with rebate payments made at the highest achieved volume tier for each contract traded in that month. The percentage thresholds are calculated based on the percentage of national customer volume in multiply-listed option classes listed on MIAX entered and executed over the course of the month (excluding QCC [7] and cQCC Orders,[8] Priority Customer-to-Priority Customer Orders, C2C,[9] and cC2C Orders,[10] PRIME and cPRIME AOC Responses, PRIME and cPRIME Contra-side Orders, and PRIME and cPRIME Orders [11] for which both the Agency and Contra-side Order are Priority Customers). Volume for transactions in both simple and complex orders are aggregated to determine the appropriate volume tier threshold applicable to each transaction. Volume is recorded for, and credits are delivered to, the Member that submits the order to MIAX. MIAX aggregates the contracts resulting from Priority Customer Orders [12] transmitted and executed electronically on MIAX from Members and Affiliates [13] for purposes of the thresholds described in the PCRP table.

Currently, Members and their Affiliates that qualify for the PCRP and execute Priority Customer simple orders in MIAX Select Symbols receive the following rebates: (i) $0.00 per contract in Tier 1; (ii) $0.10 per contract in Tier 2; (iii) $0.20 per contract in Tier 3; and (iv) $0.24 in Tier 4. The Exchange now proposes to reduce the rebate provided in Tier 3 from $0.20 to $0.18. The purpose of adjusting the Tier 3 rebate is for business and competitive reasons.

Per Contract Credit for cPRIME Agency Orders

Exchange Rule 518(b)(7) defines a cPRIME Order as a type of complex order [14] that is submitted for participation in a cPRIME Auction and trading of cPRIME Orders is governed by Rule 515A, Interpretation and Policies .12.[15] cPRIME Orders are

[3] Under the PCRP, MIAX credits each Member the per contract amount resulting from each Priority Customer order transmitted by that Member which is executed electronically on the Exchange in all multiply-listed option classes (excluding, in simple or complex as applicable, QCC and cQCC Orders, mini-options, Priority Customer-to-Priority Customer Orders, C2C and cC2C Orders, PRIME and cPRIME AOC Responses, PRIME and cPRIME Contra-side Orders, PRIME and cPRIME Orders for which both the Agency and Contra-side Order are Priority Customers, and executions related to contracts that are routed to one or more exchanges in connection with the Options Order Protection and Locked/Crossed Market Plan referenced in Exchange Rule 1400), provided the Member meets certain percentage thresholds in a month as described in the Priority Customer Rebate Program table. *See* Fee Schedule, Section 1)a)iii. The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[4] The ''Simple Order Book'' is the Exchange's regular electronic book of orders and quotes. *See* Exchange Rule 518(a)(15).

[5] The term ''MIAX Select Symbols'' means options overlying AAL, AAPL, AMAT, AMD, AMZN, BA, BABA, BB, BIDU, BP, C, CAT, CLF, CVX, DAL, EBAY, EEM, FCX, GE, GILD, GLD, GM, GOOGL, GPRO, HAL, INTC, IWM, JNJ, JPM, KMI, KO, META, MO, MRK, NFLX, NOK, ORCL, PBR, PFE, PG, QCOM, QQQ, RIG, SPY, T, TSLA, USO, VALE, WBA, WFC, WMB, X, XHB, XLE, XLF, XLP, XOM and XOP. *See* Fee Schedule, Section 1)a)iii), note 14.

[6] The term ''Priority Customer'' means a person or entity that (i) is not a broker or dealer in securities, and (ii) does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). *See* Exchange Rule 100.

[7] A Qualified Contingent Cross Order is comprised of an originating order to buy or sell at least 1,000 contracts, or 10,000 mini-option contracts, that is identified as being part of a qualified contingent trade, as that term is defined in Interpretations and Policies .01 below, coupled with a contra-side order or orders totaling an equal number of contracts. *See* Exchange Rule 516(j).

[8] A Complex Qualified Contingent Cross or ''cQCC'' Order is comprised of an originating complex order to buy or sell where each component is at least 1,000 contracts that is identified as being part of a qualified contingent trade, as defined in Rule 516, Interpretations and Policies .01, coupled with a contra-side complex order or orders totaling an equal number of contracts. Trading of cQCC Orders is governed by Rule 515(h)(4). *See* Exchange Rule 518(b)(6).

[9] A Customer Cross Order is comprised of a Priority Customer Order to buy and a Priority Customer Order to sell at the same price and for the same quantity. *See* Exchange Rule 516(i).

[10] A Complex Customer Cross or ''cC2C'' Order is comprised of one Priority Customer complex order to buy and one Priority Customer complex order to sell at the same price and for the same quantity. Trading of cC2C Orders is governed by Rule 515(h)(3). *See* Exchange Rule 518(b)(5).

[11] PRIME and cPRIME Orders are described in more detail below.

[12] The term ''Priority Customer Order'' means an order for the account of a Priority Customer. *See* Exchange Rule 100.

[13] For purposes of the MIAX Options Fee Schedule, the term ''Affiliate'' means (i) an affiliate of a Member of at least 75% common ownership between the firms as reflected on each firm's Form BD, Schedule A, (''Affiliate''), or (ii) the Appointed Market Maker of an Appointed EEM (or, conversely, the Appointed EEM of an Appointed Market Maker). An ''Appointed Market Maker'' is a MIAX Market Maker (who does not otherwise have a corporate affiliation based upon common ownership with an EEM) that has been appointed by an EEM and an ''Appointed EEM'' is an EEM (who does not otherwise have a corporate affiliation based upon common ownership with a MIAX Market Maker) that has been appointed by a MIAX Market Maker, pursuant to the following process. A MIAX Market Maker appoints an EEM and an EEM appoints a MIAX Market Maker, for the purposes of the Fee Schedule, by each completing and sending an executed Volume Aggregation Request Form by email to *membership@miaxoptions.com* no later than 2 business days prior to the first business day of the month in which the designation is to become effective. Transmittal of a validly completed and executed form to the Exchange along with the Exchange's acknowledgement of the effective designation to each of the Market Maker and EEM will be viewed as acceptance of the appointment. The Exchange will only recognize one designation per Member. A Member may make a designation not more than once every 12 months (from the date of its most recent designation), which designation shall remain in effect unless or until the Exchange receives written notice submitted 2 business days prior to the first business day of the month from either Member indicating that the appointment has been terminated. Designations will become operative on the first business day of the effective month and may not be terminated prior to the end of the month. Execution data and reports will be provided to both parties. *See* Fee Schedule, note 1.

[14] A ''complex order'' is any order involving the concurrent purchase and/or sale of two or more different options in the same underlying security (the ''legs'' or ''components'' of the complex order), for the same account, in a ratio that is equal to or greater than one-to-three (.333) and less than or equal to three-to-one (3.00) and for the purposes of executing a particular investment strategy. A complex order can also be a ''stock-option'' order, which is an order to buy or sell a stated number of units of an underlying security coupled with the purchase or sale of options contract(s) on the opposite side of the market, subject to certain contingencies set forth in the proposed rules governing complex orders. For a complete definition of a ''complex order,'' *see* Exchange Rule 518(a)(5). *See also* Securities Exchange Act Release No. 78620 (August 18, 2016), 81 FR 58770 (August 25, 2016) (SR–MIAX–2016–26).

[15] *See* Securities Exchange Act Release No. 81131 (July 12, 2017), 82 FR 32900 (July 18, 2017) (SR–MIAX–2017–19) (Order Granting Approval of a Proposed Rule Change to Amend MIAX Options Rules 515, Execution of Orders and Quotes; 515A,

processed and executed in the Exchange's PRIME mechanism, the same mechanism that the Exchange uses to process and execute simple PRIME orders, pursuant to Exchange Rule 515A.[16] PRIME is a process by which a Member may electronically submit for execution an order it represents as agent (an ''Agency Order'') against principal interest and/or solicited interest. The Member that submits the Agency Order (''Initiating Member'') agrees to guarantee the execution of the Agency Order by submitting a contra-side order representing principal interest or solicited interest (''Contra-Side Order''). When the Exchange receives a properly designated Agency Order for Auction processing, a request for response (''RFR'') detailing the option, side, size and initiating price is broadcasted to MIAX participants up to an optional designated limit price. Members may submit responses to the RFR, which can be either an Auction or Cancel (''AOC'') order or an AOC eQuote. A cPRIME Auction is the price-improvement mechanism of the Exchange's System pursuant to which an Initiating Member electronically submits a complex Agency Order into a cPRIME Auction. The Initiating Member, in submitting an Agency Order, must be willing to either (i) cross the Agency Order at a single price against principal or solicited interest, or (ii) automatically match against principal or solicited interest, the price and size of a RFR that is broadcast to MIAX participants up to an optional designated limit price. Such responses are defined as cPRIME AOC Responses or cPRIME eQuotes. The PRIME mechanism is used for orders on the Exchange's Simple Order Book. The cPRIME mechanism is used for complex orders [17] on the Exchange's Strategy Book,[18] with the cPRIME mechanism operating in the same manner for processing and execution of cPRIME Orders that is used for PRIME Orders on the Simple Order Book.

Proposal

Currently, Members and their Affiliates that qualify for the PCRP that execute cPRIME Agency Orders with a maximum leg size equal to or less than 1,000 contracts receive $0.10 per contract in Tier 1 through Tier 4, or $0.12 in Tier 4 provided certain criteria is satisfied as denoted by footnote ''**''.[19] The Exchange also provides a separate per contract credit for cPRIME Agency Orders with a max leg size of more than 1,000 contracts, which is based upon the order break-up percentage. Specifically, the Per Contract Credit for cPRIME Agency Order table provides for the following rebates: (i) $0.05 when the order break-up percentage is 0–10%; (ii) $0.06 when the order break-up percentage is greater than 10%–20%; (iii) $0.07 when the order break-up percentage is greater than 20%–30%; (iv) $0.08 when the order break-up percentage is greater than 30%–40%; (v) $0.10 when the order break-up percentage is greater than 40%–50% (or $0.12 if the Member or their Affiliate qualifies for Tier 4 and satisfies the additional criteria denoted in footnote ''**''); [20] (vi) $0.10 when the order break-up percentage is greater than 50%–60% (or $0.12 if the Member or their Affiliate qualifies for Tier 4 and satisfies the additional criteria denoted in footnote ''**''); (vii) $0.10 when the order break-up percentage is greater than 60%–70% (or $0.12 if the Member or their Affiliate qualifies for Tier 4 and satisfies the additional criteria denoted in footnote ''**''); (viii) $0.10 when the order break-up percentage is greater than 70%–80% (or $0.12 if the Member or their Affiliate qualifies for Tier 4 and satisfies the additional criteria denoted in footnote ''**''); (ix) $0.10 when the order break-up percentage is greater than 80%–90% (or $0.12 if the Member or their Affiliate qualifies for Tier 4 and satisfies the additional criteria denoted in footnote ''**''); and (x) $0.10 when the order break-up percentage is greater than 90%–100% (or $0.12 if the Member or their Affiliate qualifies for Tier 4 and satisfies the additional criteria denoted in footnote ''**'').

The Exchange now proposes to provide that all cPRIME Agency Orders will be eligible for the per contract credit described in the Per Contract Credit for cPRIME Agency Order table by removing the maximum leg size requirement from that table. The Exchange also proposes to rename this table as the cPRIME Agency Order Break-up Table for clarity. Therefore, the Exchange proposes to remove the credit amounts for the per contract credits listed in the Per Contract Credit for cPRIME Agency Order column of the standard PCRP table in Section 1)a)iii) of the Fee Schedule. The Exchange then proposes to direct market participants to the proposed ''cPRIME Agency Order Break-Up Table,'' which can be found in the Fee schedule below the standard PCRP table, by inserting the sentence, ''See cPRIME Agency Order Break-up Table Below'' in each row for the ''Per Contract Credit for cPRIME Agency Order'' in the standard PCRP table. Accordingly, with the proposed changes, all cPRIME Agency Orders that qualify for the PCRP that are submitted to the Exchange would be eligible for the per contract credit based upon the order break-up percentage as described in the above mentioned table. The Exchange conducted an internal analysis of fees and rebates associated with cPRIME Agency Orders and the proposed changes are being made for business and competitive reasons.

As a result of the aforementioned proposed change, the Exchange also proposes to remove the following footnote ''*'' to the above mentioned table and to amend footnote ''**'' to clarify the operation of the per contract credit described in the footnote and to also amend footnote ''***'' to remove the maximum leg size requirement to accurately reflect the operation of the table.

The Exchange currently provides a cPRIME break-up credit of $0.25 per contract in Penny Classes [21] and $0.60 per contract in Non-Penny Classes.[22] Additionally, the Exchange provides an enhanced PRIME break-up credit of $0.28 per contract in Penny Classes and $0.72 per contract in Non-Penny Classes to the Electronic Exchange Member (''EEM'') [23] that submitted a cPRIME Order that trades with cPRIME AOC Responses and/or cPRIME participating quotes or orders, if the cPRIME Order experiences a break-up of greater than 60%, which is not changing under this proposal.[24]

MIAX Price Improvement Mechanism (''PRIME'') and PRIME Solicitation Mechanism; and 518, Complex Orders).

[16] *Id.*

[17] Only those complex orders in the classes designated by the Exchange and communicated to Members via Regulatory Circular with no more than the applicable number of legs, as determined by the Exchange on a class-by-class basis and communicated to Members via Regulatory Circular, are eligible for processing. *See* Exchange Rule 518(a)(5).

[18] The ''Strategy Book'' is the Exchange's electronic book of complex orders and complex quotes. *See* Exchange Rule 518(a)(17).

[19] Footnote ''**'' provides that, any Member or its Affiliate that qualifies for Priority Customer Rebate Program tier 4 and executes Priority Customer standard, non-paired complex volume at least equal to or greater than three (3) times their Priority Customer cPRIME Agency Order volume, on a monthly basis, will receive a credit of $0.12 per contract for cPRIME Agency Orders instead of the credit otherwise applicable to such orders in tier 4.

[20] *Id.*

[21] *See* Exchange Rule 510(c).

[22] *See* Section 1)a)vi) MIAX Complex Price Improvement Mechanism (''cPRIME'') Fees, of the Exchange's Fee Schedule.

[23] The term ''Electronic Exchange Member'' or ''EEM'' means the holder of a Trading Permit who is not a Market Maker. Electronic Exchange Members are deemed ''members'' under the Exchange Act. See Exchange Rule 100.

[24] *See* the Exchange's Fee schedule, footnote ''*'' of Section 1)a)vi), on its public website (available at *https://www.miaxoptions.com/fees*).

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with section 6(b) of the Act [25] in general, and furthers the objectives of section 6(b)(4) of the Act [26] in particular, in that it is an equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The Exchange also believes the proposal furthers the objectives of section 6(b)(5) of the Act [27] in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The Exchange believes its proposal provides for the equitable allocation of reasonable dues and fees and is not unfairly discriminatory for the following reasons. The Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is one of 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has more than approximately 12–13% of the market share of executed volume of multiply-listed equity and exchange-traded fund (''ETF'') options trades as of January 26, 2023, for the month of January 2023.[28] Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, as of January 26, 2023, the Exchange has a total market share of 6.45% of all equity options volume, for the month of January 2023.[29]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue use of certain categories of products, in response to fee changes. For example, on March 1, 2019, the Exchange filed with the Commission an immediately effective filing to decrease certain credits assessable to Members pursuant to the PCRP.[30] The Exchange experienced a decrease in total market share between the months of February and March of 2019. Accordingly, the Exchange believes that the March 1, 2019, fee change may have contributed to the decrease in the Exchange's market share and, as such, the Exchange believes competitive forces constrain options exchange transaction and non-transaction fees.

Accordingly, competitive forces constrain the Exchange's transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. In response to the competitive environment, the Exchange offers specific rates and credits in its fees schedule, like those of other options exchanges' fees schedules, which the Exchange believes provides incentives to Members to increase order flow of certain qualifying orders.

The Exchange believes that the PCRP itself is reasonably designed because it incentivizes providers of Priority Customer order flow to send that Priority Customer order flow to the Exchange in order to receive a credit in a manner that enables the Exchange to improve its overall competitiveness and strengthen its market quality for all market participants. The PCRP, which provides increased incentives in certain tiers in high volume select symbols, is also reasonably designed to increase the competitiveness of the Exchange with other options exchanges that also offer increased incentives (*e.g.,* lower fees or higher rebates) to higher volume symbols.[31]

The Exchange believes that its proposal to amend the rebate provided for Priority Customer Orders in MIAX Select Symbols in Tier 3 is consistent with section 6(b)(4) of the Act [32] in that the proposal is reasonable, equitable and not unfairly discriminatory as it applies uniformly to all similarly situated participants. The Exchange believes the proposed change (a $0.02 decrease from the current rebate) is reasonable in that it represents a modest decrease from the current rebate provide in Tier 3. The Exchange believes that the proposed rebate will continue to provide an incentive to participants to submit Priority Customer Orders in MIAX Select Symbols. The Exchange believes that even with the proposed reduced credit in Tier 3, the Exchange's credits for the PCRP remain in line with, or higher than, competing exchanges' credits for similar programs.[33] The Exchange also believes that its proposal is consistent with section 6(b)(5) of the Act because it will apply equally to all Priority Customer Orders in Tier 3. All similarly situated participants are subject to the same rebate schedule, and access to the Exchange is offered on terms that are not unfairly discriminatory.

The Exchange believes that its proposal to provide a per contract credit for all cPRIME Agency Orders based upon the order break-up percentage will continue to encourage Priority Customer order flow to auctions. Increased Priority Customer order flow benefits all market participants because it continues to attract liquidity to the Exchange by providing more trading opportunities. This attracts Market Makers and other liquidity providers, thus, facilitating price improvement in the auction process, signaling additional corresponding order flow from other market participants, and, as a result, increasing liquidity on the Exchange.

The Exchange believes that its proposal is consistent with section 6(b)(4) of the Act [34] in that the proposal is reasonable, equitable and not unfairly discriminatory as it applies uniformly to all similarly situated participants. The Exchange believes the PCRP is reasonably designed because it will provide an incentive to providers of Priority Customer order flow to send that Priority Customer order follow to the Exchange to receive a credit in a manner that enables the Exchange to improve its overall competiveness and strengthen its market quality for all participants.

The Exchange's proposal to provide a per contract credit to eligible cPRIME Agency Orders based upon the order break-up percentage is consistent with section 6(b)(4) of the Act [35] because it applies equally to all participants of the PCRP that submit cPRIME Agency Orders. The Exchange believes that the proposed rebate structure is fair, equitable, and not unreasonably discriminatory. The PCRP is reasonably designed because it will provide an incentive to providers of Priority Customer order flow to send that

[25] 15 U.S.C. 78f(b).

[26] 15 U.S.C. 78f(b)(4).

[27] 15 U.S.C. 78f(b)(5).

[28] *See* ''The market at a glance/MTD AVERAGE'', *available at https://www.miaxoptions.com/* (data as of 1/1/2023–1/25/2023).

[29] *See id.*

[30] *See* Securities Exchange Act Release No. 85301 (March 13, 2019), 84 FR 10166 (March 19, 2019) (SR–MIAX–2019–09).

[31] *See* Nasdaq ISE Fee Schedule, Options 7, Section 3. Regular Order Fees and Rebates, Select Symbols.

[32] 15 U.S.C. 78f(b)(4).

[33] *See* NYSE American Options Fee Schedule, Section I.E., American Customer Engagement (''ACE'') Program (providing a simple credit of $0.17 in Tier 3); *see also* Cboe Exchange, Inc. Options Fee Schedule, Page 3, Volume Incentive Program (''VIP'') (providing a simple Non-AIM rebate of $0.12 in Tier 3).

[34] 15 U.S.C. 78f(b)(4).

[35] 15 U.S.C. 78f(b)(4).

Priority Customer order flow to the Exchange to receive a credit in a manner that enables the Exchange to improve its overall competitiveness and strengthen its market quality for all participants.

In addition, the Exchange believes that its proposal is consistent with section 6(b)(5) of the Act [36] because it perfects the mechanisms of a free and open market and a national market system and protects investors and the public interest because an increase in Priority Customer order flow will bring greater volume and liquidity to the Exchange, which benefits all market participants by providing more trading opportunities and tighter spreads. To the extent Priority Customer order flow is increased by this proposal, market participants will increasingly compete for the opportunity to trade on the Exchange including sending more orders and provided narrower and larger-sized quotations in the effort to trade with such Priority Customer Order flow.

The Exchange believes that providing rebates for Priority Customers that submit cPRIME Agency Orders is equitable and not unfairly discriminatory because the proposed rebate schedule will apply equally to all cPRIME Agency Orders for Priority Customers. The Exchange believes that the application of the rebate is equitable and not unfairly discriminatory because, as stated above, Customer order flow enhances liquidity on the Exchange, in turn providing more trading opportunities and attracting other market participants, thus, facilitating tighter spreads, increased order flow and trading opportunities to the benefit of all market participants. Moreover, the options industry has a long history of providing preferential pricing to Priority Customer Orders, and the Exchange's current fees schedule currently does so in many places, as does the fee structure of at least one other exchange.[37]

As noted above, the Exchange operates in a highly competitive market. The Exchange is only one of several options venues to which market participants may direct their order flow, and it represents a small percentage of the overall market. The Exchange believes that the proposed fees are reasonable, equitable, and not unfairly discriminatory in that competing options exchanges offer similar fees and credits in connection with similar price improvement auctions.[38]

The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and self-regulatory organization (''SRO'') revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [39]

The Exchange believes that the ever-shifting market shares among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue or reduce use of certain categories of products, in response to transaction and non-transaction fee changes. Accordingly, competitive forces constrain the Exchange's transaction fees and rebates, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. The Exchange believes the proposal reflects a reasonable and competitive pricing structure which will continue to incentivize market participants to direct Priority Customer Orders to the Exchange, which the Exchange believes will enhance liquidity and market quality on the exchange to the benefit of all Members.

For the reasons discussed above, the Exchange submits that the proposal satisfies the requirements of sections 6(b)(4) and 6(b)(5) of the Act [40] in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to unfairly discriminate between customers, issuers, brokers, or dealers.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with section 6(b)(8) of the Act,[41] the Exchange does not believe that the proposed rule change will impose any burden on intra-market or intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, as discussed above, the Exchange believes that the proposed changes will encourage the submission of additional liquidity to price improvement auctions, thereby promoting market depth, price discovery, transparency, and enhanced order execution and price improvement opportunities for all Members. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [42]

The Exchange does not believe that its proposal will impose any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes will apply uniformly to all eligible Priority Customers. The Exchange believes that this proposal will continue to encourage Members to submit cPRIME Agency Orders for Priority Customers, which will increase liquidity and benefit all market participants by providing more trading opportunities and tighter spreads. The Exchange notes the fact that preferential pricing to Priority Customers is a long-standing options industry practice. The proposed rebate changes serve to enhance Priority Customer order flow to the Exchange's Price Improvement Mechanism, which, as a result, facilitates increased liquidity and execution opportunities to the benefit of all market participants.

Additionally, the Exchange does not believe its proposal to reduce the Tier 3 rebate for MIAX Select Symbols will impose any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed change will apply uniformly to all similarly situated participants.

The Exchange also does not believe that its proposal will impose any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because, as noted above, at least one other competing options exchange [43] has similar rebates in place in connection with similar price improvement auctions. Additionally, and as previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues that they participate on and direct their order flow to, including 15 other options exchanges, many of which offer substantially similar price improvement auctions. Based on publicly available information, no single options exchange has more than

[36] 15 U.S.C. 78f(b)(5).

[37] *See* Cboe Fee Schedule, ''Break-Up Credits,'' available at *https://cdn.cboe.com/resources/membership/Cboe_FeeSchedule.pdf.*

[38] *Id.*

[39] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

[40] 15 U.S.C. 78f(b)(4) and (5).

[41] 15 U.S.C. 78f(b)(8).

[42] *See* Securities Exchange Act Release No. 51808, 70 FR 37495, 37498–99 (June 29, 2005) (S7–10–04) (Final Rule).

[43] *See supra* note 37.

approximately 12–13% of the equity options market share.[44] Therefore, no exchange possesses significant pricing power in the execution of option order flow. Participants can readily choose to send their orders to other exchanges if they deem fee levels at those other exchanges to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [45] The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit states as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . .'' [46] Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Accordingly, the Exchange believes that the proposed changes will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because it will continue to encourage order flow, which provides greater volume and liquidity, benefiting all market participants by providing more trading opportunities and tighter spreads.

[44] *See supra* note 28.

[45] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[46] *NetCoalition* v. *SEC,* 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

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

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act,[47] and Rule 19b–4(f)(2) [48] 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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–MIAX–2023–03 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–MIAX–2023–03. 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–MIAX–2023–03 and should be submitted on orbefore March 7, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[49]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03055 Filed 2–13–23; 8:45 am]

BILLING CODE 8011–01–P

[47] 15 U.S.C. 78s(b)(3)(A)(ii).

[48] 17 CFR 240.19b–4(f)(2).

[49] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96842; File No. SR–MSRB–2023–02]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change To Create New MSRB Rule G–46, on Duties of Solicitor Municipal Advisors, and To Amend MSRB Rule G–8, on Books and Records

February 8, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 31, 2023, the Municipal Securities Rulemaking Board (''MSRB'' or ''Board'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The MSRB filed with the Commission a proposed rule change to create a new rule, MSRB Rule G–46, on duties of solicitor municipal advisors (''Proposed Rule G–46'') and amend MSRB Rule G–8, on books and records (''Proposed Amended Rule G–8'') (together, the ''proposed rule change''). The MSRB requests that the proposed rule change be approved with an implementation date to be announced by the MSRB in a regulatory notice published no later than one month following the Commission approval date, which implementation date shall be no later than twelve months following the Commission approval date.

The text of the proposed rule change is available on the MSRB's website at *https://msrb.org/2023-SEC-Filings,* at the MSRB'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 MSRB 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 MSRB 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

Solicitor Municipal Advisor Activity

There are two broad categories of municipal advisors—those that provide certain advice to or on behalf of a municipal entity or obligated person and those that undertake certain solicitations of a municipal entity or obligated person on behalf of certain third-party financial professionals.[3] The first category of municipal advisors is often referred to as non-solicitor municipal advisors, while the latter is sometimes referred to as solicitors.[4] Proposed Rule G–46 would govern the conduct of these solicitors, more specifically defined as ''solicitor municipal advisors'' under Proposed Rule G–46(a)(vi).

While the Exchange Act[5] permits a municipal advisor to conduct such solicitations on behalf of a third-party broker, dealer or municipal securities dealer (collectively and individually ''dealers''),[6] MSRB Rule G–38, on solicitation of municipal securities business, prohibits a dealer from providing or agreeing to provide payment to third parties for solicitations of municipal securities business made on behalf of the dealer.[7] Additionally, as discussed in the MSRB's Statement on Burden on Competition below, according to MSRB data, it appears that a substantial number of solicitations that would be subject to Proposed Rule G–46 involve a solicitation on behalf of a third-party investment adviser to provide investment advisory services to a municipal entity. Anecdotally, the MSRB understands that such solicitations often occur in connection with the solicitation of a public pension plan.[8] For example, if a person communicates with a public pension plan for the purpose of getting a particular investment advisory firm hired by the plan to provide investment advisory services to such plan, that person may be a solicitor municipal advisor if such person is paid by the investment advisory firm for the communication and if such person and the investment advisory firm are not affiliated.

As discussed below, MSRB data suggests that the number of municipal advisors that engage in solicitations that may subject them to Proposed Rule G–46 comprise a relatively small percentage of the municipal advisors that are registered with the MSRB. However, notwithstanding the relatively small size of such solicitation market, the MSRB believes that it is important that the fundamental protections extended to the municipal entity and obligated person clients of other MSRB regulated entities are also extended to the municipal entities and obligated persons with whom solicitor municipal advisors interact. For example, as noted in the SEC Final MA Rule Adopting Release, the solicitation of public pension plans in connection with investment advisory services has been subject to multiple SEC enforcement

[3] Section 15B(e)(4) of the Exchange Act (15 U.S.C. 78*o*–4(e)(4)) generally defines ''municipal advisor'' to mean a person (who is not a municipal entity or an employee of a municipal entity) that (i) provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or (ii) undertakes a solicitation of a municipal entity. Notwithstanding the omission of the term, ''obligated person'' in connection with the undertaking of a solicitation under Section 15B(e)(4)(A)(ii) of the Exchange Act (15 U.S.C. 78*o*–4(e)(4)(A)(ii)), the SEC has interpreted the definition of ''municipal advisor'' to include a person who engages in the solicitation of an obligated person acting in the capacity of an obligated person. *See* Release No. 34–70462 (September 20, 2013), 78 FR 67467, at notes 138 and 408 (November 12, 2013) (File No. S7–45–10) (''SEC Final MA Rule Adopting Release''). *See also* Exchange Act Rule 15Ba1–1(d)(1)(i) (17 CFR 240.15Ba1–1(d)(1)(i)).

[4] Section 15B(e)(9) of the Exchange Act (15 U.S.C. 78*o*–4(e)(9)) generally defines ''solicitation of a municipal entity or obligated person'' to mean a direct or indirect communication with a municipal entity or obligated person made by a person, for direct or indirect compensation, on behalf of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser . . . that does not control, is not controlled by, or is not under common control with the person undertaking such solicitation for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person of a broker, dealer, municipal securities dealer, or municipal advisor for or in connection with municipal financial products, the issuance of municipal securities, or of an investment adviser to provide investment advisory services to or on behalf of a municipal entity. The SEC has interpreted this phrase generally in a manner similar to the statutory definition. However, it has also added two exceptions to the statutory definition for (i) advertising by a dealer, municipal advisor or investment adviser and (ii) solicitations of an obligated person where such obligated person is not acting in the capacity of an obligated person or the solicitation is not in connection with the issuance of municipal securities or with respect to municipal financial products. *See* Exchange Act Rule 15Ba1–1(n) (17 CFR 240.15Ba1–1(n)). Additionally, the SEC has exempted from the municipal advisor definition a person that undertakes a solicitation of a municipal entity or obligated person for the purpose of obtaining or retaining an engagement by a municipal entity or by an obligated person of a dealer or a municipal advisor for or in connection with municipal financial products that are investment strategies, to the extent such investment strategies are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments. *See* Exchange Act Rule 15Ba1–1(d)(1) (17 CFR 240.15Ba1–1(d)(1)) and 15Ba1–1(d)(3)(viii) (17 CFR 240.15Ba1–1(d)(3)(viii)).

[5] *See* Section 15B(e)(4) (15 U.S.C. 78*o*–4(e)(4)) and Section 15B(e)(9) of the Exchange Act (15 U.S.C. 78*o*–4(e)(9)).

[6] *See* 15 U.S.C. 78c(a)(4)(a) defining the term ''broker'' to mean ''any person engaged in the business of effecting transactions in securities for the account of others;'' *see also* 15 U.S.C. 78c(a)(5) defining the term ''dealer'' to mean ''any person engaged in the business of buying and selling securities (not including security-based swaps, other than security-based swaps with or for persons that are not eligible contract participants) for such person's own account through a broker or otherwise'' and 15 U.S.C. 78c(a)(30) generally defining the term ''municipal securities dealer'' to mean any person (including a separately identifiable department or division of a bank) engaged in the business of buying and selling municipal securities for his own account, through a broker or otherwise, subject to certain exclusions.

[7] The prohibition in Rule G–38 predates the regulation of municipal advisors.

[8] *See e.g.,* Third-Party Marketers Association: Letter from Donna DiMaria, Chairman of the Board of Directors and Chair of the 3PM Regulatory Committee to the MSRB, dated June 16, 2021 (''3PM I'').

actions.[9] The MSRB believes that the proposed rule change would serve as an important bulwark against potential improper practices in the municipal market and also would provide greater certainty and transparency to solicitor municipal advisors regarding regulatory expectations.

From a practical perspective, any registered municipal advisor is permitted to act as both a solicitor municipal advisor and a non-solicitor municipal advisor. However, anecdotally, the MSRB understands that relatively few non-solicitor municipal advisors also act as solicitor municipal advisors.[10] With respect to solicitations on behalf of third parties to provide investment advisory services, commenters have informed the MSRB that there are two ways in which a solicitor municipal advisor typically may solicit a municipal entity: (1) directly or (2) through an intermediary.[11] They are discussed below.

Direct Solicitations

A solicitor municipal advisor often first communicates with a staff member of the solicited entity (*i.e.,* the municipal entity or obligated person) who handles investment manager research for the entity. This individual generally is responsible for evaluating the solicitor client's product/services to ensure they are appropriate for the entity given the entity's investment policy statement guidelines and restrictions. This first communication potentially is one of many that may span years. Additionally, the solicitor municipal advisor's client likely will have its own communications with the solicited entity, which may include board presentations, meetings and discussions during which the solicitor municipal advisor may or may not be present.

Indirect Solicitations Through an Intermediary

A solicitor municipal advisor typically initially will solicit a financial intermediary or an investment consultant (collectively ''intermediary'') who is hired by the solicited entity to conduct searches and identify appropriate investment managers to meet a municipal entity's specific need.[12] Such intermediary itself may be a solicitor municipal advisor.[13] When a solicitor municipal advisor first solicits the intermediary, the solicitor municipal advisor may not necessarily know who the intermediary represents (*i.e.,* whether the intermediary represents municipal entities, obligated persons, other private entities, or all of the above). Additionally, the solicitor municipal advisor generally will not know whether the intermediary will recommend the solicitor municipal advisor's client to the intermediary's municipal entity client(s) (if any). As a result, at the time of the first solicitation, a solicitor municipal advisor may not know if it is indirectly soliciting a municipal entity. Moreover, the solicitor municipal advisor's client (*e.g.,* the investment adviser) may engage in multiple subsequent communications with either the intermediary and/or the intermediary's client (*e.g.,* the municipal entity or obligated person), during which the solicitor municipal advisor may or may not be present. In some instances, the solicitor municipal advisor may never meet or directly communicate with an intermediary's municipal entity or obligated person client.

Proposed Rule G–46

Summary of Proposed Rule G–46

Proposed Rule G–46 would establish the core standards of conduct and duties of ''solicitor municipal advisors'' (as defined below) when engaging in solicitation activities that would require them to register with the SEC and the MSRB as municipal advisors. The proposed rule also would codify certain statements in an MSRB notice issued in 2017 pertaining to the application of MSRB rules to solicitor municipal advisors.[14] Those statements relate to the obligation of solicitor municipal advisors under MSRB Rule G–17, on conduct of municipal securities and municipal advisory activities (the ''G–17 Excerpt for Solicitor Municipal Advisors'').[15] In addition to codifying much of the substance of the G–17 Excerpt for Solicitor Municipal Advisors, Proposed Rule G–46 also would add additional requirements that would better align some of the obligations imposed on solicitor municipal advisors with those applicable to: non-solicitor municipal advisors under Rule G–42, on duties of non-solicitor municipal advisors; underwriters under Rule G–17, on fair dealing, and; certain solicitations undertaken on behalf of third-party investment advisers under the SEC's marketing rule for investment advisers (the ''IA Marketing Rule'' or ''IA Rule 206(4)–1'').[16]

In summary, the core provisions of Proposed Rule G–46 generally would:

- Set forth definitions for terms used in the proposed rule;
- Require solicitor municipal advisors to provide to their solicitor clients full and fair disclosure in writing of all of their material conflicts of interest and material legal or disciplinary events;
- Require solicitor municipal advisors to document their relationships in writing(s), deliver such writing(s) to their solicitor clients, and set forth certain minimum content that must be included in such writing(s);
- Prohibit solicitor municipal advisors from making a representation that the solicitor municipal advisor knows or should know is either materially false or misleading regarding the capacity, resources or knowledge of the solicitor client and require solicitor municipal advisors to have a reasonable basis for any material representations it makes to a solicited entity regarding the capacity, resources or knowledge of the solicitor client;
- Require solicitor municipal advisors to disclose to solicited entities material facts about the solicitation, including but not limited to an obligation to disclose:
  - Information about the solicitor municipal advisor's role and compensation;
  - The solicitor municipal advisor's material conflicts of interest;
  - Information regarding the solicitor client (*i.e.,* the type of information that is generally on Form MA or Form ADV, Part 2 and a description of how the solicited entity can obtain a copy of the

[9] *See* SEC Final MA Rule Adopting Release, 78 FR at 67482.

[10] According to MSRB data shown in Table 1 below, 69 municipal advisors indicated that they engage in both solicitation and non-solicitation municipal advisory activity. However, it is unclear the extent to which these municipal advisors *actively* engage in both types of activity.

[11] *See e.g.,* ''3PM I''. While these comments pertained primarily to the solicitation of municipal entities, the MSRB does not have reason to believe that the practice of soliciting obligated persons, to the extent that such solicitations occur, would be substantially different. The MSRB notes that the intermediary itself may be a solicitor municipal advisor to the extent that the intermediary makes a communication with an unaffiliated municipal entity or obligated person, for compensation, on behalf of a third-party dealer, municipal advisor, or investment adviser for the purpose of obtaining or retaining an engagement by such municipal entity or obligated person of a dealer or municipal advisor for or in connection with municipal financial products or the issuance of municipal securities, or of an investment adviser to provide investment advisory services. *See* Section 15B(e)(9) of the Exchange Act (15 U.S.C. 78*o*–4(e)(9)).

[12] In the most common scenario, an intermediary will be an investment consultant or will perform similar functions.

[13] *See supra* note 11.

[14] *See* MSRB Notice 2017–08, Application of MSRB Rules to Solicitor Municipal Advisors (May 4, 2017).

[15] *See id.* at 17–18.

[16] 17 CFR 275.206(4)–1.

solicitor client's Form MA or Form ADV, Part 2, as applicable);

- Set forth a dual disclosure standard with respect to required disclosures to solicited entities:
  - Generally, disclosures would be required to be made in writing and delivered:
    - At the time of the first communication to a solicited entity (or in the case of an indirect solicitation, the first communication to an intermediary of the solicited entity) on behalf of a specific solicitor client; and
    - If the solicitation results in a solicited entity engaging a solicitor client for investment advisory services or municipal advisory services, again at the time that engagement documentation between the solicitor client and the solicited entity is delivered to the solicited entity or promptly thereafter. Such disclosures may be provided by either the solicitor client or the solicitor municipal advisor, but must be made to an official of the solicited entity that, among other things, the solicitor municipal advisor (or, the solicitor client if the solicitor client provides such disclosures) reasonably believes has the authority to bind the solicited entity by contract; and
- Expressly prohibit solicitor municipal advisors from: delivering an inaccurate invoice for fees or expenses and making payments for the purpose of obtaining or retaining an engagement to perform municipal advisory activities subject to exceptions specified in the rule.

Supplementary material to Proposed Rule G–46 generally would:

- Provide additional explanation regarding the MSRB's expectations with respect to the reasonable basis a solicitor municipal advisor must have for certain of its representations;
- Explain the relationship between a solicitor municipal advisor's fair dealing obligations and a federal fiduciary duty for municipal advisors;
- Explain the relationship between a municipal advisor's obligations under Proposed Rule G–46 and Rule G–42; and
- Provide additional explanation applicable to a solicitor municipal advisor's obligation to document its compensation arrangement and make related disclosures.

Provided below is a more detailed description of Proposed Rule G–46.

Definitions

Proposed Rule G–46(a) would set forth a set of definitions for terms used in the rule. It would define the terms ''compensation,'' [17] ''excluded communications,'' [18] ''solicitation,'' ''solicited entity,'' ''solicitor client,'' ''solicitor municipal advisor,'' and ''solicitor relationship.'' [19] The most important of these definitions, which are integral to understanding nearly all of the provisions of Proposed Rule G–46 are discussed below.

Proposed Rule G–46(a)(iii) generally would define the term ''solicitation'' to mean a direct or indirect communication with a municipal entity or obligated person made by a solicitor municipal advisor, for direct or indirect compensation, on behalf of a municipal advisor or investment adviser that does not control, is not controlled by, or is not under common control with the solicitor municipal advisor for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person of a municipal advisor for or in connection with municipal financial products or the issuance of municipal securities or of an investment adviser to provide investment advisory services to or on behalf of a municipal entity; provided, however, that it does not include excluded communications, as defined in Proposed Rule G–46(a)(ii). This definition is consistent with the defined term ''solicitation of a municipal entity or obligated person'' under Section 15B(e)(9) of the Exchange Act,[20] except to the extent that the term ''solicitation'' under Proposed Rule G–46(a)(iii) does not address solicitations undertaken on behalf of a third-party dealer. As noted above, MSRB Rule G–38 generally prohibits a dealer from providing or agreeing to provide payment to third parties for solicitations of municipal securities business made on behalf of the dealer. As a result, Proposed Rule G–46 assumes that such solicitations do not occur.

Proposed Rule G–46(a)(iv) generally would define the term ''solicited entity'' to mean any municipal entity or obligated person (as those terms are defined in Section 15B(e)(8) and (e)(10) of the Exchange Act [21] and the rules and regulations thereunder) that the solicitor municipal advisor has solicited, is soliciting or intends to solicit within the meaning of Sections 15B(e)(4)(A)(ii) and (e)(9) of the Act [22] and the rules and regulations thereunder.

Proposed Rule G–46(a)(v) generally would define the term ''solicitor client'' to mean the municipal advisor or investment adviser on behalf of whom the solicitor municipal advisor undertakes a solicitation within the meaning of Sections 15B(e)(4)(A)(ii) and (e)(9) of the Act [23] and the rules and regulations thereunder. As noted above, because of the prohibition set forth in MSRB Rule G–38, Proposed Rule G–46 presumes that solicitors do not conduct paid solicitations on behalf of third-party dealers. As a result, the term ''solicitor client'' as defined in Proposed Rule G–46(a)(v) does not include dealers as solicitor clients.

Proposed Rule G–46(a)(vi) generally would define the term ''solicitor municipal advisor'' to mean, for purposes of the rule, a municipal advisor within the meaning of Section 15B(e)(4) of the Act [24] and other rules and regulations thereunder; provided, that it shall exclude a person that is otherwise a municipal advisor solely based on activities within the meaning of Section 15B(e)(4)(A)(i) of the Act [25] and the rules and regulations thereunder. Generally, this means that a solicitor municipal advisor is any municipal advisor that is not a non-solicitor municipal advisor.

Disclosure to Solicitor Clients

Proposed Rule G–46(b) would require a solicitor municipal advisor to provide

[17] Proposed Rule G–46(a)(i) generally would provide that ''compensation'' means any cash, in-kind or non-cash remuneration, including but not limited to merchandise, gifts, travel expenses, meals and lodging.

[18] Proposed Rule G–46(a)(ii) generally would provide that ''excluded communications'' means (A) advertising by a dealer, municipal advisor, or investment adviser; (B) direct or indirect communications with an obligated person if such obligated person is not acting in the capacity of an obligated person; (C) direct or indirect communications with an obligated person made for the purpose of obtaining or retaining an engagement that is not in connection with the issuance of municipal securities or with respect to municipal financial products; and (D) direct or indirect communications made for the purpose of obtaining or retaining an engagement for or in connection with municipal financial products that are investment strategies to the extent that those investment strategies are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments. The term ''excluded communications'' is used in the term ''solicitation,'' which would be defined in Proposed Rule G–46(a)(iii).

[19] Proposed Rule G–46(a)(vii) generally would provide that, for purposes of the rule, a ''solicitor relationship'' is deemed to exist when a municipal advisor enters into an agreement to undertake a solicitation of a municipal entity or obligated person within the meaning of Section 15B(e)(9) of the Act, 15 U.S.C. 78*o*–4(e)(9), and the rules and regulations thereunder. The solicitor relationship shall be deemed to have ended on the date which is the earlier of (i) the date on which the solicitor relationship has terminated pursuant to the terms of the documentation of the solicitor relationship required by Proposed Rule G–46(c) or (ii) the date on which the solicitor municipal advisor withdraws from the solicitor relationship.

[20] 15 U.S.C. 78*o*–4(e)(9).

[21] 15 U.S.C. 78*o*–4(e)(8) and 15 U.S.C. 78*o*–4(e)(10).

[22] 15 U.S.C. 78*o*–4(e)(4)(A)(ii) and 15 U.S.C. 78*o*–4(e)(9).

[23] *Id.*

[24] 15 U.S.C. 78*o*–4(e)(4).

[25] 15 U.S.C. 78*o*–4(e)(4)(A)(i).

to a client full and fair disclosure in writing of all material conflicts of interest and any legal or disciplinary event that would be material to a reasonable solicitor client's evaluation of the solicitor municipal advisor or the integrity of its management or advisory personnel. The disclosures must be provided prior to or upon engaging in municipal advisory activities.

The proposed rule sets forth an alternative to providing a narrative description of any such legal or disciplinary events by permitting solicitor municipal advisors to reference such information in certain other publicly available information if the conditions specified in the rule are met. As a result, solicitor municipal advisors that are also registered broker-dealers or investment advisers would be permitted to identify the specific type of event and make specific reference to the relevant portions of the solicitor municipal advisor's Form BD or Form ADV if the solicitor municipal advisor provides detailed information specifying where the client may electronically access such forms.[26] All other municipal advisors would be permitted to identify the specific type of event and make specific reference to the relevant portions of the solicitor municipal advisor's most recent Forms MA or MA–I filed with the Commission if the solicitor municipal advisor provides detailed information specifying where the client may electronically access such forms.[27]

Documentation of the Solicitor Relationship

Proposed Rule G–46(c) would require a solicitor municipal advisor to evidence each of its solicitor relationships by a writing or writings created and delivered to the solicitor client prior to, upon or promptly after the establishment of the solicitor relationship. The writing(s) would be required to be dated and include, at a minimum:

- A description of the solicitation activities to be engaged in by the solicitor municipal advisor on behalf of the solicitor client (including the scope of the agreed-upon activities and a statement that the scope of the solicitation is anticipated to include the solicitation of municipal entities and/or obligated persons);
- The terms and amount of the compensation to be received by the solicitor municipal advisor for such activities;
- The date, triggering event, or means for the termination of the relationship, or, if none, a statement that there is none; and
- Any terms relating to withdrawal from the relationship.

The proposed obligation to document the relationship is generally consistent with a non-solicitor municipal advisor's obligation to document its municipal advisory relationship with a client under Rule G–42(c).[28] The MSRB believes that this documentation obligation will help ensure that the solicitor client has certain basic material information about the engagement including the scope of agreed-upon activities and information pertaining to compensation for such activities. The MSRB also believes that this documentation obligation will assist examining authorities in understanding the solicitation arrangement and will provide them with necessary information to assist in evaluating a solicitor municipal advisor's compliance with relevant obligations.

The MSRB understands that a solicitor may be asked to solicit a broad range of entities on behalf of a client of the solicitor. These entities may include municipal entities, obligated persons and corporate entities that are not obligated persons. While the solicitation of municipal entities and obligated persons generally would require compliance with Proposed Rule G–46 (to the extent the solicitation would make the solicitor a ''municipal advisor''), the solicitation of an entity that is not a municipal entity or an obligated person would not require such compliance. In order to promote certainty as to the applicable regulatory scheme for any engagement, the MSRB believes that it is imperative for any engagement to be documented in a writing that clearly indicates whether the solicitation of municipal entities and/or obligated persons is anticipated. Information pertaining to termination of the relationship or withdrawal from the relationship will similarly assist both solicitor clients and examination and enforcement authorities in understanding the scope of an engagement.

Supplementary Material .04 would provide additional guidance with respect to the obligation to document the terms and the amount of compensation to be received. Specifically, it provides that the documentation(s) must clearly describe the structure of the compensation arrangement and the amount of compensation paid or to be paid. For example, a solicitor municipal advisor that will be paid on the basis of a flat or fixed fee would be required to disclose the amount of the flat fee, if known and/or calculable at the time of the documentation. If the precise dollar amount is not known at the time, the documentation should disclose how such compensation will be calculated. As another example, if the compensation arrangement calls for a percentage of fees collected from the referred clients, then the documentation should state so and describe what that percentage is.

Representations to Solicited Entities

Proposed Rule G–46(d)(i) expressly would prohibit a solicitor municipal advisor from making a representation that the solicitor municipal advisor knows or should know is either materially false or materially misleading due to the omission of a material fact about the capacity, resources or knowledge of the solicitor client. This prohibition is similar to a prohibition applicable to non-solicitor municipal advisors under Rule G–42 except that, unlike with Rule G–42, the prohibition for solicitor municipal advisors would not be limited to representations that occur in response to requests for proposals or qualifications or in oral presentations to a client or prospective client for the purpose of obtaining or retaining an engagement for the solicitor client.[29] This is because the MSRB believes that all of the solicitor municipal advisor's communications regarding the capacity, resources or knowledge of the solicitor's clients are expected to be for the purpose of

[26] For example, a solicitor municipal advisor could direct a solicitor client to FINRA's BrokerCheck system or the Investment Adviser Public Disclosure website, as applicable; provided, that the direction is accompanied by information as to how to retrieve the firm's specific Form BD or Form ADV and specific reference to the relevant portions of the applicable form.

[27] For example, a solicitor municipal advisor could direct a solicitor client to the SEC's EDGAR system; provided, that the direction is accompanied by information as to how to retrieve the firm's specific form(s) and specific reference to the relevant portions of the applicable form(s).

[28] Rule G–42(c) generally requires a municipal advisor to evidence each of its municipal advisory relationships by a writing or writings created and delivered to the municipal entity or obligated person client prior to, upon or promptly after the establishment of the municipal advisory relationship.

[29] *See* Rule G–42(e)(i)(C) which prohibits non-solicitor municipal advisors from making any representation or the submission of any information that the municipal advisor knows or should know is either materially false or materially misleading due to the omission of a material fact about the capacity, resources or knowledge of the municipal advisor, in response to requests for proposals or qualifications or in oral presentations to a client or prospective client, for the purpose of obtaining or retaining an engagement to perform municipal advisory activities.

obtaining or retaining an engagement for their clients.

Proposed Rule G–46(d)(ii) would require a solicitor municipal advisor to have a reasonable basis for any material representations it makes to a solicited entity regarding the capacity, resources or knowledge of the solicitor client. The MSRB believes that solicited entities should be entitled to rely on the material representations made by solicitor municipal advisors, as regulated financial professionals hired for the purpose of soliciting business on behalf of their clients, with respect to the qualifications of their clients. The MSRB further believes that such representations should have some reasonable basis.[30]

Supplementary Material .01 would provide guidance on compliance with the reasonable-basis standard. Specifically, this supplementary material would state that while a solicitor municipal advisor must have a reasonable basis for the representations described in Proposed Rule G–46(d), the solicitor municipal advisor is not required to actively seek out every piece of information that may be relevant to such representations. It further provides an example to help illustrate this point.

Disclosures to Solicited Entities

Proposed Rule G–46(e) would require a solicitor municipal advisor to disclose to any solicited entity all material facts about the solicitation in the manner specified in section (f) of the proposed rule. This would include an obligation to disclose certain information pertaining to the solicitor municipal advisor's: (i) role and compensation; (ii) conflicts of interest; and (iii) client.

Role and Compensation Disclosures. Proposed Rule G–46(e)(i) would require a solicitor municipal advisor to disclose to any solicited entity:

- The solicitor municipal advisor's name;
- The solicitor client's name;
- The type of business being solicited (*i.e.,* municipal advisory business or investment advisory services);
- The material terms of the solicitor municipal advisor's compensation arrangement, including a description of the compensation provided or to be provided, directly or indirectly, to the solicitor municipal advisor for such solicitation; and
- Payments made by the solicitor municipal advisor to another solicitor municipal advisor to facilitate the solicitation.

Supplementary Material .04 would provide additional guidance with respect to the obligation to disclose the material terms of the solicitor municipal advisor's compensation arrangement. Specifically, it would provide that Proposed Rule G–46(e)(i)(D) would require disclosure of at least the same information as that required by Proposed Rule G–46(c)(ii), to the extent material. However, Proposed Rule G–46(e)(i)(D) also may require the disclosure of additional information, depending on the facts and circumstances. For example, if the solicitor municipal advisor receives indirect compensation for the solicitation, information pertaining to the indirect compensation also must be disclosed.

Additionally, the solicitor municipal advisor would be required to disclose the following statements:

- In connection with its solicitation activities as a municipal advisor, a solicitor municipal advisor does not owe a fiduciary duty under Section 15B(c)(i) of the Exchange Act or MSRB rules to the entities that it solicits and is not required by those provisions to act in the best interests of such entities without regard to the solicitor municipal advisor's own financial or other interests. However, in connection with such solicitation activities, a solicitor municipal advisor is required to deal fairly with all persons, including both solicited entities and the solicitor municipal advisor's clients; and
- A solicitor municipal advisor's primary role is to solicit the solicited entity on behalf of certain third-party regulated entities and the solicitor municipal advisor will be compensated for its solicitation services by the solicitor municipal advisor's client.[31]

These statements draw from analogous disclosures that underwriters must make to their issuer clients pursuant to Rule G–17 [32] but are tailored to reflect the existence of a federal fiduciary duty for non-solicitor municipal advisors and to make clear that a solicitor municipal advisor's fair dealing obligations apply in connection with its solicitation activities.[33]

Supplementary Material .02 would expound on the relationship between Proposed Rule G–46 and the fair dealing obligation under Rule G–17 and includes similar discussion regarding application of the federal fiduciary duty to a solicitor municipal advisor's solicitations of solicited entities. However, it specifies that solicitor municipal advisors may be subject to fiduciary or other duties under state or other laws and that nothing in Proposed Rule G–46 shall be deemed to supersede any more restrictive provision of state or other laws applicable to municipal advisory activities. Finally, Supplementary Material .02 includes a cross reference to Supplementary Material .03 and would remind solicitor municipal advisors that, to the extent they also engage in non-solicitor municipal advisory activity, the requirements of Rule G–42 will apply with respect to such activity and a federal fiduciary duty will apply with respect to the municipal entity clients of the municipal advisor.

Conflicts Disclosures. Proposed Rule G–46(e)(ii) would require a solicitor municipal advisor to disclose any

[30] The MSRB notes that this obligation bears some analogy to a non-solicitor municipal advisor's duty of care obligation to have a reasonable basis for any advice provided to or on behalf of a client pursuant to Rule G–42, Supplementary Material .01. While a non-solicitor municipal advisor provides advice to or on behalf of its municipal entity and obligated person clients, a solicitor municipal advisor solicits municipal entities and obligated persons on behalf of its clients. In both cases, the municipal advisor would be required to have a reasonable basis for what are likely to be the core material statements the municipal advisor was hired to provide to municipal entities and obligated persons.

[31] While the proposed rule text uses the defined term ''solicitor municipal advisor,'' to facilitate a more plain-language disclosure, the MSRB expects that solicitor municipal advisors would insert their name in place of the term ''solicitor municipal advisor.''

[32] These disclosures include an obligation to disclose that: Rule G–17 requires an underwriter to deal fairly at all times with both issuers and investors; unlike a municipal advisor, the underwriter does not have a fiduciary duty to the issuer under the federal securities laws and is, therefore, not required by federal law to act in the best interests of the issuer without regard to its own financial or other interests; and the underwriter's primary role is to purchase securities with a view to distribution in an arm's-length commercial transaction with the issuer and it has financial and other interests that differ from those of the issuer. *See* MSRB Interpretive Notice Concerning the Application of MSRB Rule G–17 to Underwriters of Municipal Securities (March 31, 2021) (the ''G–17 Underwriter's Guidance'').

[33] *See* SEC MA Final Rule Adopting Release, 78 FR 67467 at note 100 (stating that ''. . . the fiduciary duty of a municipal advisor, as set forth in Exchange Act Section 15B(c)(1), *extends only to its municipal entity clients*'') (emphasis added); *see also* text accompanying note 100 (stating that ''. . . the Exchange Act, as amended by the Dodd-Frank Act, grants the MSRB regulatory authority over municipal advisors and imposes a fiduciary duty on municipal advisors *when advising municipal entities*'') (emphasis added); Exchange Act Section 15B(b)(2)(L)(i) (15 U.S.C. 78*o*–4(b)(2)(L)(i)) (granting the MSRB authority to ''prescribe means reasonably designed to prevent acts, practices, and courses of business as are not consistent with *a municipal advisor's fiduciary duty to its clients*'') (emphasis added). Because a solicitor municipal advisor's clients are not the municipal entities that they solicit, but rather the third parties that retain or engage the solicitor municipal advisor to solicit such municipal entities, solicitor municipal advisors do not owe a fiduciary duty under the Exchange Act or MSRB rules to their clients (or the municipal entity) in connection with such activity. *See* MSRB Notice 2017–08, at 10.

material conflicts of interest,[34] including but not limited to the fact that, because the solicitor municipal advisor is compensated for its solicitation efforts, it has an incentive to recommend its clients, resulting in a material conflict of interest. The solicitor municipal advisor also would be required to disclose any material conflicts of interest, of which the solicitor municipal advisor is aware after reasonable inquiry, that could reasonably be anticipated to impair the solicitor municipal advisor's ability to solicit the solicited entity in accordance with its duty of fair dealing. This obligation is comparable to a non-solicitor municipal advisor's obligation under Rule G–42 to disclose to its clients all material conflicts of interest, including any conflicts, of which the municipal advisor is aware after reasonable inquiry, that could reasonably be anticipated to impair the municipal advisor's ability to provide advice to or on behalf of the client in accordance with the standards set forth in the rule.[35] It also is comparable to the obligation under the IA Marketing Rule to disclose that a promoter, due to the fact that it is compensated, has an incentive to recommend the investment adviser it promotes, resulting in a material conflict of interest.[36] The MSRB believes that disclosure of such conflict-of-interest information is key to assisting a solicited entity in evaluating the solicitor municipal advisor's statements and in determining whether to retain the solicitor's client. For example, without a specific disclosure about a solicitor municipal advisor's incentives, a solicitation creates a risk that the solicited entity would mistakenly view the solicitor municipal advisor's recommendation as being an unbiased opinion about the solicitor client's ability to, for example, manage the solicited entity's assets, and would rely on that recommendation more than the solicited entity otherwise would if the solicited entity knew of the solicitor municipal advisor's incentive.

Solicitor Client Disclosures. Proposed Rule G–46(e)(iii) would require a solicitor municipal advisor to provide to the solicited entity the following information regarding the solicitor client:

- The type of information that is generally available on Form MA (in the case of a municipal advisor client) or Form ADV, Part 2 (in the case of an investment adviser client); and
- A description of how the solicited entity can obtain a copy of the solicitor client's Form MA or Form ADV, Part 2, as applicable.

These requirements are designed to help ensure that, at any early stage, solicited entities are directed to important written information about the entities the solicitor municipal advisor represents—including, but not limited to, information about the disciplinary history of the solicitor municipal advisor's clients. However, it does not require solicitor municipal advisors to obtain a copy of these documents and provide them to their solicited entities, nor does it require a solicitor municipal advisor to disclose any specific information about the client that is included in such forms.[37]

Timing and Manner of Disclosures to Solicited Entities

Proposed Rule G–46(f) would provide that any disclosures required under section (e) of the proposed rule (pertaining to disclosures to solicited entities) must be made in writing. The proposed rule also would provide for a dual-disclosure requirement, such that solicitations that result in a solicited entity engaging a solicitor client would receive the requisite disclosures twice. Specifically, they would receive the disclosures once at the time of the first communication giving rise to the solicitation and again at the time that engagement documentation pertaining to the solicited entity's engagement of the solicitor client is delivered (or promptly thereafter).

Initial Disclosure at the Time of the First Communication. The disclosures would be required to be delivered at the time of the first communication (as that term is used in the definition of ''solicitation'') with a solicited entity on behalf of a specific solicitor client.[38] Specifically, the disclosures would be required to be provided to the solicitor client representative with whom such communication is made. In the case of an indirect solicitation—a solicitation of an intermediary who represents a municipal entity or obligated person—the disclosures must be provided to the intermediary with whom such communication is made.[39]

Second Disclosure at the Time of the Solicitor Client's Engagement with the Solicited Entity. If the solicitation results in a solicited entity engaging a solicitor client for investment advisory services or municipal advisory services, all disclosures required by Proposed Rule G–46(e) would be required to be provided at the time that such engagement documentation is delivered to the solicited entity or promptly thereafter. This is the case even if there are no changes between the initial set of disclosures and the second set of disclosures.

The second set of disclosures may be provided by either the solicitor client or the solicitor municipal advisor. The MSRB believes that this flexibility would permit, for example, a solicitor municipal advisor's investment adviser client to provide the solicitor's disclosures to the solicited entity at the time that the investment adviser enters into an engagement with the solicited entity.[40] These disclosures would be required to be made to an official of the solicited entity that: (1) the solicitor municipal advisor (or, the solicitor client, if the solicitor client provides such disclosures) reasonably believes

[34] If a reasonable solicited entity would consider a particular conflict of interest on the part of the solicitor municipal advisor to be material to the decision to choose the solicitor municipal adviser's client, then such conflict of interest should be disclosed.

[35] *See* Rule G–42(b)(i)(F).

[36] *See* Investment Adviser Marketing, Release No. IA–5653 at 101 (Dec. 22, 2020), 86 FR 13024 (March 5, 2021) available at: *https://www.federalregister.gov/d/2020-28868/p-618.*

[37] However, solicitor municipal advisors should be mindful of their general fair dealing obligations under Rule G–17 and of their obligations related to certain of their representations under Proposed Rule G–46(d). If a solicitor municipal advisor were to make a representation regarding the capacity, resources or knowledge of the solicitor's client that the solicitor municipal advisor knows or should know is inaccurate based on a review of its client's Form MA or Form ADV, that solicitor municipal advisor could be in violation of Proposed Rule G–46.

[38] A solicitor municipal advisor would be expected to provide separate disclosures for each of its engagements. For example, assume that a solicitor municipal advisor solicits a municipal entity on behalf of a municipal advisor client to provide municipal advisory services to the municipal entity. One week later, the solicitor municipal advisor solicits the municipal entity again—this time to obtain an engagement for the solicitor municipal advisor's investment advisory client to provide investment advisory services to the municipal entity. The solicitor municipal advisor would be expected to provide its disclosures to the municipal entity again in connection with the second solicitation.

[39] For example, a solicitor municipal advisor presentation to an investment consultant hired by a public pension plan may be an indirect solicitation of that public pension plan. In such a case, the disclosure would be provided to the investment consultant.

[40] The MSRB does not propose to require the engagement documentation between the solicitor municipal advisor and its solicitor clients to include an affirmative undertaking on the part of the solicitor client to provide the solicitor's disclosures to a solicited entity. However, a solicitor municipal advisor might seek the inclusion of such language in its engagement documentation as one means of seeking to comply with Proposed Rule G–46. As one additional alternative, a solicitor municipal advisor might seek to include in its engagement documentation with its solicitor clients a requirement that the solicitor client provide to the solicitor municipal advisor prompt notice that the solicitor client has been engaged by the solicited entity. Proposed Rule G–46 would provide solicitor municipal advisors flexibility in determining how to deliver the second set of disclosures.

has the authority to bind the solicited entity by contract;[41] and (2) is not a party to a disclosed conflict.[42] These two conditions would not apply to the initial delivery of disclosures.

The MSRB believes that this dual or bifurcated approach would help ensure that the person that is initially solicited receives this key information in time to consider it in connection with the initial solicitation. However, because such person(s) may not have the authority to bind the solicited entity by contract (particularly where such person is an intermediary between the solicitor and the solicited entity), the MSRB would require that the disclosures are provided again at the time of the engagement between the solicited entity and the solicitor client (or promptly thereafter). The MSRB believes that any risk associated with the first disclosures not being passed on to a knowledgeable person with the authority to bind the solicited entity in contract would be mitigated by requiring that the disclosures are provided again at the time of the engagement—this time, to someone who does have such authority. Additionally, the MSRB understands that solicitations may sometimes span years. Particularly in such instances, the MSRB believes that it is important that the solicited entity receives the disclosures again at the time of the solicitor client's engagement with the solicited entity.

Specified Prohibitions

Proposed Rule G–46(g) expressly would prohibit a solicitor municipal advisor from:

- Delivering an invoice for fees or expenses for municipal advisory activities that is materially inaccurate in its reflection of the activities actually performed or the personnel that actually performed those activities; and
- Making payments for the purpose of obtaining or retaining an engagement to perform municipal advisory activities, subject to three specified exceptions discussed further below.

Exceptions for Payments to Obtain or Retain an Engagement. Solicitor municipal advisors would be prohibited from making payments for the purpose of obtaining or retaining an engagement to perform municipal advisory activities other than:

- Payments to an affiliate for a direct or indirect communication with a municipal entity or obligated person on behalf of the solicitor municipal advisor where such communication is made for the purpose of obtaining or retaining an engagement to perform municipal advisory activities;
- Reasonable fees paid to another municipal advisor registered as such with the Commission and the MSRB for making a communication for the purpose of obtaining or retaining an engagement to perform municipal advisory activities; and
- Payments that are permissible ''normal business dealings'' as described in Rule G–20, on gifts, gratuities, non-cash compensation and expenses of issuance.

These specified prohibitions are modeled on similar prohibitions applicable to non-solicitors under MSRB Rule G–42(e)(i) and to a lesser degree would align with certain prohibitions applicable to underwriters under the G–17 Underwriter's Guidance.[43]

Supplementary Material

Proposed Rule G–46 would set forth four supplementary material sections:

- Providing additional explanation regarding the MSRB's expectations with respect to the reasonable basis a solicitor municipal advisor must have for the representations described in Proposed Rule G–46(d);[44]
- Explaining the relationship between a solicitor municipal advisor's fair dealing obligations and the applicability of a federal fiduciary duty for municipal advisors;[45]
- Explaining the relationship between a municipal advisor's obligations under Proposed Rule G–46 and Rule G–42; and
- Providing additional detail regarding a solicitor municipal advisor's compensation documentation and disclosure obligations.[46]

Supplementary Material .03 explains that municipal advisors should be mindful that one may be, simultaneously, both a solicitor municipal advisor for purposes of Proposed Rule G–46 and a non-solicitor municipal advisor for purposes of Rule G–42. For example, a municipal advisor may provide ''advice'' as defined in Rule G–42 to a municipal entity (the ''advisory engagement'') and separately may act as a solicitor municipal advisor with respect to that same municipal entity or another municipal entity as contemplated in Proposed Rule G–46 (the ''solicitor municipal advisor engagement''). As a result, the municipal advisor would be subject to Rule G–42 with respect to the advisory engagement and would be subject to Proposed Rule G–46 with respect to the solicitor municipal advisor engagement. Municipal advisors should evaluate the activity undertaken with respect to each engagement to determine which rule governs and ensure the written supervisory procedures required under Rule G–44 reflect such.

Proposed Amendments to MSRB Rule G–8

Proposed amendments to Rule G–8 would add specific recordkeeping obligations designed to help facilitate and document compliance with Proposed Rule G–46. Specifically, they would add new subsection (viii)[47] requiring solicitor municipal advisors to make and keep the following books and records:

- Evidence that the disclosures required by Proposed Rule G–46(b) were made in the manner required by that section;
- A copy of each writing or writings required by Proposed Rule G–46(c);
- Documentation substantiating the solicitor municipal advisor's reasonable basis for believing its representations as described in Proposed Rule G–46(d) (*e.g.,* a checklist confirming that an investment adviser client's Form ADV was reviewed); and
- Evidence that the disclosures required by Proposed Rule G–46(e) were made in the manner described in Proposed Rule G–46(f) (*e.g.,* automatic email delivery receipt).

[41] Solicitor municipal advisors would be expected to adopt reasonable policies and procedures to support the reasonable belief that the solicited entity representative has the authority to bind the solicited entity. However, consistent with the flexible approach to supervision under Rule G–44, on supervisory and compliance obligations of municipal advisors, the reasonable policies and procedures of one firm may reasonably differ from that of another's. As one example only, solicitor municipal advisors could seek to incorporate into their written agreements with their solicitor clients a condition that such disclosures provided on behalf of the solicitor municipal advisor must be provided to a solicited entity representative that the solicitor client reasonably believes has the authority to bind the solicited entity.

[42] To the extent a solicitor municipal advisor relies on its client to pass on its second set of disclosures, the solicitor municipal advisor may wish to provide its clients with a list of persons associated with the solicited entity who are a party to a conflict to help ensure that the solicitor client does not pass on the disclosures to such persons.

[43] *See* Rule G–42(e)(i); *see also* G–17 Underwriter's Guidance at section titled, ''Underwriter Compensation and New Issue Pricing.''

[44] *See* supra discussion titled ''Representations to Solicited Entities.''

[45] *See* supra discussion titled ''Disclosures to Solicited Entities.''

[46] *See* supra discussion titled ''Documentation of the Solicitor Relationship'' and ''Disclosures to Solicited Entities.''

[47] Today the MSRB also filed a proposed rule change to amend MSRB Rule G–40, on advertising by municipal advisors, and amend MSRB Rule G–8 by adding subparagraph (h)(viii) to the rule.

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2) of the Exchange Act,[48] which provides that the Board shall propose and adopt rules to effect the purposes of this title with respect to transactions in municipal securities effected by brokers, dealers, and municipal securities dealers and advice provided to or on behalf of municipal entities or obligated persons by brokers, dealers, municipal securities dealers, and municipal advisors with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by brokers, dealers, municipal securities dealers, and municipal advisors.

Section 15B(b)(2)(C) of the Exchange Act[49] provides that the MSRB's rules shall 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 municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.

Prevention of Fraudulent and Manipulative Acts and Practices

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(C) of the Exchange Act[50] because the proposed rule change would help prevent fraudulent and manipulative acts and practices. It would do so by expressly prohibiting solicitor municipal advisors from making a representation that the solicitor municipal advisor knows or should know is either materially false or misleading regarding the capacity, resources or knowledge of the solicitor client. It also would require solicitor municipal advisors to have a reasonable basis for any material representations the solicitor municipal advisor makes to a solicited entity regarding the capacity, resources or knowledge of the solicitor client. The proposed rule change also expressly would prohibit solicitor municipal advisors from delivering an inaccurate invoice for fees or expenses. The MSRB believes that the express prohibition of such conduct—all of which could be forms of fraudulent and manipulative acts and practices themselves—would help prevent fraudulent and manipulative acts and practices. Finally, the proposed rule change would provide that solicitor municipal advisors would be prohibited from making payments for the purpose of obtaining or retaining an engagement to perform municipal advisory activities subject to specified exceptions. Among other things, this would effectively require solicitor municipal advisors to use only associated persons or other regulated solicitor municipal advisors to obtain business on their behalf. This would help ensure that only regulated persons—who are subject to rules designed to prevent fraudulent and manipulative acts and practices—may engage in solicitation activities on behalf of a solicitor municipal advisor.

Fostering Cooperation and Coordination

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(C) of the Exchange Act[51] because it would foster cooperation and coordination with persons engaged in regulating transactions in municipal securities and municipal financial products. It would do so by requiring solicitor municipal advisors to document their relationships in writing that includes certain minimum content that is vital to the solicitor municipal advisor, its clients and applicable regulators in understanding the material terms of an engagement—including the scope of agreed-upon activities, information pertaining to compensation for such activities and whether the solicitation of municipal entities and/or obligated persons is anticipated. This documentation obligation would help promote certainty as to the applicable regulatory scheme for any engagement since only solicitations of municipal entities and obligated persons would be subject to Proposed Rule G–46, whereas other solicitations may fall within the jurisdiction of the rules of other regulators (*e.g.,* the Commission or the Financial Industry Regulatory Authority). The MSRB believes that this documentation obligation (and related books and records obligations stemming from the proposed amendments to Rule G–8) would assist examining authorities in understanding the solicitation arrangement and would provide them with necessary information to assist in evaluating a solicitor municipal advisor's compliance with relevant obligations. The MSRB further believes that the proposed amendments to Rule G–8 (with the ensuing application of existing Rule G–9 on records preservation) would help create an audit trail to assist examination and enforcement authorities in their examination for compliance with these prohibitions, fostering cooperation and coordination between regulatory authorities.

Protection of Municipal Entities, Obligated Persons, and the Public Interest

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(C) of the Exchange Act[52] because it would protect municipal entities, obligated persons, and the public interest. It would do so by requiring solicitor municipal advisors to disclose in writing all of their material conflicts of interest and material legal or disciplinary events to the entities that determine whether to hire such solicitor municipal advisors. The MSRB believes that this requirement would increase solicitor municipal advisor accountability and discourage conduct inconsistent with a solicitor municipal advisor's obligations because such conduct would be required to be disclosed in information provided to clients, thereby incentivizing firms to refrain from such conduct or risk not retaining an engagement. The MSRB also believes that such requirement would simultaneously provide prospective clients with valuable information that is directly relevant to their solicitor municipal advisor hiring decisions.

The proposed rule change also would protect municipal entities and obligated persons by better aligning the obligations owed by solicitor municipal advisors to their clients with those applicable to non-solicitor municipal advisors to their clients under Rule G–42. Like non-solicitor municipal advisors, solicitor municipal advisors would be required to: disclose their material conflicts of interest;[53] document their relationships in writing;[54] and refrain from certain conduct such as making certain materially false or misleading representations,[55] delivering a materially inaccurate invoice,[56] and making certain payments for the purpose of obtaining or retaining an

[48] 15 U.S.C. 78*o*–4(b)(2).

[49] 15 U.S.C. 78*o*–4(b)(2)(C).

[50] *Id.*

[51] 15 U.S.C. 78*o*–4(b)(2)(C).

[52] 15 U.S.C. 78*o*–4(b)(2)(C).

[53] *See* Rule G–42(b)(i)(F).

[54] *See* Rule G–42(c) and Proposed Rule G–46(c).

[55] *See* Rule G–42(e)(i)(C) and Proposed Rule G–46(d)(i).

[56] *See* Rule G–42(e)(i)(B) and Proposed Rule G–46(g)(i).

engagement.[57] These Rule G–42 provisions protect municipal entities by assisting non-solicitor municipal advisors in complying with, or helping prevent breaches of, applicable obligations such as the duty of fair dealing, which is owed under Rule G–17 by all municipal advisors to all persons. These protections also would be provided to municipal entities and obligated persons solicited by solicitor municipal advisors. Additionally, as municipal advisors are permitted to engage in both solicitor municipal advisor activity and non-solicitor municipal advisor activity, the MSRB believes that the promotion of consistent standards among these municipal advisors, where applicable, is appropriate since the municipal entities and obligated persons solicited by solicitor municipal advisors and the municipal entity and obligated person clients of non-solicitor municipal advisors may reasonably expect a certain baseline level of conduct from all municipal advisors. More specifically, the MSRB believes that the proposed rule change would protect municipal entities and obligated persons by requiring solicitor municipal advisors to disclose to solicited entities all material facts about the solicitation including certain information pertaining to the solicitor municipal advisor's: (i) role and compensation; (ii) conflicts of interest; and (iii) client. The MSRB believes that the role disclosures would help ensure that solicited entities (which are municipal entities and obligated persons) understand the role of a solicitor municipal advisor. The MSRB also believes that such disclosures would help to clarify potential confusion about the difference between a solicitor municipal advisor and other municipal advisors since they owe very different obligations to municipal entities. The proposed compensation disclosures are designed to help ensure that solicited entities have important information about how a solicitor municipal advisor is compensated to help inform the solicited entity's analysis of the nature and extent of a solicitor municipal advisor's incentive to recommend that a solicited entity hire a specific solicitor client. Finally, the MSRB believes that disclosure related to the solicitor municipal advisor's client would protect municipal entities, obligated persons and the public interest by ensuring that—at any early stage—solicited entities are directed to disclosures about the entities the solicitor municipal advisor represents including, but not limited to, information about the disciplinary history of the solicitor municipal advisor's clients.

Section 15B(b)(2)(L)(iv) of the Exchange Act[58] requires that rules adopted by the Board not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons, provided that there is robust protection of investors against fraud. The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(L)(iv) of the Exchange Act[59] because the proposed rule change would impose on all municipal advisors, including small municipal advisors, only the necessary and appropriate regulatory burdens needed to promote compliance with the proposed rule change. The proposed rule change represents a balanced approach to prescriptive standards with flexibility for large and small municipal advisors alike. For example, the MSRB believes that the flexibility to provide certain disclosures to a solicited entity via a third party (*i.e.,* the solicitor's client) could be particularly helpful for small municipal advisors who may be less likely to be involved in subsequent communications with a solicited entity and, therefore, may need to rely on their clients to pass along certain disclosures at the time of the solicitor client's engagement. Finally, the MSRB seeks to harmonize standards, where appropriate, among those applicable to solicitor municipal advisors, non-solicitor municipal advisors and Commission-registered investment advisers such that those that engage in conduct that would make them two or more of the above could leverage some of the existing processes to comply with relevant obligations under a comparable regime. The MSRB believes that this will minimize the regulatory burden on all solicitor municipal advisors, including small municipal advisors.

The MSRB also believes that the proposed rule change is consistent with Section 15B(b)(2)(G) of the Exchange Act,[60] which provides that the MSRB's rules shall prescribe records to be made and kept by municipal securities brokers, municipal securities dealers, and municipal advisors and the periods for which such records shall be preserved. The proposed rule change would require solicitor municipal advisors to make and keep current evidence that the disclosures required by Proposed Rule G–46 were made in the manner required by the proposed rule change, a copy of the writing(s) documenting the relationship, and documentation substantiating the solicitor municipal advisor's reasonable basis belief regarding its representations. The MSRB believes that the proposed amendments to Rule G–8 related to recordkeeping (with the ensuing application of existing Rule G–9 on records preservation) would promote compliance and facilitate enforcement of Proposed Rule G–46, other MSRB rules, and other applicable securities laws and regulations.

B. Self-Regulatory Organization's Statement on Burden on Competition

Section 15B(b)(2)(C) of the Act[61] requires that MSRB rules not be designed to impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The MSRB believes that Proposed Rule G–46 on the duties of solicitor municipal advisors and Proposed Amended Rule G–8 on recordkeeping obligations would not impose any new burden on competition and, in fact, may relieve a burden on competition. The MSRB considered the economic impact associated with the proposed rule change, including a comparison to reasonable alternative regulatory approaches, relative to the baseline.[62] The MSRB believes that the proposed rule change would not place a burden on competition as it would apply a regulatory regime to all solicitor municipal advisors similar to the regime that currently exists for non-solicitor municipal advisors under Rule G–42 and Rule G–8 on recordkeeping, and for underwriters under the Rule G–17 Underwriter's Guidance. Additionally, it would promote clearer regulatory requirements and expectations, enhancing the transparency and protection for recipients of solicitations and ensuring fair dealings between the market participants.

Furthermore, Section 15B(b)(2)(L)(iv) of the Act[63] provides that MSRB rules may not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public

[57] *See* Rule G–42(e)(i)(E) and Proposed Rule G–46(g)(ii).

[58] 15 U.S.C. 78*o*–4(b)(2)(L)(iv).

[59] *Id.*

[60] 15 U.S.C. 78*o*–4(b)(2)(G).

[61] 15 U.S.C. 78*o*–4(b)(2)(C).

[62] *See* Policy on the Use of Economic Analysis in MSRB Rulemaking, available at *http://msrb.org/Rules-and-Interpretations/Economic-Analysis-Policy.aspx.* In evaluating whether there was a burden on competition, the Board was guided by its principles that required the Board to consider costs and benefits of a rule change, its impact on capital formation and the main reasonable alternative regulatory approach.

[63] 15 U.S.C. 78*o*–4(b)(2)(L)(iv).

interest and for the protection of investors, municipal entities, and obligated persons, provided that there is robust protection of investors against fraud. The MSRB believes the proposed rule change would apply equally to all solicitor municipal advisors, and on an ongoing year-by-year basis, the additional regulatory burden imposed would be proportional to each solicitor municipal advisory firm's size and business activities and hence would not affect competition. Therefore, the MSRB believes the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The purpose of amending Rule G–8 and proposing Proposed Rule G–46 would be to codify certain statements on the obligations of solicitor municipal advisors currently outlined in the G–17 Excerpt for Solicitor Municipal Advisors. Further, Proposed Rule G–46 would better align the duty and obligations of solicitor municipal advisors with those for underwriters under Rule G–17, for non-solicitor municipal advisors under Rule G–42, and for solicitors that undertake certain solicitations on behalf of investment advisers under the SEC's investment adviser regime.

The core standards applicable to non-solicitor municipal advisors and underwriters under MSRB Rule G–42 and Rule G–17 are highlighted in a standalone rule for non-solicitor municipal advisors and a standalone interpretation that was filed with and approved by the SEC, respectively. In contrast, the G–17 Excerpt for Solicitor Municipal Advisors was issued in a notice that largely summarized existing rules and obligations applicable to solicitor municipal advisors and the standards set forth in the G–17 Excerpt for Solicitor Municipal Advisors were not as robust as the standards set forth in the proposed rule change. The proposed rule change is intended to enhance the consistency of regulatory standards and should therefore remove burdens to competition by providing clear expectations for all solicitor municipal advisors.

In conjunction with Proposed Rule G–46, the proposed amendments to Rule G–8 would add specific language relating to solicitor municipal advisors, which would facilitate recordkeeping compliance associated with Proposed Rule G–46 and help ensure solicitor municipal advisor accountability.

In contrast to the regulation of underwriters and non-solicitor municipal advisors, the MSRB currently does not have any explicit standards regarding documentation of a solicitor municipal advisor's engagement. Nor does it have express standards regarding solicitor municipal advisor disclosures of conflicts of interest. The MSRB believes that a Proposed Amended Rule G–8 and a codified Proposed Rule G–46 would result in informed, clearer regulatory standards and expectations for all solicitor municipal advisors, which would not impose a burden on competition because the rule would apply to all solicitor municipal advisors equally. In addition, Proposed Amended Rule G–8 and Proposed Rule G–46 would better align the obligations imposed on solicitor municipal advisors with those applicable to non-solicitor municipal advisors under Rule G–42, underwriters under the G–17 Underwriter's Guidance, and investment advisers or their promoters under the IA Marketing Rule.[64]

For all solicitor municipal advisors, the evaluation baseline is Rule G–17 which applies to all municipal advisors (solicitor and non-solicitor alike) and requires municipal advisors to deal fairly with all persons and not engage in any deceptive, dishonest, or unfair practice and the G–17 Excerpt for Solicitor Municipal Advisors which applies to solicitor municipal advisors. Another baseline for consideration is the IA Marketing Rule[65] for investment advisers, a merged rule that replaces the former advertising and cash solicitation rules for investment advisers. Thus, for a subgroup of solicitor municipal advisors who undertake solicitations on behalf of an investment adviser that is already subject to the requirements, the burden for compliance is already in place partially, as these solicitor municipal advisors are presumably already complying with the conditions outlined by the IA Marketing Rule. Finally, for a subset of municipal advisory firms who conduct both solicitation and non-solicitation business activities, the baseline is comprised of Rule G–17 and Rule G–42 on duties of non-solicitor municipal advisors.

The MSRB also evaluated reasonable alternative regulatory approaches. In one alternative, the MSRB would create a new Rule G–46 for solicitor municipal advisors, but the text of the rule would state that solicitors should follow the SEC's IA Marketing Rule. The main benefit of this would be to completely harmonize between MSRB and SEC rules for solicitor municipal advisors who solicit municipal entities and obligated persons for investment advisory services. However, this alternative would reduce alignment with MSRB Rule G–42 for solicitor municipal advisors who are also non-solicitor municipal advisors and are obligated to comply with Rule G–42. Since all municipal advisors are permitted to engage in both solicitation activity and non-solicitation activity, the MSRB deems Proposed Rule G–46 superior to this alternative as it would be a tailored rule for solicitor municipal advisors that aligns with Rule G–42 where appropriate and aligns with the IA Marketing Rule where appropriate. Therefore, the MSRB believes that the approach taken in Proposed Rule G–46 for solicitor municipal advisors is warranted under the Exchange Act.

Benefits

The main benefit of Proposed Amended Rule G–8 and Proposed Rule G–46 would be to codify certain statements and provide clarification on regulatory obligations for solicitor municipal advisors with regard to their duties. By aligning Proposed Rule G–46 with Rule G–42, Rule G–17 and the IA Marketing Rule[66] where appropriate, Proposed Amended Rule G–8 and Proposed Rule G–46 would enhance the consistency of regulatory standards, thereby removing burdens to competition because it would provide clear expectations for all solicitor municipal advisors that are generally consistent with the standards under the comparative rules.

For example, Proposed Rule G–46 would make clear the types of disclosures that a solicitor municipal advisor would be expected to make to solicited entities in order to ensure that such entities have access to material information to inform their decisions pertaining to whether to retain the solicitor municipal advisor's client(s). This information also would assist these solicited entities in evaluating the solicitor municipal advisor's potential conflicts of interest associated with making such solicitations. Additionally, by codifying much of the G–17 Excerpt for Solicitor Municipal Advisors with additional requirements, Proposed Rule G–46 expressly would prohibit solicitor municipal advisors from making certain false or materially misleading representations about their clients and would require them to have a reasonable basis for similar representations in order to help ensure the protection of the municipal entities and obligated persons solicited by such solicitor municipal advisors.

[64] *See* 17 CFR 275.206(4)–1.

[65] *Id.*

[66] 17 CFR 275.206(4)–1.

Furthermore, the codification of certain existing requirements and the expansion of those standards in the proposed rule change would enhance transparency for the recipients of the new disclosures that would be required by the proposed rule change and promote clearer regulatory obligations for solicitor municipal advisors. The proposed rule change also would provide protection for municipal entities and obligated persons of solicitations, further promoting fair dealings between the market participants. As mentioned above, the additional requirements also would align some of the obligations imposed on solicitor municipal advisors with those applicable to non-solicitor municipal advisors under Rule G–42 and underwriters under the G–17 Underwriter's Guidance as well as those applicable to certain endorsements and testimonials in connection with certain investment adviser advertisements under the SEC's investment adviser regime. This alignment would level the playing field by applying somewhat similar obligations for different regulated entities and increasing the efficiency for regulatory entities tasked with examining and enforcing such requirements and regulated entities seeking compliance. In particular, Proposed Rule G–46 would require solicitor municipal advisors to document their relationships in writing to the solicitor client, which would be instrumental in assisting examining authorities and other regulators to determine the relevant regulatory regime applicable to a solicitor municipal advisor's solicitation.

Costs

The MSRB acknowledges that solicitor municipal advisors likely would incur costs, relative to the baseline state, to meet the standards of conduct and duties contained in the proposed rule change. These changes may include the one-time upfront costs related to setting up and/or revising policies and procedures, as well as the ongoing costs such as compliance costs associated with maintaining and updating disclosures. Solicitor municipal advisors also may have additional costs associated with additional record-keeping.

For the upfront costs, it is possible that solicitor municipal advisors may need to seek the appropriate advice of in-house or outside legal and compliance professionals to revise policies and procedures in compliance with Proposed Amended Rule G–8 and Proposed Rule G–46. Solicitor municipal advisors also may incur costs related to standards of training in preparation for the implementation of Proposed Amended Rule G–8 and Proposed Rule G–46. Assuming solicitor municipal advisors currently already have policies and procedures in place in relation to the G–17 Excerpt for Solicitor Municipal Advisors, the upfront costs for Proposed Amended Rule G–8 and Proposed Rule G–46 should be incremental. Furthermore, the upfront costs may be lower for solicitor municipal advisors that are also non-solicitor municipal advisors as they presumably are already complying with similar Rule G–8 and Rule G–42 requirements. Similarly, such costs may be lower for solicitor municipal advisors who are soliciting on behalf of investment advisory business and therefore presumably are already complying with the IA Marketing Rule.[67]

For the ongoing costs, solicitor municipal advisors may incur compliance costs related to each solicitation, including costs pertaining to creating and maintaining books and records. Firms may have to make changes to their current recordkeeping practices in order to satisfy the additional requirements of Proposed Amended Rule G–8 and Proposed Rule G–46 for the specific disclosures to a solicited entity as outlined above, such as the creation of disclosures for all material information regarding the role and compensation of the solicitor municipal advisor; documentation of the relationship between a solicitor municipal advisor and its solicitor client; disclosure of material conflicts of interest; and certain payments made by a solicitor municipal advisor to another solicitor municipal advisor.

Table 1 below shows the number of solicitor municipal advisory firms registered with the MSRB as of the end of January 2022. The table groups together solicitor municipal advisor only firms (meaning those firms that indicated to the MSRB that they engage in solicitation activity only and not non-solicitation municipal advisory activity) and separately groups together those solicitor municipal advisor firms that indicated to the MSRB in Form A–12 that they engage in both solicitation and non-solicitation municipal advisory activities (*e.g.,* under some engagements, they conduct solicitations of municipal entities and/or obligated persons whereas pursuant to other engagements, they provide covered advice to municipal entities and/or obligated persons). Table 1 also illustrates the type of solicitation activity in which solicitor municipal advisory firms registered with the MSRB engage (*i.e.,* solicitations for investment advisory business versus other solicitations), as reported by solicitor municipal advisory firms on Form A–12.[68]

Table 2 illustrates preliminary estimates for both the upfront and ongoing compliance costs assuming implementation of Proposed Amended Rule G–8 and Proposed Rule G–46 for each solicitor municipal advisory firm in its respective group who chooses to continue their solicitation business practice in the future state.[69] As of January 2022, there is a total of 86 municipal advisory firms registered with the MSRB who indicated solicitation business activities on Form A–12, with 17 of those firms indicating that they engage solely in solicitation activities and the remaining 69 firms indicating they engage in both solicitation and non-solicitation municipal advisory activities.[70] Of the

[67] 17 CFR 275.206(4)–1.

[68] Pursuant to MSRB Rule A–12, on registration, all municipal advisors, including solicitor municipal advisors, must register with the MSRB prior to engaging in any municipal advisory activity. Form A–12 is the single, consolidated form for registrants to provide the MSRB with registration information required under Rule A–12. Among other things, Form A–12 is used to: register with the MSRB, update registration information following a change to any information contained in the form and affirm registration information on an annual basis. The data in Tables 1 and 2 below regarding the number and breakdown of solicitor municipal advisor firms and the types of activities in which they engage is derived from Form A–12 data submitted to the MSRB.

[69] Hourly rate data are gathered from the 2021 SEC's Amendments Regarding the Definition of ''Exchange'' and ''Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities,'' 17 CFR parts 232, 240, 242, and 249. The SEC's Economic Analysis utilizes the Securities Industry and Financial Markets Association, Management & Professional Earnings in the Securities Industry—2013 Report for the hourly rates of various financial industry market professionals. To compensate for inflation, ''the 2013 professional wage rates are adjusted for an inflation rate of 17.45 percent based on the Bureau of Labor Statistics data on Consumer Price Index for all Urban Consumers (CPI–U) between September 2013 and September 2021'' (Page 452). The MSRB added an additional five percentage points for relevant roles mentioned by the SEC and captured in SIFMA's 2013 Report to account for an increase in salary inflation for 2022. The inflation-adjusted effective hourly wage rates for in-house attorneys are estimated at $465 ($380 × 1.2245), $594 ($485 × 1.2245) for chief compliance officers, $347 ($283 × 1.2245) for compliance managers, and $490 ($400 × 1.2245) for outside counsel.

[70] As previously mentioned, the MSRB utilized Form A–12 data for the economic analysis provided. Of note, the MSRB identified that between FY 2021–Q2 (January–March) and FY 2022–Q2 there was a 11.7% decline in the total number of registered municipal advisory firms. The number of solicitor municipal advisory firms, including firms with both solicitation and non-

Continued

17 municipal advisory firms engaging solely in solicitation activities, 16 firms (9 + 7) indicate solicitation activities made on behalf of investment advisory business and one firm indicates solicitation activities only made on behalf of non-investment advisory business. Of the 69 municipal advisory firms engaging in both solicitation and non-solicitation activities, 47 firms (20 + 27) indicate solicitation activities made on behalf of investment advisory business and 22 firms indicate solicitation activities only made on behalf of non-investment advisory business.

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Table 1. Number of Solicitor Municipal Advisory Firms[71]

Business Activities	Number of Firms
Firms with Solicitation Activities Only	17
Investment Advisory Business Only	9
Non-Investment Advisory Business Only	1
Both	7
Firms with Solicitation and Non-Solicitation Activities	69
Investment Advisory Business Only	20
Non-Investment Advisory Business Only	22
Both	27
Total	86

Table 2. Estimated Incremental Compliance Costs for Each Solicitor Municipal Advisory Firm

		17 Firms with Solicitation Activities Only				69 Firms with Solicitation and Non-Solicitation Activities			
		16 Firms On Behalf of Investment Advisory Business		One Firm Not On Behalf of Investment Advisory Business		47 Firms On Behalf of Investment Advisory Business		22 Firms Not On Behalf of Investment Advisory Business	
Cost Components	Projected Hourly Rate for 2022	Number of Hours	Cost per Firm	Number of Hours	Cost per Firm	Number of Hours	Cost per Firm	Number of Hours	Cost per Firm
Upfront Cost									
a) Revision of Policies and Procedures	$ 490	3.50	$ 1,715	4.50	$ 2,205	3.00	$ 1,470	4.00	$ 1,960
b) Training	$ 594	1.25	$ 743	1.75	$ 1,040	1.25	$ 743	1.75	$ 1,040
Ongoing Compliance Cost - Per Each Solicitation	$ 465	2.25	$ 1,046	3.25	$ 1,511	2.25	$ 1,046	3.25	$ 1,511

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As previously mentioned, the incremental costs for the subgroup of solicitor municipal advisory firms soliciting on behalf of investment advisory business may be lower than other solicitor municipal advisory firms to the extent that such solicitor municipal advisors engage in solicitations that are subject to the IA Marketing Rule.[72] These solicitor municipal advisors are presumed to have policies and procedures consistent with, although not necessarily identical to, some of the requirements under Proposed Amended Rule G–8 and Proposed Rule G–46. In addition, the MSRB assumes that municipal advisory firms that engage in both solicitation and non-solicitation activities are currently in compliance with Rule G–8 and Rule G–42 with respect to their non-solicitation municipal advisory activities. The MSRB believes these firms may be able to leverage some of their existing Rule G–8 and Rule G–42 policies and procedures, resulting in a potentially lower upfront cost for implementing Proposed Amended Rule G–8 and Proposed Rule G–46 as compared to municipal advisory firms that engage in solicitation activities only. For example, municipal advisory firms that engage in both solicitation and non-solicitation activities are likely accustomed to documenting their relationships in an engagement letter and may be able to leverage their existing supervisory and compliance framework to extend it to their solicitation activities.

Effect on Competition, Efficiency, and Capital Formation

The MSRB believes that Proposed Amended Rule G–8 and Proposed Rule G–46 would neither impose a burden on competition nor hinder capital formation, as the proposed rule changes bring a similar regulatory regime to solicitor municipal advisors that currently exists for non-solicitor municipal advisors under Rule G–8 on

solicitation activities, also decreased from 105 to 86 firms during the same period.

[71] The MSRB uses the higher hourly rate in each category of costs. For example, while the revision of policies and procedures can be conducted by either an in-house attorney (average hourly rate $465) or outside counsel (average hourly rate $490), the MSRB chooses the higher hourly rate for this analysis to be aggressive in the cost estimate. Similarly, for both the training and the ongoing compliance cost per each solicitation, the task can be performed by either a Chief Compliance Officer (average hourly rate of $594), an in-house compliance attorney (average hourly rate $465) or an in-house compliance manager (average hourly rate $347), and the MSRB chooses the Chief Compliance Officer rate for the training and the compliance attorney rate for the ongoing compliance cost in the estimates.

[72] 17 CFR 275.206(4)–1.

recordkeeping and Rule G–42 and for underwriters under the G–17 Underwriter's Guidance. The MSRB believes that the proposed rule change would improve the municipal securities market's operational efficiency by providing solicitor municipal advisors with a clearer understanding of regulatory obligations, as well as enhancing the transparency and protection for recipients of the solicitations, further promoting fair dealings between market participants.

At present, the MSRB is unable to quantitatively evaluate the magnitude of the efficiency gains or losses, but believes the overall benefits accumulated over time for market participants would outweigh the upfront costs of revising policies and procedures and ongoing compliance and recordkeeping costs by solicitor municipal advisors.

Finally, the proposed rule change would apply equally to all solicitor municipal advisors. Therefore, the MSRB does not expect that Proposed Amended Rule G–8 and Proposed Rule G–46 would impose a burden on competition with respect to solicitor municipal advisory services, as the upfront costs are expected to be relatively minor for all solicitor municipal advisory firms while the ongoing costs are expected to be proportionate to the size and business activities of each solicitor municipal advisory firm. In fact, the proposed rule change may relieve a burden on competition. Therefore, the MSRB believes the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The MSRB solicited comment on the proposed rule change in two requests for comment. The MSRB first sought comment on a draft of Rule G–46 in a request for comment that was published in March 2021 (the ''First Request for Comment'').[73] The MSRB again sought comment on a revised draft of Rule G–46 that was published in December 2021 (the ''Second Request for Comment'').[74]

The MSRB received three comment letters in response to the First Request for Comment[75] and another three comment letters in response to the Second Request for Comment.[76] The comments are summarized below by topic and MSRB responses are provided.

As described above, Proposed Rule G–46 would establish the core standards of conduct and duties of solicitor municipal advisors when engaging in certain solicitation activities. The proposed rule also would codify certain statements from the G–17 Excerpt for Solicitor Municipal Advisors and add additional requirements that would better align some of the obligations imposed on solicitor municipal advisors with those applicable to: non-solicitor municipal advisors under Rule G–42; underwriters under Rule G–17; and certain solicitations undertaken on behalf of third-party investment advisers under the IA Marketing Rule.

Harmonization With Other Rules

Commenters were supportive of harmonization efforts between the standards set forth in the requests for comment and those applicable to other regulated entities. In response to the First Request for Comment, commenters urged even more harmonization with those standards,[77] in particular Rule G–42 since issuers would be familiar with the requirements applicable to municipal advisors and greater conformance with those standards would permit issuers to receive disclosures in a format with which they may already be familiar.[78]

The MSRB made a number of refinements to draft Rule G–46, as reflected in the proposed rule change. Key changes are discussed in the context of the MSRB's summary of comments and responses thereto below.

Applicability of Fiduciary Duty

In the First Request for Comment, the MSRB did not specifically include any draft text regarding the application of a fiduciary duty to solicitor municipal advisors. However, the MSRB sought comment as to whether such a statement would be helpful to solicited entities. Commenters generally supported adding a clear statement to the rule text indicating that solicitor municipal advisors do not owe a federal fiduciary duty to either their clients or the municipal entities and obligated persons that they solicit.[79] They also advocated for a similar mandatory disclosure to solicited entities.[80] While one commenter did not see an appreciable benefit to requiring any such disclosure, this commenter did not raise any objections to such disclosure either.[81]

In response, in the Second Request for Comment, the MSRB revised draft Rule G–46 to add additional supplementary material to the draft rule. This supplementary material expressly stated that solicitor municipal advisors must comply with their fair dealing obligations pursuant to Rule G–17 on fair dealing, but that they do not owe a fiduciary duty to their municipal entity and obligated person clients in connection with their solicitation activities. The MSRB also revised the draft rule text to require a similar disclosure to be provided to the solicitor municipal advisor's solicited entities. The substance of this supplementary material as well as the draft disclosure requirement also are reflected in the proposed rule change.

Solicitor Representations

In response to the First Request for Comment, draft rule text set forth standards regarding solicitor municipal advisor representations to solicited entities. Commenters generally urged the MSRB to narrow these draft standards.[82] One commenter suggested that the standards should only apply to a subset of a solicitor's representations (generally regarding the capacity and resources of the municipal advisor). This commenter also suggested that the applicable standard more closely mirror that posed in the G–17 Excerpt for Solicitor Municipal Advisors.[83]

In the Second Request for Comment, the MSRB revised the draft rule text accordingly and in a manner that is consistent with the standard set forth in

[73] *See* MSRB Notice Request for Comment on Fair Dealing Solicitor Municipal Advisor Obligations and New Draft Rule G–46 (March 17, 2021) available at: *https://msrb.org/sites/default/files/2021-07.pdf.*

[74] *See* MSRB Notice 2021–18, Second Request for Comment on Fair Dealing Solicitor Municipal Advisor Obligations and New Draft Rule G–46 (December 15, 2021) available at: *https://msrb.org/sites/default/files/2021-18.pdf.*

[75] Comments were received in response to the First Request for Comment from: National Association of Municipal Advisors: Letter from Susan Gaffney, Executive Director, dated June 17, 2021 (''NAMA I''); Securities Industry and Financial Markets Association: Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, dated June 17, 2021 (''SIFMA I''); and 3PM I, supra note 8. Comment letters are available here.

[76] Comments were received in response to the Second Request for Comment from: National Association of Municipal Advisors: Letter from Susan Gaffney, Executive Director, dated March 15, 2022 (''NAMA II''); Securities Industry and Financial Markets Association: Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, dated March 15, 2022 (''SIFMA II''); and Third-Party Marketers Association: Letter form Donna DiMaria, Chairman of the Board of Directors and Chair of the 3PM Regulatory Committee, dated March 15, 2022 (''3PM II''). Comment letters are available here.

[77] *See* NAMA I at 1–2; *see generally* SIFMA I.

[78] *See* NAMA I at 1–2.

[79] *See* SIFMA I at 1–2.

[80] *See* NAMA I at 1 and SIFMA I at 4.

[81] *See* 3PM I at 7.

[82] *See* SIFMA I 2–3.

[83] *See id.* at 2.

the proposed rule change. The MSRB believes that this more narrow standard is consistent with the standard applicable to non-solicitor municipal advisors and that these standards, in concert with a solicitor municipal advisor's Rule G–17 fair dealing obligations, offer appropriate protections to entities solicited by solicitor municipal advisors.

Prohibited Conduct

The rule text in the First Request for Comment did not include a section setting forth specific conduct that would expressly be prohibited. One commenter suggested that the MSRB add such language to the rule and that such prohibitions could largely be drawn from the specifically prohibited conduct under Rule G–42.[84] In the Second Request for Comment, the MSRB proposed a new section to draft Rule G–46 that would prohibit solicitor municipal advisors from: (i) receiving excessive compensation and (ii) delivering a materially inaccurate invoice. Additionally, the MSRB sought comment as to how to determine that compensation for a solicitation is excessive.

In response to the Second Request for Comment, one commenter stated that the provision to prohibit excessive compensation should be excluded noting, in part, the challenges in determining the appropriate compensation a solicitor municipal advisor should earn. In the alternative, this commenter suggested that the MSRB should provide guidance as to how excessive compensation should be determined.[85] In response, the MSRB determined not to include in the proposed rule change the prohibition on excessive compensation. The MSRB notes that, solicitor municipal advisors are already subject to a general duty of fair dealing under Rule G–17 and unlike the clients of non-solicitor municipal advisors, solicitor municipal advisor clients are not municipal entities and investors, but instead are themselves regulated financial professionals. As a result, the MSRB believes that the potential benefits associated with such a prohibition may not be sufficiently outweighed by the burdens associated with determining and demonstrating compliance. Additionally, the proposed rule change reflects the addition of another specified prohibition pertaining to third-party payments, which was added in response to a comment regarding the use of solicitors and the establishment of a more level playing field between solicitor municipal advisors and dealers (discussed further below).

Documentation of the Relationship

In the First Request for Comment, draft Rule G–46 proposed to require solicitor municipal advisors to document their relationship and would have required such documentation to include relatively limited content—in part to align with standards under the IA Marketing Rule.[86] One commenter stated that the draft requirement to document the solicitor municipal advisor's engagement should be more aligned with a non-solicitor municipal advisor's obligation to document its municipal advisory relationship under Rule G–42 (which includes additional terms not set forth in the First Request for Comment).[87] In the Second Request for Comment, the MSRB added two additional draft elements that would be required to be included in such engagement, both of which are required under Rule G–42 and pertain to termination of the relationship. The MSRB also sought comment as to whether additional information regarding the terms of such documentation may be warranted.

In response to the Second Request for Comment, while one commenter stated that the draft text of draft Rule G–46 adequately captured the description of the compensation arrangement,[88] another commenter stated that the MSRB should provide additional information regarding the terms and amount of compensation to be received by a solicitor (a term that would be required to be included in the documentation of the relationship).[89]

The proposed rule change currently reflects a new Supplementary Material .04, which provides additional detail regarding written disclosures pertaining to a solicitor's compensation. This supplementary material is designed to inform a solicitor municipal advisor's compliance with both its documentation obligation under Proposed Rule G–46(c)(ii) and its disclosure obligation under Proposed Rule G–46(e)(i)(D).

Required Disclosures

In the First Request for Comment, the MSRB proposed to require solicitor municipal advisors to disclose to solicited entities certain: role and compensation disclosures; conflicts disclosures; and solicitor client disclosures. Commenters did not oppose a draft obligation to make such disclosures but suggested that the MSRB modify them in some respects. One commenter suggested that the MSRB could better align the types of required disclosures with those required by non-solicitors under Rule G–42.[90] Another stated that the MSRB should require solicitors to make certain disclosures to their clients regarding their conflicts of interest and legal and disciplinary history.[91] This commenter also suggested that solicitor municipal advisors should be permitted to customize their role-based disclosures.[92]

Commenters also suggested that the MSRB align the timing and manner of required disclosures with the standards set forth under Rule G–42 [93] and requested guidance from the MSRB as to what qualifies as evidence that disclosure was provided in the manner set forth under the draft rule. While one commenter supported an option to make oral disclosures if the MSRB were to provide additional guidance in this area, another commenter was not supportive of such an option.[94] Finally, one commenter suggested a bifurcated approach to disclosures for solicited entities, which would permit the solicitor municipal advisor to provide an initial set of disclosures to the person solicited followed by a second set of disclosures at the time of capital allocation that would increase the likelihood that an official with the authority to bind the solicited entity by contract would see such disclosures.[95]

In the Second Request for Comment, the MSRB revised the timing and manner of such disclosures in response to comments received and also sought comment as to whether disclosures should be permitted to be provided orally, consistent with the IA Marketing Rule.[96] In response, commenters generally indicated that the revised timing and manner of disclosures was workable and less burdensome than the approach initially proposed.[97] However, one commenter requested clarification regarding whether, in the case of an indirect solicitation, the disclosure requirement would be met if a solicitor municipal advisor presents the requisite disclosures to an intermediary to be passed on to an official of the solicited entity.[98] Additionally, two commenters

[84] *See id.* at 3–4.

[85] *See* 3PM II at 1–3.

[86] 17 CFR 275.206(4)–1.

[87] *See* SIFMA I at 3.

[88] *See* SIFMA II at 8.

[89] *See* 3PM II at 3.

[90] *See* NAMA I at 1–2.

[91] *See* 3PM I at 6–7.

[92] *See id.* at 1.

[93] *See* SIFMA I at 4.

[94] *See id.* at 11.

[95] *See* 3PM I at 3.

[96] 17 CFR 275.206(4)–1.

[97] *See* 3PM II at 7–8.

[98] *See* 3PM II at 3–4.

stated that disclosures should be provided in writing,[99] while another commenter responded that disclosures should be permitted to be provided orally only if the MSRB can provide proper guidance as how to meet a solicitor municipal advisor's books and records obligations.[100]

In response to these comments, the proposed rule change currently reflects a slightly modified approach as compared to that set forth in the Second Request for Comment. As discussed above, a solicitor municipal advisor would be expected to provide the first set of disclosures for a solicited entity to the person actually solicited. For indirect solicitations, the second set of disclosures must be presented to an official of the solicited entity. However, the proposed rule change expressly provides that an intermediary would be permitted to pass such disclosures on to such official. After reviewing the comments received, the MSRB determined to retain the requirement that all disclosures be provided in writing.

The MSRB believes that it is important that all solicited entities receive consistent role disclosures from the solicitor municipal advisors that solicit them. Accordingly, the proposed rule change requires solicitor municipal advisors to use identical language in connection with their role disclosures. The MSRB also believes that as registered municipal advisors, solicitor municipal advisors have been required to keep appropriate books and records in order to show compliance with other relevant MSRB rules and that they can leverage similar processes and experiences to determine what evidence would establish that disclosures were made in the manner required by the proposed rule change. If compliance resources would assist solicitor municipal advisors in their compliance efforts, the MSRB is prepared to produce such resources as solicitor municipal advisors begin to implement new policies and procedures to comply with Proposed Rule G–46, if approved by the Commission.[101]

Clarification of Solicitor Municipal Advisory Activity

Commenters asked the MSRB to provide guidance on certain areas relevant to the definition of a municipal advisor, including when the solicitation of an obligated person would cause one to be a solicitor municipal advisor as well as when the solicitation of an intermediary of a municipal entity would cause one to be a solicitor municipal advisor.

The MSRB believes that the more appropriate regulator to whom to direct such comments may be the Commission. Commenters may wish to consult the Commission's set of Frequently Asked Questions pertaining to registration as a municipal advisor.[102]

The Use of Solicitors

One commenter emphasized the importance of creating a level playing field between dealers and municipal advisors, noting that under Rule G–38, on solicitation of municipal securities business, dealers are currently prohibited from providing payment to unaffiliated persons for a solicitation of municipal securities business on behalf of the dealer.[103] This commenter suggested that a similar standard should apply with respect to solicitor municipal advisors, such that Proposed Rule G–46 expressly should prohibit solicitor municipal advisors from paying other third-party solicitors to solicit municipal advisory business on their behalf. This commenter further suggested that, if the MSRB deemed not to extend this prohibition to solicitor municipal advisors, it should permit both dealers and municipal advisors to pay solicitor municipal advisors for their third-party solicitation efforts; provided, that such solicitors are subject to comprehensive pay-to-play regulation.

As described above, Exchange Act Sections 15B(e)(4) and 15B(e)(9) [104] permit municipal advisors to engage in certain solicitation activities on behalf of third-party dealers, municipal advisors, and investment advisers. MSRB Rule G–38 (which pre-dates the amendments to the Exchange Act that brought municipal advisors under the MSRB's regulatory jurisdiction) prohibits dealers from paying third parties for such solicitation activities. Non-solicitor municipal advisors are similarly subject to a restriction on paying third parties for solicitation activities on their behalf, subject to an exception.[105] Unlike dealers, non-solicitor municipal advisors are permitted to pay reasonable fees to another registered municipal advisor for such solicitation.

In response to commenters and as discussed above, the proposed rule change would extend a similar prohibition (and related narrow exception) to solicitor municipal advisors. Because registered municipal advisors are permitted to engage in both solicitation and non-solicitation municipal advisory activities, the MSRB believes that this is the appropriate approach to harmonization among regulated entities. The MSRB notes that, unlike dealers, municipal advisors owe their municipal entity clients a fiduciary duty, which may mitigate any potential risk associated with municipal advisor use of third-party solicitors. As a result, the MSRB believes that the current approach taken in the proposed rule change represents an appropriate approach to protecting municipal entities and obligated persons.

Books and Records

In the First Request for Comment, the MSRB proposed to include the books and records obligations relevant to draft Rule G–46 in the text of draft Rule G–46 itself. In the Second Request for Comment, the MSRB explained that it proposed to take a similar approach with respect to future MSRB rules or rule amendments. A number of commenters opposed this standard and urged the MSRB to move the relevant books and records requirements into Rule G–8, on books and records, as regulated entities are more accustomed to consulting that rule to identify their relevant books and records obligations.[106] As discussed above, the proposed rule change proposes to amend Rule G–8 to take such an approach.

Inadvertent Solicitations

In the First Request for Comment and the Second Request for Comment, the MSRB did not propose a safe harbor for inadvertent solicitations. One commenter recommended that the MSRB consider such a safe harbor provision, modeled off of the safe harbor provision in Rule G–42.[107] The MSRB determined not to include such a provision in the proposed rule change because even a one-time solicitation could result in a solicitor municipal advisor's client getting hired and providing services to the municipal entity or obligated person solicited. As a result, the MSRB believes that it is important that the solicited entity has

[99] *See* NAMA II at 2 and SIFMA II at 8.

[100] *See* 3PM II at 6.

[101] Additionally, if the proposed rule change is approved, the MSRB expects to revise the G–17 Excerpt for Solicitor Municipal Advisors to reflect the adoption of Proposed Rule G–46.

[102] *See* SEC, Registration of Municipal Advisors Frequently Asked Questions, available at: *SEC.gov* Registration of Municipal Advisors Frequently Asked Questions.

[103] *See* SIFMA II at 2–3.

[104] 15 U.S.C 78*o*–4(e)(4) and 15 U.S.C. 78*o*–4(e)(9).

[105] *See* Rule G–42(e)(i)(E).

[106] *See* SIFMA I at 4, NAMA II at 2 and SIFMA II at 4–5.

[107] *See* SIFMA I at 6 and SIFMA II at 4.

all of the protections afforded by the proposed rule change and that all of the other obligations under Rule G–46 are met. The MSRB notes that the proposed rule change would apply only to certain solicitations on behalf of unaffiliated dealers, municipal advisors or investment advisers. As a result, if a firm solicits an entity only on its own behalf or even on behalf of an entity that controls, is controlled by, or is under common control with the soliciting firm, the proposed rule change would not apply.

Other

In the First Request for Comment and the Second Request for Comment, the MSRB inquired whether a municipal advisor client should be required to make a bona fide effort to ascertain whether the solicitor municipal advisor has provided to solicited entities the required disclosures related to a municipal advisor client. The MSRB also sought comment as to whether there would be value to solicited entities receiving disclosures regarding the payments made by one solicitor municipal advisor to another to facilitate a solicitation.

With respect to the bona fide effort requirement, commenters were not supportive of such a requirement [108] and the proposed rule change does not impose this obligation on municipal advisor clients of solicitor municipal advisors. With respect to the comment regarding payments made by one solicitor municipal advisor to another, commenters indicated that such disclosures are important and supported an obligation to require such disclosures.[109] The MSRB subsequently refined draft Rule G–46 to require the disclosure of such payments. This obligation appears in Proposed Rule G–46(e)(i)(E).

One commenter suggested that reference to obligated persons should be removed from the definitions of solicitor municipal advisor and solicited entity, noting that they are not relevant for the purposes of the activity in which solicitors typically engage.[110] Because the MSRB has an obligation to protect both municipal entities and obligated persons and because solicitor municipal advisors may (within the scope of their professional qualification activities) solicit obligated persons, the MSRB believes that it is important that the proposed rule change extend the same protections afforded to municipal entities under Proposed Rule G–46 to obligated persons as well.

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 of up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

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–MSRB–2023–02 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–MSRB–2023–02. 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 MSRB. 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–MSRB–2023–02 and should be submitted on or before March 7, 2023.

For the Commission, pursuant to delegated authority.[111]

Sherry R. Haywood,

Assistant Secretary.

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[108] *See* 3PM I at 8 and 3PM II at 7.

[109] *See* SIFMA II at 9 and 3PM II at 7.

[110] *See* 3PM I at 4.

[111] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96836; File No. SR–PEARL–2023–02]

Self-Regulatory Organizations: MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by MIAX PEARL, LLC To Amend the MIAX Pearl Options Fee Schedule

February 8, 2023.

Pursuant to the provisions of 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 January 31, 2023, MIAX PEARL, LLC (''MIAX Pearl'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Pearl Options Fee Schedule (the ''Fee Schedule'').

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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 the Add/Remove Tiered Rebates/Fees set forth in Section 1(a) of the Fee Schedule that apply to the MIAX Pearl Market Maker[3] origin to modify the volume threshold for the alternative volume criteria (described below) in Tier 2 (defined below).

Background

The Exchange currently assesses transaction rebates and fees to all market participants which are based upon the total monthly volume executed by the Member[4] on MIAX Pearl in the relevant, respective origin type (not including Excluded Contracts)[5] (as the numerator) expressed as a percentage of (divided by) TCV[6] (as the denominator). In addition, the per contract transaction rebates and fees are applied retroactively to all eligible volume for that origin type once the respective threshold tier (''Tier'') has been reached by the Member. The Exchange aggregates the volume of Members and their Affiliates.[7] Members that place resting liquidity, *i.e.,* orders resting on the book of the MIAX Pearl System,[8] are paid the specified ''maker'' rebate (each a ''Maker''), and Members that execute against resting liquidity are assessed the specified ''taker'' fee (each a ''Taker''). For opening transactions and ABBO[9] uncrossing transactions, per contract transaction rebates and fees are waived for all market participants. Finally, Members are assessed lower transaction fees and receive lower rebates for order executions in standard option classes in the Penny Interval Program[10] (''Penny Classes'') than for order executions in standard option classes which are not in the Penny Interval Program (''Non-Penny Classes''), where Members are assessed higher transaction fees and receive higher rebates.

Alternative Volume Criteria Threshold Change in Tier 2

The Exchange proposes to amend the Add/Remove Tiered Rebates/Fees set forth in Section 1(a) of the Fee Schedule that apply to the MIAX Pearl Market Maker origin, to modify the volume threshold for the alternative Volume Criteria in Tier 2. The Market Maker origin currently provides an alternative volume criteria in Tier 2, which is based upon the total monthly volume executed by a MIAX Pearl Market Maker collectively in SPY/QQQ/IWM options on the Exchange, expressed as a percentage of total consolidated national volume in SPY/QQQ/IWM options.[11] Pursuant to this alternative volume criteria, a Market Maker is able to reach the Tier 2 threshold if the Market Maker's total executed monthly volume, not including Excluded Contracts, in SPY/QQQ/IWM options on MIAX Pearl is above 0.75% of total consolidated national monthly volume in SPY/QQQ/IWM options. For this calculation, volume that is from resting liquidity (Maker) and taking liquidity (Taker) in SPY/QQQ/IWM options is counted towards the alternative volume criteria, and the 0.75% threshold does not have to be reached individually in each of the three symbols. A Market Maker is able to qualify for Tier 2 rebates and fees, which will then be applicable to all volume executed by the MIAX Pearl Market Maker on MIAX Pearl. The two

[3] ''Market Maker'' means a Member registered with the Exchange for the purpose of making markets in options contracts traded on the Exchange and that is vested with the rights and responsibilities specified in Chapter VI of Exchange Rules. *See* the Definitions Section of the Fee Schedule.

[4] ''Member'' means an individual or organization that is registered with the Exchange pursuant to Chapter II of Exchange Rules for purposes of trading on the Exchange as an ''Electronic Exchange Member'' or ''Market Maker.'' Members are deemed ''members'' under the Exchange Act. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

[5] ''Excluded Contracts'' means any contracts routed to an away market for execution. *See* the Definitions Section of the Fee Schedule.

[6] ''TCV'' means total consolidated volume calculated as the total national volume in those classes listed on MIAX PEARL for the month for which the fees apply, excluding consolidated volume executed during the period time in which the Exchange experiences an ''Exchange System Disruption'' (solely in the option classes of the affected Matching Engine (as defined below)). The term Exchange System Disruption, which is defined in the Definitions section of the Fee Schedule, means an outage of a Matching Engine or collective Matching Engines for a period of two consecutive hours or more, during trading hours. The term Matching Engine, which is also defined in the Definitions section of the Fee Schedule, is a part of the MIAX PEARL electronic system that processes options orders and trades on a symbol-by-symbol basis. Some Matching Engines will process option classes with multiple root symbols, and other Matching Engines may be dedicated to one single option root symbol (for example, options on SPY may be processed by one single Matching Engine that is dedicated only to SPY). A particular root symbol may only be assigned to a single designated Matching Engine. A particular root symbol may not be assigned to multiple Matching Engines. The Exchange believes that it is reasonable and appropriate to select two consecutive hours as the amount of time necessary to constitute an Exchange System Disruption, as two hours equates to approximately 1.4% of available trading time per month. The Exchange notes that the term ''Exchange System Disruption'' and its meaning have no applicability outside of the Fee Schedule, as it is used solely for purposes of calculating volume for the threshold tiers in the Fee Schedule. *See* the Definitions Section of the Fee Schedule.

[7] ''Affiliate'' means (i) an affiliate of a Member of at least 75% common ownership between the firms as reflected on each firm's Form BD, Schedule A, or (ii) the Appointed Market Maker of an Appointed EEM (or, conversely, the Appointed EEM of an Appointed Market Maker). An ''Appointed Market Maker'' is a MIAX PEARL Market Maker (who does not otherwise have a corporate affiliation based upon common ownership with an EEM) that has been appointed by an EEM and an ''Appointed EEM'' is an EEM (who does not otherwise have a corporate affiliation based upon common ownership with a MIAX PEARL Market Maker) that has been appointed by a MIAX PEARL Market Maker, pursuant to the following process. A MIAX PEARL Market Maker appoints an EEM and an EEM appoints a MIAX PEARL Market Maker, for the purposes of the Fee Schedule, by each completing and sending an executed Volume Aggregation Request Form by email to *membership@miaxoptions.com* no later than 2 business days prior to the first business day of the month in which the designation is to become effective. Transmittal of a validly completed and executed form to the Exchange along with the Exchange's acknowledgement of the effective designation to each of the Market Maker and EEM will be viewed as acceptance of the appointment. The Exchange will only recognize one designation per Member. A Member may make a designation not more than once every 12 months (from the date of its most recent designation), which designation shall remain in effect unless or until the Exchange receives written notice submitted 2 business days prior to the first business day of the month from either Member indicating that the appointment has been terminated. Designations will become operative on the first business day of the effective month and may not be terminated prior to the end of the month. Execution data and reports will be provided to both parties. *See* the Definitions Section of the Fee Schedule.

[8] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

[9] ''ABBO'' means the best bid(s) or offer(s) disseminated by other Eligible Exchanges (defined in Exchange Rule 1400(g)) and calculated by the Exchange based on market information received by the Exchange from OPRA. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

[10] *See* Securities Exchange Act Release No. 88992 (June 2, 2020), 85 FR 35142 (June 8, 2020) (SR–PEARL–2020–06).

[11] *See* Fee Schedule, Section 1(a), explanatory paragraph below the tables and footnotes. *See also* Securities Exchange Act Release Nos. 84592 (November 14, 2018), 83 FR 58646 (November 20, 2018) (SR–PEARL–2018–23); 90906 (January 21, 2021), 86 FR 5296 (January 19, 2021) (SR–PEARL–2020–38).

volume criteria available for Tier 2 is based upon either: (a) the total monthly volume executed by the Market Maker in all options classes on MIAX Pearl, not including Excluded Contracts, (as the numerator), expressed as a percentage of (divided by) TCV (as the denominator); or (b) the total monthly volume executed by the MIAX Pearl Market Maker collectively in SPY/QQQ/IWM options on MIAX Pearl, not including Excluded Contracts, (as the numerator), expressed as a percentage of (divided by) SPY/QQQ/IWM TCV [12] (as the denominator). Once either volume criteria threshold in Tier 2 is reached by the Market Maker, the Tier 2 per contract rebates and fees apply to all volume in all options classes executed by that MIAX Pearl Market Maker on MIAX Pearl.

The Exchange now proposes to modify the threshold for the alternative volume criteria in Tier 2 from 0.75% to 0.55% of total consolidated national monthly volume in SPY/QQQ/IWM options. With the proposed change, a Market Maker will be able to reach the alternative Volume Criteria in Tier 2 if the Market Maker's total executed monthly volume, not including Excluded Contracts, in SPY/QQQ/IWM options on MIAX Pearl is above 0.55% of total consolidated national monthly volume in SPY/QQQ/IWM options. The Exchange is not modifying the calculation method for a Market Maker to reach the alternative volume criteria in Tier 2, only the threshold percentage. The Exchange proposes to make the corresponding change to the volume threshold percentage described in the explanatory paragraph for the alternative volume criteria for Tier 2 that is below the tables in Section 1(a) of the Fee Schedule.

The purpose of this proposed change is for business and competitive reasons. In order to attract order flow, the Exchange initially set its volume threshold for the alternative volume criteria in Tier 2 at a meaningful low level.[13] In 2021, the Exchange then increased the volume threshold for the alternative volume criteria in Tier 2.[14] The Exchange now believes that it is appropriate to adjust this volume threshold so that it is more in line with the volume threshold that Market Makers currently achieve in SPY/QQQ/IWM options on MIAX Pearl by reducing the volume threshold for the alternative volume criteria in Tier 2 from 0.75% to 0.55% in SPY/QQQ/IWM options. Further, the Exchange believes that with the proposed change, the Exchange will attract additional SPY/QQQ/IWM option order flow from Market Makers, which should benefit all Exchange participants by providing more trading opportunities and tighter spreads. The Exchange cannot predict with certainty how many Market Makers will achieve the alternative volume criteria in Tier 2 with the decreased threshold percentage.

Implementation

The proposed change will be effective beginning February 1, 2023.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with section 6(b) of the Act [15] in general, and furthers the objectives of section 6(b)(4) of the Act,[16] in that it is an equitable allocation of reasonable dues, fees and other charges among Exchange members and issuers and other persons using its facilities, and 6(b)(5) of the Act,[17] in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [18]

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, as of January 26, 2023, no single exchange has more than approximately 12–13% equity options market share for the month of January 2023.[19] Therefore, no exchange possesses significant pricing power. More specifically, as of January 26, 2023, the Exchange had a market share of approximately 6.71% of executed volume of multiply-listed equity options for the month of January 2023.[20]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can discontinue or reduce use of certain categories of products and services, terminate an existing membership or determine to not become a new member, and/or shift order flow, in response to transaction fee changes. For example, on February 28, 2019, the Exchange filed with the Commission a proposal to increase Taker fees in certain Tiers for options transactions in certain Penny classes for Priority Customers and decrease Maker rebates in certain Tiers for options transactions in Penny classes for Priority Customers (which fee was to be effective March 1, 2019).[21] The Exchange experienced a decrease in total market share for the month of March 2019, after the proposal went into effect. Accordingly, the Exchange believes that its March 1, 2019, fee change, to increase certain transaction fees and decrease certain transaction rebates, may have contributed to the decrease in MIAX Pearl's market share and, as such, the Exchange believes competitive forces constrain the Exchange's, and other options exchanges, ability to set transaction fees and market participants can shift order flow based on fee changes instituted by the exchanges.

The Exchange believes its proposal to decrease the threshold for the alternative volume criteria in Tier 2 from 0.75% to 0.55% of total consolidated national monthly volume in SPY/QQQ/IWM options is reasonable, equitably allocated and not unfairly discriminatory because the reduced threshold percentage should attract additional SPY/QQQ/IWM option order flow from Market Makers, which will benefit all Exchange participants by providing more trading opportunities and tighter spreads.

[12] ''SPY/QQQ/IWM TCV'' means total consolidated volume in SPY, QQQ, and IWM calculated as the total national volume in SPY, QQQ, and IWM for the month for which the fees apply, excluding consolidated volume executed during the period of time in which the Exchange experiences an Exchange System Disruption (solely in SPY, QQQ, or IWM options). *See* the Definitions Section of the Fee Schedule.

[13] *See* Securities Exchange Act Release No. 84592 (November 14, 2018), 83 FR 58646 (November 20, 2018) (SR–PEARL–2018–23).

[14] *See* Securities Exchange Act Release No. 90906 (January 21, 2021), 86 FR 5296 (January 19, 2021) (SR–PEARL–2020–38).

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(4).

[17] 15 U.S.C. 78f(b)(1) and (b)(5).

[18] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

[19] *See* ''The market at a glance,'' (last visited January 26, 2023), *available at https://www.miaxoptions.com/.*

[20] *See id.*

[21] *See* Securities Exchange Act Release No. 85304 (March 13, 2019), 84 FR 10144 (March 19, 2019) (SR–PEARL–2019–07).

The Exchange believes its proposal is reasonable, equitable and not unfairly discriminatory because all similarly situated market participants in the same origin type (MIAX Pearl Market Makers) are subject to the same tiered Maker rebates and access to the Exchange is offered on terms that are not unfairly discriminatory. The Exchange believes its proposal will incentivize Market Makers to increase their posted liquidity in SPY/QQQ/IWM options to the benefit of the entire market, which will increase order flow sent to the Exchange, benefiting all market participants through increased liquidity, tighter markets and order interaction.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule changes will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed change should continue to encourage the provision of liquidity in SPY/QQQ/IWM options that enhances the quality of the Exchange's market and increases the number of trading opportunities on the Exchange for all participants who will be able to compete for such opportunities. The proposed rule changes should enable the Exchange to continue to attract and compete for order flow with other exchanges. However, this competition does not create an undue burden on competition but rather offers all market participants the opportunity to receive the benefit of competitive pricing.

The proposed change to the threshold criteria for the alternative volume criteria in Tier 2 for the Market Maker origin is intended to keep the Exchange's rebates highly competitive with those of other exchanges, and to encourage liquidity and should enable the Exchange to continue to attract and compete for order flow with other exchanges. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its rebates and fees to remain competitive with other exchanges and to attract order flow. The Exchange believes that the proposed rule changes reflect this competitive environment because the proposal modifies the Exchange's fees in a manner that encourages market participants to continue to provide liquidity and to send order flow to the Exchange.

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

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act,[22] and Rule 19b–4(f)(2)[23] 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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–PEARL–2023–02 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–PEARL–2023–02. 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–2023–02 and should be submitted on or before March 7, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03056 Filed 2–13–23; 8:45 am]

BILLING CODE 8011–01–P

[22] 15 U.S.C. 78s(b)(3)(A)(ii).

[23] 17 CFR 240.19b–4(f)(2).

[24] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Securities Act of 1933, Release No. 11155/February 8, 2023; Securities Exchange Act of 1934, Release No. 96851/February 8, 2023]

Order Regarding Review of FASB Accounting Support Fee for 2023 Under the Sarbanes-Oxley Act of 2002

The Sarbanes-Oxley Act of 2002 (''SOX'' or the ''Act'') provides that the Securities and Exchange Commission (the ''Commission'') may recognize, as generally accepted for purposes of the securities laws, any accounting principles established by a standard-setting body that meets certain criteria.[1] Section 109 of SOX provides that all of the budget of such a standard-setting body shall be payable from an annual accounting support fee assessed and collected against each issuer, as may be necessary or appropriate to pay for the budget and provide for the expenses of the standard-setting body, and to provide for an independent, stable source of funding, subject to review by the Commission. Under section 109(f) of the Act, the amount of fees collected for a fiscal year shall not exceed the

[1] *See* 15 U.S.C. 7201 *et seq.*

''recoverable budget expenses'' of the standard-setting body. Section 109(i) of SOX amends section 13(b)(2) of the Securities Exchange Act of 1934 to require issuers to pay the allocable share of a reasonable annual accounting support fee or fees, determined in accordance with section 109 of the Act.

On April 25, 2003, the Commission issued a policy statement concluding that the Financial Accounting Standards Board (''FASB'') and its parent organization, the Financial Accounting Foundation (''FAF''), satisfied the criteria for an accounting standard-setting body under the Act, and recognizing the FASB's financial accounting and reporting standards as ''generally accepted'' under section 108 of the Act.[2] Accordingly, the Commission undertook a review of the FASB's accounting support fee for calendar year 2023.[3] In connection with its review, the Commission also reviewed the budget for the FAF and the FASB for calendar year 2023.

Section 109 of SOX provides that, in addition to the accounting support fee, the standard-setting body can have additional sources of revenue for its activities, such as earnings from sales of publications, provided that each additional source of revenue shall not jeopardize, in the judgment of the Commission, the actual or perceived independence of the standard setter. In this regard, the Commission also considered the interrelation of the operating budgets of the FAF, the FASB, and the Governmental Accounting Standards Board (''GASB''), the FASB's sister organization, which sets accounting standards used by state and local government entities. The Commission has been advised by the FAF that neither the FAF, the FASB, nor the GASB accept contributions from the accounting profession.

The Commission understands that the Office of Management and Budget (''OMB'') has determined the FASB's spending of the 2023 accounting support fee is sequestrable under the Budget Control Act of 2011.[4] So long as sequestration is applicable, we anticipate that the FAF will work with the Commission and Commission staff as appropriate regarding its implementation of sequestration.

After its review, the Commission determined that the 2023 annual accounting support fee for the FASB is consistent with section 109 of the Act. Accordingly,

It is ordered, pursuant to section 109 of SOX, that the FASB may act in accordance with this determination of the Commission.

By the Commission.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2023–03077 Filed 2–13–23; 8:45 am]

BILLING CODE 8011–01–P

[2] *See* Commission Statement of Policy Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter, Release No. 33–8221 (April 25, 2003) [68 FR 23333 (May 1, 2003)].

[3] The Financial Accounting Foundation's Board of Trustees approved the FASB's budget on November 15, 2022. The FAF submitted the approved budget to the Commission on November 21, 2022.

[4] *See* OMB Report to the Congress on the BBEDCA 251A Sequestration for Fiscal Year 2023, available at *https://www.whitehouse.gov/wp-content/uploads/2022/03/BBEDCA_251A_Sequestration_Report_FY2023.pdf.*

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96840; File No. SR–MSRB–2023–01]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change Consisting of Amendments to MSRB Rule G–40, on Advertising by Municipal Advisors, and MSRB Rule G–8, on Books and Records

February 8, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 31, 2023, the Municipal Securities Rulemaking Board (''MSRB'' or ''Board'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The MSRB filed with the Commission a proposed rule change consisting of amendments to MSRB Rule G–40, on advertising by municipal advisors. Specifically, the proposed rule change consists of amendments to MSRB Rule G–40 to (i) permit municipal advisors to use testimonials in advertisements, subject to certain conditions; (ii) specify additional supervisory obligations with respect to the use of testimonials; (iii) modify the definition of municipal advisory client to better align with MSRB Rule G–38, on solicitation of municipal securities business; (iv) specify the obligation to keep a record of any payment for a testimonial; and (v) create a conforming obligation under MSRB Rule G–8, on books and records to be made by brokers, dealers, municipal securities dealers and municipal advisors, to include records to correspond with the current obligation under MSRB Rule G–40 to maintain records relating to the supervision of advertisements as well as the proposed obligation to maintain records of any payments for a testimonial (together ''the proposed rule change''). The MSRB requests that the proposed rule change be approved with an implementation date to be announced by the MSRB in a regulatory notice published no later than one month following the Commission approval date, which implementation date shall be no later than three months following the Commission approval date.

The text of the proposed rule change is available on the MSRB's website at *https://msrb.org/2023-SEC-Filings,* at the MSRB'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 MSRB 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 MSRB 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

Consistent with the MSRB's strategic goal to modernize the MSRB Rulebook, the proposed rule change would amend MSRB Rule G–40 to allow municipal advisors to use testimonials in certain circumstances, which would better align MSRB Rule G–40 with, to the extent appropriate, the principles of MSRB Rule G–21, on advertising by brokers, dealers or municipal securities, as well as Rule 206(4)–1[3] under the Investment

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 275.206(4)–1.

Advisers Act of 1940 (the ''Advisers Act'') [4] adopted by the Commission.[5]

Background

Advertisements Under MSRB Rule G–40

In recognition of the fact that municipal advisors bear similarities with both brokers, dealers and municipal securities dealers (collectively and individually, ''dealers'') and investment advisers and to promote regulatory consistency for regulated entities dually registered as a dealer and as a municipal advisor, or as an investment adviser registered with the SEC, the MSRB established advertising standards for municipal advisors in 2018.[6] These advertising standards were developed by aligning with, to the extent practicable, the then existing standards for investment advisers under Rule 206(4)–1 and the then existing standards for dealers under MSRB Rule G–21.

MSRB Rule G–40 is designed to protect municipal entities, obligated persons and the general public by requiring a municipal advisor's advertisement to adhere to specific content standards based on the principles of fair dealing and good faith. An advertisement is generally defined in MSRB Rule G–40 to include any material published or used in any electronic or other public media, or any written or electronic promotional literature distributed or made generally available to municipal entities, obligated persons, municipal advisory clients or the public, including any notice, circular, report, market letter, form letter, telemarketing script, seminar text, press release concerning the services of the municipal advisor or the engagement of a municipal advisory client or reprint, or any excerpt of the foregoing or of a published article.[7] MSRB Rule G–40 specifies content standards that require, among other things, that all advertisements by a municipal advisor be fair and balanced and provide a sound basis for evaluating the facts in regard to any particular municipal security or type of municipal security, municipal financial product, industry, or service.[8] A municipal advisor may not make any false, exaggerated, unwarranted, promissory or misleading statement or claim in any advertisement or omit any material fact or qualification if the omission, in light of the context of the material presented, would cause the advertisement to be misleading.[9] Additionally, a municipal advisor is prohibited from publishing false or misleading advertisements concerning the services of the municipal advisor or the engagement of a municipal advisory client or concerning the facilities, services, or skills of any municipal advisor.[10]

In establishing MSRB Rule G–40, the MSRB determined to prohibit municipal advisors, directly or indirectly, from publishing, circulating or distributing any advertisement which refers, directly or indirectly, to any testimonial of any kind concerning the municipal advisor or concerning the advice, analysis, report or other service rendered by the municipal advisor.[11] At that time, the MSRB expressed the view that a testimonial in a municipal advisor's advertisement would present significant issues, including the possibility of being misleading.[12] As a basis for this view, the MSRB noted that the Commission had taken a similar position in adopting Advisers Act Rule 206(4)–1 in 1961 (the ''Initial IA Advertising Rule'' or ''Initial Rule 206(4)–1''), determining that the use of a testimonial by an investment adviser would constitute a fraudulent, deceptive, or manipulative act, practice, or course of action.[13] Believing that doing so would help ensure consistent regulation between regulated entities subject to a fiduciary standard, the MSRB determined to act consistently with the language of Initial Rule 206(4).[14]

Testimonials Under MSRB Rule G–21

In establishing MSRB Rule G–40, the MSRB also sought, to the extent practicable, to harmonize with its existing rule governing the advertisements of dealers, MSRB Rule G–21. While not identical, the two MSRB rules are analogous in that they both are based on principles of fair dealing and maintain rigorous content standards. However, MSRB Rule G–40 currently prohibits a municipal advisor from using a testimonial in an advertisement. This prohibition is based in part on the fiduciary duty that a non-solicitor municipal advisor (as opposed to a dealer) owes its municipal entity clients.[15]

MSRB Rule G–21 permits a dealer to use a testimonial in an advertisement if certain conditions are met. Specifically, if a dealer's advertisement contains a testimonial, then the person providing the testimonial concerning a technical aspect of investing must have the knowledge and experience to form a valid opinion.[16] Additionally, if an advertisement contains a testimonial about the investment advice or investment performance of the dealer, the advertisement must prominently disclose (i) the fact that the testimonial may not be representative of the experience of other customers; (ii) the fact that the testimonial is no guarantee of future performance or success; and (iii) if more than $100 in value is paid for the testimonial, the fact that it is a paid testimonial.[17]

Testimonials Under Advisers Act Rule 206(4)–1

In establishing MSRB Rule G–40 in 2018, the MSRB recognized that the Commission was considering modernizing the Initial IA Advertising Rule and noted that it would monitor developments related to the testimonial ban.[18] On December 22, 2020, the Commission adopted amendments to modernize and consolidate the Initial IA Advertising Rule and Rule 206(4)–3 of the Adviser's Act (the ''IA Solicitation Rule'') [19] into one marketing rule for investment advisers, under the Advisers Act (the ''Modernized IA Marketing Rule'' or ''SEC Rule 206(4)–1'').[20] When adopting the Modernized IA Marketing Rule, the SEC noted that, among other things, it replaces the previous rule's ''broadly drawn limitations with principles-based provisions designed to accommodate the continual evolution and interplay of technology and advice

[4] 15 U.S.C. 80b–1 *et seq.*

[5] *See* Investment Advisers Act Release No. 5653 (Dec. 22, 2020), the adopting release for Investment Adviser Marketing (the ''SEC 2020 Adopting Release''), 86 FR 13024–13147 (Mar. 5, 2021).

[6] *See* Exchange Act Release No. 83177 (May 7, 2018), 83 FR 21794 (May 10, 2018), approval of proposed rule change File No. SR–MSRB–2018–01 (''SEC approval order of MSRB Rule G–40''). The effective date for municipal advisors to comply with MSRB Rule G–40 was August 23, 2019.

[7] *See* MSRB Rule G–40(a)(i).

[8] *See* MSRB Rule G–40(a)(iv)(A).

[9] *See* MSRB Rule G–40(a)(iv)(B).

[10] *See* MSRB Rule G–40(a)(iv)(B).

[11] *See* MSRB Rule G–40(a)(iv)(G).

[12] *See* Exchange Act Release No. 82616 (Feb. 1, 2018), 83 FR 5474 (Feb. 7, 2018), notice of proposed rule change File No. SR–MSRB–2018–01) (''Notice of proposed Rule G–40'').

[13] *See* Investment Advisers Act Release No. 121 (Nov. 1, 1961) (the ''1961 Advertising Rule Adopting Release''), 26 FR 10548 (Nov. 9, 1961). The Commission adopted the Advertising Rule in 1961 to target advertising practices that the Commission believed were likely to be misleading.

[14] *See* Notice of Proposed MSRB Rule G–40, 83 FR 5474, 5478 n.26, 5488 & n.119.

[15] *See* generally Notice of Proposed MSRB Rule G–40.

[16] MSRB Rule G–21(a)(iii)(G)(1).

[17] MSRB Rule G–21(a)(iii)(G)(2).

[18] Notice of Proposed MSRB Rule G–40, 83 FR 5474, 5487.

[19] 17 CFR 275.206(4)–3. The IA Solicitation Rule was adopted in 1979 ''to help ensure that clients are aware that paid solicitors who refer them to advisers have a conflict of interest.'' *See* SEC 2020 Adopting Release, 86 FR 13025.

[20] SEC 2020 Adopting Release. The Modernized IA Marketing Rule applies to any investment adviser registered or required to be registered with the Commission under § 203 of the Advisers Act that directly or indirectly disseminates an advertisement.

and includes tailored requirements for certain types of advertisements.'' [21] Significantly, the Modernized IA Marketing Rule replaced the prior ban on testimonials under the Initial IA Advertising Rule with a permissive use of testimonials and endorsements in advertisements,[22] which includes traditional referral and solicitation activity, subject to certain conditions.[23]

The Modernized IA Marketing Rule requires advertisements that include testimonials or endorsements to provide disclosures of certain information.[24] Specifically, the Modernized IA Marketing Rule requires that an investment adviser clearly and prominently disclose the following at the time the testimonial or endorsement is disseminated: (i) that the testimonial was given by a current client or investor or, if an endorsement, that the endorsement was given by a person other than a current client or investor; (ii) that cash or non-cash compensation was provided for the testimonial, if applicable; and (iii) a brief statement of any material conflicts of interest on the part of the person giving the testimonial or endorsement resulting from the adviser's relationship with such person.[25]

In addition, disclosure of the material terms of any compensation arrangement and a description of any material conflicts of interest on the part of the person giving the testimonial or endorsement resulting from the advisers' relationship with such person and/or any compensation arrangement must be provided to the recipient(s) of the testimonial.[26] All testimonials, including those that are compensated and uncompensated are subject to oversight and compliance. Specifically, the investment adviser must have (i) a reasonable basis for believing that any testimonial or endorsement complies with the requirements of the rule, and (ii) a written agreement with any person giving a compensated testimonial or endorsement that describes the scope of the agreed upon activities. The requirement to have a written agreement only applies when the adviser is providing compensation for testimonials and endorsements is above the *de minimis* threshold (*i.e.,* $1,000 or less, or the equivalent value in non-cash compensation during the preceding twelve months).[27]

In light of the Commission's adoption of the Modernized IA Marketing Rule, the MSRB has conducted a review of MSRB Rule G–40 and is filing the proposed rule change to promote regulatory consistency among regulated entities subject to a fiduciary standard. The proposed rule change would permit municipal advisors to use testimonials in advertisements, subject to certain conditions, as discussed below.[28]

Summary of Proposed Amendments

To promote regulatory consistency, where practicable, among MSRB Rule G–40, MSRB Rule G–21, and the SEC's Modernized IA Marketing Rule, proposed amended MSRB Rule G–40 would permit the use of testimonials subject to disclosures and other tailored conditions. The proposed rule change would not only align MSRB Rule G–40 with the analogous requirements for dealers under MSRB Rule G–21, but, because municipal advisors have a fiduciary duty to their clients, the proposed rule change would also include certain provisions, tailored to apply to municipal advisors, which align with the SEC's Modernized IA Marketing Rule. Specifically, the proposed rule change would amend the content standards under MSRB Rule G–40(a)(iv) to permit municipal advisors to use testimonials in advertisements subject to certain conditions; amend the supervisory obligations under MSRB Rule G–40(c) to specify additional supervisory obligations with respect to the use of testimonials; modify the definition of municipal advisory client; and amend MSRB Rule G–8 to include records to correspond with the current obligation under MSRB Rule G–40 to maintain records relating to the supervision of advertisements.

MSRB Rule G–40 Content Standards

MSRB Rule G–40 currently prohibits the use of testimonials in advertisements by municipal advisors.[29] The MSRB is not proposing to alter the fundamental content standards of MSRB Rule G–40 that require advertisements to be based on the principles of fair dealing and good faith, be fair and balanced, and provide a sound basis for evaluating the facts and that the advertisements not make any false, exaggerated, unwarranted, promissory, or misleading statement or claim.[30] Consistent with those standards, and recognizing the fiduciary duty owed by municipal advisors to their municipal entity clients, the MSRB is proposing to permit the use of testimonials in advertisements by municipal advisors subject to certain conditions that the MSRB believes would diminish the concern, expressed in establishing MSRB Rule G–40, that testimonials could cause a municipal advisor's advertisement to be misleading.[31] Specifically, as proposed, MSRB Rule G–40(a)(iv)(G) would be amended to provide that municipal advisor advertisements that contain testimonials would be subject to additional content standards.

If a municipal advisor's advertisement contains a testimonial of any kind concerning the municipal advisor or concerning the advice, analysis, report, or other service rendered by the municipal advisor, the person making the testimonial would be required to have the knowledge and experience to form a valid opinion.[32] This obligation would standardize the content standard with that applicable to dealers' use of testimonials under MSRB Rule G–21.[33] The MSRB believes applying this standard to municipal advisors is consistent with the existing content standards of MSRB Rule G–40 established to prevent false or misleading advertisements and would promote regulatory consistency.

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[21] SEC Press Release, SEC Adopts Modernized Marketing Rule for Investment Advisers, dated December 22, 2020.

[22] A ''testimonial'' is a statement made by a current client or investor in a private fund advised by the investment adviser, whereas an ''endorsement'' is a statement made by a person other than a current client or investor in a private fund advised by the investment adviser. *See* 17 CFR 275.206(4)–1(e)(17) and 17 CFR 275.206(4)–1(e)(5).

[23] 17 CFR 275.206(4)–1(b) (relating to compensated testimonials and endorsements); *see also* 17 CFR 206(4)–1(e)(1)(ii) (defining the term ''advertisement'' to include compensated testimonials and endorsements). These conditions differ depending on whether the testimonial or endorsement is compensated or uncompensated. 17 CFR 275.206(4)–1(b)(4)(i) (exempting a testimonial or endorsement disseminated for no compensation or *de minimis* compensation from paragraphs 206(4)–1(b)(2)(ii) and (3).

[24] 17 CFR 275.206(4)–1(b)(1).

[25] 17 CFR 275.206(4)–1(b). *See* 17 CFR 275.206(4)–1(b)(4) discussing exemptions from the disclosure requirements.

[26] This includes a description of the compensation provided or to be provided, directly or indirectly, to the person for the testimonial or endorsement. 17 CFR 275.206(4)–1(b)(1).

[27] 17 CFR 275.206(4)–1(b)(2).

[28] The term ''testimonial'' is not specifically defined in MSRB Rule G–21 or MSRB Rule G–40; based on the application of each rule, the term has been understood to include a statement given by a current client or person other than a current client and does not distinguish between a testimonial and an endorsement.

[29] MSRB Rule G–40(a)(iv)(G).

[30] MSRB Rule G–40(a)(iv)(A)–(F), G–40(a)(v) and G–40(b)(ii).

[31] *See* Notice of Proposed MSRB Rule G–40, 83 FR 5474, 5487.

[32] Proposed MSRB Rule G–40(a)(iv)(G)(1).

[33] This content standard in MSRB Rule G–21 currently aligns with the standard established in Rule 2210, Communications with the Public, of the Financial Industry Regulatory Authority (''FINRA''). Specifically, FINRA Rule 2210(d)(6)(A) provides that ''if any testimonial in a communication concerns a technical aspect of investing, the person making the testimonial must have the knowledge and experience to form a valid opinion.''

If an advertisement contains a testimonial concerning the municipal advisor or concerning the advice, analysis, report, or other service rendered by the municipal advisor, that advertisement must include, clearly and prominently, disclosures designed to reduce the risk that the use of a testimonial in an advertisement could be misleading. First, the testimonial must include a clear and prominent disclosure that the person providing the testimonial is a current municipal advisory client or, if not currently a municipal advisory client, the timeframe, denoted by calendar year(s), during which the person was a municipal advisory client.[34] The MSRB believes that allowing the use of a testimonial only when the testimonial is from a current or former client reinforces the proposed requirement that the person providing the testimonial have the knowledge and experience to form a valid opinion and helps ensure that the municipal advisor's advertisement is fair and balanced. In addition, disclosing the time frame when a person providing a testimonial was a municipal advisory client would provide important context to help reduce the risk that the use of a testimonial could be misleading, which would benefit the likely recipients of the advertisement (*i.e.,* municipal entities and obligated persons). The clear and prominent disclosure standard requires that the disclosures be included within the advertisement that includes the testimonial such that the testimonial and disclosures are read at the same time and improve the salience and impact of the disclosures.

The testimonial would also be required to include clear and prominent disclosures that the testimonial may not be representative of the experience of other clients,[35] that the testimonial is no guarantee of future performance or success,[36] and, if more than $100 in total value in cash or non-cash compensation is paid for the testimonial, the fact that it is a paid testimonial.[37] Requiring municipal advisors that use testimonials to adhere to these disclosure requirements would harmonize the content standards with those applicable to dealers' use of testimonials under MSRB Rule G–21.[38] The MSRB believes requiring such disclosures is consistent with the existing content standards of MSRB Rule G–40 and would promote regulatory consistency.

Finally, the testimonial also would be required to include, clearly and prominently, a brief statement of any material conflicts of interest on the part of the person providing the testimonial resulting from the municipal advisor's relationship with such person. Recognizing the fiduciary duty owed by municipal advisors to their municipal entity clients, the MSRB considered the obligations of registered investment advisers, who, like municipal advisors, are subject to a fiduciary standard in determining the disclosures that would be appropriate for municipal advisors when using testimonials in advertisements. This disclosure obligation parallels a disclosure obligation required of registered investment advisers under SEC Rule 206(4)–1(b)(1)(iii). The MSRB believes that a brief statement of any material conflicts of interest on the part of the person providing the testimonial resulting from the municipal advisor's relationship with such person would result in information that informs the likely recipients of the advertisement (*i.e.,* municipal entities and obligated persons) which serves to ensure that the advertisement is fair and balanced and reduces the risk that the use of a testimonial could be misleading. Furthermore, the MSRB believes establishing the same disclosure obligation for municipal advisors under MSRB Rule G–40 promotes regulatory consistency, particularly among regulated entities subject to a fiduciary standard. To that end, the MSRB expects this disclosure to be succinct.[39]

There are two broad categories of municipal advisors [40] — those that provide certain advice to or on behalf of a municipal entity or obligated person and those that undertake certain solicitations of a municipal entity or obligated person on behalf of certain third-party financial professionals, often referred to as solicitors.[41] The MSRB understands that municipal entity clients generally do not accept compensation for testimonials and believes that the payment of more than a *de minimis* amount (more than $1000 in total value in cash or non-cash compensation during the preceding 12 months) to a municipal entity client could present a potential conflict of interest. Therefore, proposed MSRB Rule G–40(a)(iv)(G)(3) would prohibit a non-solicitor municipal advisor from paying more than a *de minimis* amount of compensation for a testimonial.

To avoid this concern and to avoid creating complexity in MSRB Rule G–40 by establishing different standards for

[34] Proposed MSRB Rule G–40(a)(iv)(G)(2)(a).

[35] Proposed MSRB Rule G–40(a)(iv)(G)(2)(b).

[36] Proposed MSRB Rule G–40(a)(iv)(G)(2)(c).

[37] Proposed Rule MSRB G–40(a)(iv)(G)(2)(d).

[38] These disclosure requirements in MSRB Rule G–21 currently align with the disclosure requirements in FINRA Rule 2210(d)(6)(B)(1)–(3).

[39] In adopting Rule 206(4)–1(b)(1)(iii), the SEC noted that ''[s]imilar to the other disclosures subject to the clear and prominent standard, we expect this disclosure to be succinct. For example, it would be sufficient for an adviser to simply state that the testimonial or endorsement was provided by an affiliate of the adviser, or that the promoter is related to the adviser, if this relationship is the source of the conflict.'' SEC 2020 Adopting Release, 86 FR 13025.

[40] Section 15B(e)(4) of the Exchange Act (15 U.S.C. 78*o*–4(e)(4)) generally defines ''municipal advisor'' to mean a person (who is not a municipal entity or an employee of a municipal entity) that (i) provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or (ii) undertakes a solicitation of a municipal entity. Notwithstanding the omission of the term, ''obligated person'' in connection with the undertaking of a solicitation under Section 15B(e)(4)(A)(ii) of the Exchange Act (15 U.S.C. 78*o*–4(e)(4)(A)(ii)), the SEC has interpreted the definition of ''municipal advisor'' to include a person who engages in the solicitation of an obligated person acting in the capacity of an obligated person. *See* Exchange Act Release No. 70462 (September 20, 2013), 78 FR 67467, at notes 138 and 408 (November 12, 2013) (File No. S7–45–10) (''Order Adopting SEC Final MA Rule''). *See also* Exchange Act Rule 15Ba1–1(d)(1)(i) (17 CFR 240.15Ba1–1(d)(1)(i)).

[41] Section 15B(e)(9) of the Exchange Act (15 U.S.C. 78*o*–4(e)(9)) generally defines ''solicitation of a municipal entity or obligated person'' to mean a direct or indirect communication with a municipal entity or obligated person made by a person, for direct or indirect compensation, on behalf of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser . . . that does not control, is not controlled by, or is not under common control with the person undertaking such solicitation for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person of a broker, dealer, municipal securities dealer, or municipal advisor for or in connection with municipal financial products, the issuance of municipal securities, or of an investment adviser to provide investment advisory services to or on behalf of a municipal entity. The SEC has interpreted this phrase generally in a manner similar to the statutory definition. However, it has also added two exceptions to the statutory definition for (i) advertising by a dealer, municipal advisor or investment adviser and (ii) solicitations of an obligated person where such obligated person is not acting in the capacity of an obligated person or the solicitation is not in connection with the issuance of municipal securities or with respect to municipal financial products. *See* Exchange Act Rule 15Ba1–1(n) (17 CFR 240.15Ba1–1(n)). Additionally, the SEC has exempted from the municipal advisor definition a person that undertakes a solicitation of a municipal entity or obligated person for the purpose of obtaining or retaining an engagement by a municipal entity or by an obligated person of a dealer or a municipal advisor for or in connection with municipal financial products that are investment strategies, to the extent such investment strategies are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments. *See* Exchange Act Rule 15Ba1–1(d)(1) (17 CFR 240.15Ba1–1(d)(1)) and 15Ba1–1(d)(3)(viii) (17 CFR 240.15Ba1–1(d)(3)(viii)).

obligated person clients of non-solicitor municipal advisors, the MSRB determined to prohibit non-solicitor municipal advisors from paying any compensation for a testimonial to a person, directly or indirectly, of more than $1000 in total value in cash or non-cash compensation during the preceding 12 months. However, the proposed rule change would permit solicitor municipal advisors to pay such compensation to a municipal advisor, or an investment adviser (as defined under section 202 of the Investment Advisers Act of 1940) on behalf of whom the municipal advisor undertakes, or has undertaken, a solicitation of a municipal entity or obligated person, as defined in Rule 15Ba1–1(n)[42] subject to certain conditions.

The first condition would require a solicitor municipal advisor to conclude, based on the exercise of reasonable diligence, that the municipal advisor or investment adviser who will provide the testimonial is currently registered with the Commission. The MSRB believes requiring a solicitor municipal advisor to determine that the municipal advisor or investment adviser providing the testimonial is registered with the Commission would establish a reasonable basis to believe that the entity providing the testimonial would not be the subject of a ''disqualifying Commission action'' or ''disqualifying event'' as those terms are defined in SEC Rule 206(4)–1(e)(3) and (4).[43] While this proposed requirement under MSRB Rule G–40 is similar to a requirement imposed on investment advisers under the Modernized IA Marketing Rule, the requirement under MSRB Rule G–40 is tailored to solicitor municipal advisors with the recognition that the intended recipients of municipal advisors' advertisements are municipal entities and obligated persons.

The second condition would require a solicitor municipal advisor that compensates a municipal advisor or investment adviser, directly or indirectly, more than $1000 in total value in cash or non-cash compensation during the preceding 12 months, to have a written agreement with the municipal advisor or investment adviser.[44] The written agreement would be required to describe the scope of the agreed-upon activities with respect to the testimonial and the terms of the compensation for those activities. The proposed obligation for a solicitor municipal advisor to have a written agreement with the municipal advisor or investment adviser that describes the scope of the agreed-upon activities with respect to the testimonial is akin to an obligation under the Modernized IA Marketing Rule.[45] The MSRB believes the proposed additional conditions that would permit solicitor municipal advisors to pay more than a *de minimis* amount of compensation to a municipal advisory client providing a testimonial would reduce the potential concerns raised by permitting a non-solicitor municipal advisor to pay more than a *de minimis* amount of compensation to municipal advisory clients.

MSRB Rule G–40 Supervisory Obligations

MSRB Rule G–40 currently requires that each advertisement subject to the requirements of the rule be approved in writing by a municipal advisor principal, as defined in MSRB Rule G–3(e)(i), prior to first use. The proposed rule change would broaden these supervisory obligations to require, with respect to an advertisement that includes a testimonial, that such approval be based on a reasonable belief that the testimonial complies with the requirements of proposed MSRB Rule G–40(a)(iv)(G). The MSRB believes this additional supervisory obligation is appropriate in allowing municipal advisors the use of testimonials in advertisements. This obligation would be consistent with the oversight obligation under the Modernized IA Marketing Rule that requires an investment adviser to have a reasonable basis for believing that a testimonial complies with the requirements of SEC Rule 206(4)-1.[46] The MSRB believes establishing the same obligation for municipal advisors under MSRB Rule G–40 would promote regulatory consistency, particularly among regulated entities subject to a fiduciary standard.

MSRB Rule G–40 Definitions

MSRB Rule G–40(a)(iii) currently defines ''municipal advisory client,'' for purposes of MSRB Rule G–40, to include either: a municipal entity or obligated person for whom the municipal advisor engages in municipal advisory activities, as defined in MSRB Rule G–42(f)(iv); or a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser (as defined under section 202 of the Investment Advisers Act of 1940) on behalf of whom the municipal advisor undertakes a solicitation of a municipal entity or obligated person, as defined in Rule 15Ba1–1(n), 17 CFR 240.15Ba1–1(n), under the Act.[47] However, MSRB Rule G–38 prohibits dealers from paying persons who are not affiliated with the dealers for a solicitation of municipal securities business on their behalf. Accordingly, to avoid confusion and promote standardization across MSRB rules, the proposed rule change would modify the definition of municipal advisory client. Specifically, as proposed, the amended definition would exclude a broker, dealer, and municipal securities dealer from the list of entities on behalf of whom the municipal advisor undertakes a solicitation of a municipal entity or obligated person.

Recordkeeping Requirements Under Rule G–40 and G–8

MSRB Rule G–40 currently requires that each municipal advisor make and keep current in a separate file, records of all advertisements.[48] The proposed rule change would extend that

[42] 17 CFR 240.15Ba1–1(n).

[43] SEC Rule 206(4)–1(e)(3) defines a ''disqualifying Commission action'' to mean a Commission opinion or order barring, suspending, or prohibiting the person from acting in any capacity under the Federal securities laws. SEC Rule 206(4)–1(e)(4) defines a ''disqualifying event'' as any of the following events that occurred within ten years prior to the person disseminating an endorsement or testimonial: (i) a conviction by a court of competent jurisdiction within the United States of any felony or misdemeanor involving conduct described in paragraph (2)(A) through (D) of section 203(e) of the Act; (ii) a conviction by a court of competent jurisdiction within the United States of engaging in any of the conduct specified in paragraphs (1), (5), or (6) of section 203(e) of the Act; (iii) the entry of any final order by any entity described in paragraph (9) of section 203(e) of the Act, or by the U.S. Commodity Futures Trading Commission or a self-regulatory organization (as defined in the Form ADV Glossary of Terms), of the type described in paragraph (9) of section 203(e) of the Act; (iv) the entry of an order, judgment or decree described in paragraph (4) of section 203(e) of the Act, and still in effect, by any court of competent jurisdiction within the United States; and (v) a Commission order that a person cease and desist from committing or causing a violation or future violation of (A) any scienter-based anti-fraud provision of the Federal securities laws, including without limitation section 17(a)(1) of the Securities Act of 1933 (15 U.S.C. 77q(a)(1)), section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and § 240.10b-5 of this chapter, section 15(c)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(c)(1)), and section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–6(1)), or any other rule or regulation thereunder; or (B) section 5 of the Securities Act of 1933 (15 U.S.C. 77e). 17 CFR 275.206(4)–1.

[44] As discussed below, MSRB Rule G–38 prohibits dealers from paying persons who are not affiliated with the dealers for a solicitation of municipal securities business on their behalf. As a result, the proposed rule change assumes that solicitor municipal advisors would not obtain testimonials from dealers since dealers are prohibited from paying solicitor municipal advisors for their solicitations.

[45] *See* SEC Rule 206(4)–1(b)(2)(ii), 17 CFR 275.206(4)–1(b)(2)(ii).

[46] *See* SEC Rule 206(4)–1(b)(2)(i), 17 CFR 275.206(4)–1(b)(2)(i).

[47] MSRB Rule G–40(a)(iii).

[48] MSRB Rule G–40(e).

obligation to include records of any payment made to a municipal advisory client for a testimonial. The proposed rule change also would make a conforming amendment to the recordkeeping obligations under MSRB Rule G–8(h) to add subparagraph (viii) to include records concerning compliance with MSRB Rule G–40.[49] Specifically, the proposed rule change would amend MSRB Rule G–8(h) to specify that every municipal advisor that is registered or required to be registered under Section 15B of the Act and the rules and regulations thereunder would be required to make and keep current the records specified under MSRB Rule G–40. This would, therefore, include not only a record of all advertisements, which is currently required under MSRB Rule G–40(e), but also, to align with the proposed amendments to MSRB Rule G–40(e), a record of any cash or non-cash compensation provided to a municipal advisory client, as that term is defined in MSRB Rule G–40(a)(iii) and a record of any written agreement with a municipal advisor or investment adviser required under proposed MSRB Rule G–40(a)(iv)(G)(3)(b), which is required to describe the scope of the agreed-upon activities with respect to the testimonial and the terms of the compensation for such.

The MSRB believes that specifying these recordkeeping requirements would provide more certainty for municipal advisors with respect to their recordkeeping obligations. In addition, with the application of existing MSRB Rule G–9, which requires that municipal advisors generally preserve the books and records described in Rule G–8(h) for a period of not less than five years, the proposed amendments to MSRB Rule G–8(h) would provide examining authorities beneficial information to assist in evaluating a municipal advisor's compliance with MSRB Rule G–40.[50] In addition, the proposed amendment to MSRB Rule G–8 would align with SEC recordkeeping requirements, which require a municipal advisor to make and keep true, accurate, and current certain books and records relating to its municipal advisory activities, including originals or copies of all written communications sent, by such municipal advisor (including inter-office memoranda and communications) relating to municipal advisory activities, regardless of the format of such communications.[51]

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2) of the Exchange Act,[52] which provides that the Board shall propose and adopt rules to effect the purposes of this title with respect to transactions in municipal securities effected by brokers, dealers, and municipal securities dealers and advice provided to or on behalf of municipal entities or obligated persons by brokers, dealers, municipal securities dealers, and municipal advisors with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by brokers, dealers, municipal securities dealers, and municipal advisors.

Section 15B(b)(2)(C) of the Exchange Act[53] provides that the MSRB's rules shall 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 municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.

The MSRB believes the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act[54] because proposed MSRB Rule G–40, while permitting the use of testimonials, would continue to: prevent fraudulent and manipulative acts and practices; protect municipal entities, obligated persons and the public interest; promote just and equitable principles of trade; remove impediments to and perfect the mechanism of a free and open market in municipal securities; and foster cooperation and coordination with regulators.

The MSRB believes that the proposed rule change would help prevent fraudulent and manipulative acts and practices. The proposed rule change does not alter the standards that advertisements be based on the principles of fair dealing and good faith, be fair and balanced, and provide a sound basis for evaluating the facts and that the advertisements do not include any false, exaggerated, unwarranted, promissory or misleading statement or claim. As a result, the MSRB believes that permitting municipal advisors to use only testimonials that are consistent with these standards would help ensure that MSRB Rule G–40 continues to prevent fraudulent and manipulatives acts and practices.

Proposed MSRB Rule G–40 also would protect municipal entities, obligated persons and the public interest. It would do so by ensuring that recipients of any advertisement containing a testimonial have the necessary context to evaluate the testimonial because the proposed rule change would only permit the use of testimonials if certain conditions are met, including that specified disclosures are made. Since municipal entities and obligated persons are the likely recipients of municipal advisor's testimonials, the MSRB believes that the requisite disclosures would help ensure that the proposed rule change would not result in an erosion of protection for municipal entities, obligated persons and the public interest.

The MSRB also believes that the proposed rule change would promote just and equitable principles of trade by aligning the advertising rule for municipal advisors, to the extent practicable, with the advertising rules for dealers and for investment advisers. This serves to provide regulatory consistency for entities that may be dually registered, for example as a municipal advisor and an investment adviser, and therefore promotes compliance with the advertising rules, which in turn serves to help prevent fraudulent and manipulative practices and protect municipal entities, obligated persons, and the public interest. Additionally, the MSRB believes that the proposed rule change may remove impediments to a free and open municipal securities market by permitting municipal advisors to also use testimonials in advertisements, which could improve competition among municipal advisors by allowing another method for advertising.

In addition, the proposed rule change would foster coordination with persons engaged in regulating transactions in municipal securities. The amendments to MSRB Rule G–40 would more tightly align the content standards for MSRB Rule G–40 with the content standards of the SEC's Modernized IA Marketing

[49] Today the MSRB also filed a proposed rule change to adopt new MSRB Rule G–46, on duties of solicitor municipal advisors, and amend MSRB Rule G–8 by adding subparagraph (h)(ix) to include records concerning compliance with MSRB Rule G–46.

[50] Municipal advisors are also subject to the recordkeeping requirements described in SEC Rule 15Ba1–8(a)(1)–(8) under the Act.

[51] *See* Rule 15Ba1–8(a)(1)–(8), 240.15Ba1–8. MSRB Rule G–8 requires that municipal advisors make and keep current all books and records described in Rule 15Ba–18(a)(1)–(8) under the Act.

[52] 15 U.S.C. 78*o*–4(b)(2).

[53] 15 U.S.C. 78*o*–4(b)(2)(C).

[54] *Id.*

Rule. Providing a more uniform standard for regulated entities subject to a fiduciary standard serves to foster greater cooperation and coordination among the examining authorities responsible for ensuring compliance with MSRB rules. The MSRB further believes that the proposed amendment to MSRB Rule G–8 (with the related application of existing MSRB Rule G–9 on records preservation) would help municipal advisors create an audit trail for compliance and, in turn, would assist examination and enforcement authorities in their examination for compliance with MSRB Rule G–40, which would further help prevent fraudulent and manipulative acts and practices.

Section 15B(b)(2)(L)(iv) of the Exchange Act[55] requires that rules adopted by the Board not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons, provided that there is robust protection of investors against fraud. The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(L)(iv) of the Exchange Act[56] because the proposed rule change would allow the use of testimonials by all municipal advisors, including small municipal advisors. The use of testimonials in advertising would be subject to tailored obligations designed to impose only the necessary and appropriate regulatory burdens needed to promote compliance with the proposed rule change. The proposed rule change represents a balanced approach to prescriptive standards for those municipal advisors that choose to have the potential benefit of using testimonials in advertisements.

Additionally, the MSRB sought to harmonize standards, where applicable, between those applicable to solicitor municipal advisors, non-solicitor municipal advisors, dealers, and registered investment advisers such that those regulated entities that engage in conduct that would make them two or more of the above could leverage some of their existing processes to comply with relevant obligations under a comparable regulatory framework. Moreover, the MSRB believes that permitting municipal advisors to use a testimonial in an advertisement would be particularly helpful for small municipal advisors to highlight the services provided to other municipal advisory clients.

[55] 15 U.S.C. 78*o*–4(b)(2)(L)(iv).

[56] *Id.*

The MSRB also believes that the proposed rule change is consistent with Section 15B(b)(2)(G) of the Exchange Act,[57] which provides that the MSRB's rules shall prescribe records to be made and kept by municipal securities brokers, municipal securities dealers, and municipal advisors and the periods for which such records shall be preserved. The proposed rule change would require municipal advisors, consistent with current MSRB Rule G–40(e), to make and keep current a record of all advertisements and, consistent with proposed MSRB Rule G–40(e), a record of any payment made to a municipal advisory client, as that term is defined in MSRB Rule G–40(a)(iii) for a testimonial and a record of any written agreements required under proposed MSRB Rule G–40(a)(iv)(G)(3)(b). The MSRB believes that the proposed amendments to MSRB Rule G–8 related to recordkeeping (with the ensuing application of existing MSRB Rule G–9 on records preservation) would promote regulatory consistency and compliance as well as facilitate the examination for compliance with MSRB Rule G–40, other MSRB rules, and other applicable securities laws and regulations.

B. Self-Regulatory Organization's Statement on Burden on Competition

Section 15B(b)(2)(C) of the Exchange Act[58] requires that MSRB rules not be designed to impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The MSRB believes the proposed rule change to amend MSRB Rule G–40 and MSRB Rule G–8 would not impose any burden on competition and would not have an impact on competition, as the proposed rule change would apply a similar regulatory regime to all municipal advisors.

In accordance with the Board's policy on the use of economic analysis in rulemaking, the Board has reviewed proposed amended MSRB Rule G–40 and proposed amended MRB Rule G–8.[59] The MSRB believes that the proposed changes to MSRB Rule G–40 and MSRB Rule G–8 would promote regulatory consistency and would benefit municipal advisors by removing the prohibition that an advertisement does not refer, directly or indirectly, to any testimonial of any kind concerning the municipal advisors. The proposed amendments to MSRB Rule G–40 and MSRB Rule G–8, by design, would continue to prevent any fraudulent or manipulative practices, and therefore would protect issuers and investors, as municipal advisors could only include the usage of a testimonial as part of an advertisement if certain conditions are met, and if abiding by the standards of the advertising rule in general. In addition, by aligning MSRB rules with the SEC's Modernized IA Marketing Rule, as well as MSRB Rule G–21, the proposed amendments to MSRB Rule G–40 and MSRB Rule G–8 would also improve efficiency by providing regulatory consistency for regulated entities dually registered as a dealer and as a municipal advisor, or as an investment adviser registered with the SEC and as a municipal advisor. The MSRB therefore believes the proposed amendments to MSRB Rule G–40 and MSRB Rule G–8 would promote competition and would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Necessity of the Amendments to MSRB Rule G–40 and MSRB Rule G–8

As part of the MSRB's strategic goal to modernize the MSRB Rulebook, the MSRB proposes to amend MSRB Rule G–40 on advertising by municipal advisors to permit municipal advisors to use testimonials in advertisements. As MSRB Rule G–40 is currently written, municipal advisors are prohibited from using testimonials. This was due to the MSRB modeling MSRB Rule G–40 on the original 1961 Initial IA Advertising Rule specifying that using a testimonial by an investment adviser would constitute a fraudulent, deceptive, or manipulative act, practice, or course of action. In December 2020, the SEC amended Rule 206(4)–1, establishing the Modernized IA Marketing Rule and reversed the prior ban on the use of testimonials for traditional referral and solicitation activity, subject to certain conditions.[60] At the time of the 1961 Initial IA Advertising Rule, the SEC explained that investment advisers had stricter standards of conduct than those for other commercial enterprises and that clients and prospective clients of investment advisers are frequently unsophisticated in investment matters.[61] The advent of the internet and the growth of technological advances, in general, have made social

[57] 15 U.S.C. 78*o*–4(b)(2)(G).

[58] 15 U.S.C. 78*o*–4(b)(2)(C).

[59] Policy on the Use of Economic Analysis in MSRB Rulemaking is available at *http://msrb.org/Rules-and-Interpretations/Economic-Analysis-Policy.aspx*. In evaluating whether there was a burden on competition, the Board was guided by its principles that required the Board to consider costs and benefits of a rule change, its impact on capital formation and the main reasonable alternative regulatory approaches.

[60] *See* SEC 2020 Adopting Release.

[61] *See* 1961 Advertising Rule Adopting Release.

media and websites key parts of commerce, including investment advisory services.[62] To provide investment advisers with more flexibility, and to increase investors' awareness of service providers' offerings and potentially reduce investors' search costs for an adviser, the SEC amended the Initial IA Advertising Rule to reflect the common use of testimonials and to provide a principles-based regulatory approach.[63]

For the reasons discussed above, the proposed amendments to MSRB Rule G–40 are intended to align MSRB Rule G–40's provision governing the use of testimonials by municipal advisors to the analogous requirements under the SEC's Modernized IA Marketing Rule, by prohibiting the use of testimonials in an advertisement unless a municipal advisor complies with disclosure and oversight provisions. The proposed amendments to MSRB Rule G–40 are intended to promote regulatory consistency for regulated entities dually registered as a dealer and as a municipal advisor, or as an investment adviser with the SEC and as a municipal advisor. Because municipal advisors have a fiduciary duty to their clients, the MSRB believes the associated requirements for using testimonials as part of the advertising, which are meant to protect potential issuer clients from misleading advertisements of municipal advisors, would ensure the proposed amendments to MSRB Rule G–40 would not result in an erosion of protections for issuers, obligated persons and other market participants.

Baseline for Evaluation and Reasonable Alternative Approaches

To evaluate the potential impact of amending MSRB Rule G–40 and MSRB Rule G–8, a baseline or baselines must be established as a point of reference to compare the expected future state with the proposed change to MSRB Rule G–40 and MSRB Rule G–8. The economic impact of the proposed change is generally viewed as the difference between the baseline state and the expected state. The baseline is the current iteration of MSRB Rule G–40 and MSRB Rule G–8.

The MSRB has considered reasonable alternatives where applicable when considering the costs, benefits, and impact of a proposed amendment. One alternative would be to merge MSRB Rule G–40 with MSRB Rule G–21 on advertising for dealers. Consolidating advertising requirements for dealers and municipal advisors would provide the benefit of holding both groups to the same standards, including the usage of testimonials in advertisements. However, dealers and municipal advisors provide vastly different services because, unlike dealers, most municipal advisors have a fiduciary duty to their clients. As a result, the MSRB believes that there is a need for a separate municipal advisor advertising rule.[64] In addition, prioritizing harmonization solely within MSRB rules, as opposed to harmonization of MSRB rules with Commission rules, as appropriate, would still result in inconsistency in rule requirements as related to advertisements between municipal advisors and investment advisers, both of which are subject to a fiduciary standard.

As another alternative, the MSRB considered harmonizing MSRB Rule G–40 with FINRA Rule 2210(2)(6) on communications with the public, including the usage of testimonials. Harmonizing with FINRA rules would provide a benefit to dually registered entities with FINRA and the MSRB. This position has previously been proposed by SIFMA in response to MSRB's SEC filing on creating MSRB Rule G–40.[65] However, FINRA Rule 2210 governs a broker-dealer's communications, as opposed to a municipal advisor's communications. This alternative may still cause inconsistency and confusion for advisory entities that provide both investment advisory and municipal advisory services because they would need to follow two separate testimonial rules (the SEC's Modernized IA Marketing Rule and a FINRA-aligned MSRB Rule G–40), which may also result in more costs associated with compliance. For the reasons stated above, the current proposed amendments to MSRB Rule G–40, which are designed, to the extent practicable, to align with MSRB Rule G–21 and the SEC's Modernized IA Market Rule are deemed to be superior to the alternative of aligning with FINRA's rule requirements related to the use of testimonials by broker-dealers.

Benefits and Costs

The MSRB believes that the proposed amendments to MSRB Rule G–40 and MSRB Rule G–8, in aggregate, would benefit municipal advisors by allowing testimonials in their advertisements subject to certain requirements, which would provide municipal advisors another marketing method to solicit potential clients, subject to certain conditions. In addition, the proposed amendments to MSRB Rule G–40 and MSRB Rule G–8 would potentially reduce the compliance burden for regulated entities dually registered as a dealer and as a municipal advisor, or as an investment adviser with the SEC and as a municipal advisor by aligning MSRB Rule G–40 with the SEC's Modernized IA Marketing Rule, as well as with MSRB Rule G–21 as related to the usage of testimonials in advertisements.

The ability to provide testimonials in advertisements may benefit municipal advisors by allowing municipal advisors to show satisfied clients or other individuals willing to endorse their business practices. In addition, the MSRB believes the associated requirements for using testimonials as part of an advertisement, which are meant to protect potential issuer clients and obligated persons of municipal advisors, would help ensure the proposed amendments to MSRB Rule G–40 and MSRB Rule G–8 would not result in an erosion of protection for issuers, obligated persons and other market participants.

The MSRB believes that the proposed amendments to MSRB Rule G–40 and MSRB Rule G–8 would impose minor costs on municipal advisors. Municipal advisors would incur the upfront costs related to updating policies and procedures on using testimonials in advertising, which would be a one-time effort only. In addition, on an ongoing basis, there would be minor compliance costs to assure municipal advisors' adherence to the disclosure requirements and supervisory obligations when using testimonials in advertisements, which would likely be greater than the current ongoing compliance costs of ensuring no testimonial is included in an advertisement. If a municipal advisor opts to use testimonials in advertisements, there would also be a cost from the resultant recordkeeping obligations, recognizing that absent proposed amendments to MSRB Rule G–8, municipal advisors are subject to SEC recordkeeping requirements to make and keep records of all written communications received, and originals

[62] *See* 84 FR 67518. ''People continue to seek out and consider the views of others when making a multitude of transactions or decisions—from purchasing a coffee maker to finding the right medical expert to consult.''

[63] *See* SEC 2020 Adopting Release.

[64] *See* Response to Comments on File No. SR–MSRB–2014–08, February 5, 2015. ''. . . market for municipal advisory services is separate and distinct from the market for services of municipal securities brokers and dealers.''

[65] Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated February 28, 2018 (''SIFMA'').

or copies of all written communications sent, by such municipal advisor relating to municipal advisory activities.[66]

The MSRB estimates that the annual costs for fulfilling the requirements associated with the use of testimonials in advertisements would be no more than $400 per municipal advisor per year, assuming each municipal advisor would use approximately five testimonials per year, based on the SEC's 2019 estimated ongoing costs for investment advisers using testimonials and endorsements.[67] The MSRB does not expect any of the cost components to be a major burden for municipal advisors. Furthermore, individual municipal advisory firms may decide whether it is cost-effective to use testimonials in advertising when weighing against the associated requirements and the compliance costs, as the usage of testimonials is optional. It is expected that municipal advisors would only choose to include testimonials in their advertisements if the expected benefits exceed the expected costs of doing so.

Effect on Competition, Efficiency and Capital Formation

The proposed amendments to MSRB Rule G–40 and MSRB Rule G–8 would be applicable to all municipal advisors and would help ensure that all regulated entities dually registered as a dealer and as a municipal advisor, or as an investment adviser with the SEC and as a municipal advisor, are subject to consistent standards on the use of testimonials in advertisements. The proposed amendments to MSRB Rule G–40 and MSRB Rule G–8 would therefore promote efficiency in the marketplace.

The MSRB believes that proposed amended MSRB Rule G–40 and MSRB Rule G–8 would not impose an unnecessary or inappropriate regulatory burden on small municipal advisory firms, as the potential benefits from using testimonials in advertising would be applicable to all municipal advisors and should be proportionate to each municipal advisory firm's business activities. The proposed amendments to MSRB Rule G–40 and MSRB Rule G–8 therefore should not negatively affect competition and capital formation; it may improve competition among municipal advisors by allowing another method for advertising. The MSRB believes that permitting municipal advisors to use a testimonial in an advertisement would be particularly helpful for small municipal advisors to highlight the services provided to other municipal advisory clients.

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 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 of up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

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–MSRB–2023–01 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–MSRB–2023–01. 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 MSRB. 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–MSRB–2023–01 and should be submitted on or before March 7, 2023.

For the Commission, pursuant to delegated authority.[68]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03059 Filed 2–13–23; 8:45 am]

BILLING CODE 8011–01–P

[66] *See* Rule 15Ba1–8(a)(1)–(8) and MSRB Rule G–8(h)(i).

[67] *See SEC 2020 Adopting Release. In 2019, the Commission estimated that the aggregate internal cost of providing the disclosures associated with testimonials and endorsements would be $337 per investment adviser per year, assuming each investment adviser would use approximately five testimonials or endorsements per year.*

[68] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17767 and #17768; California Disaster Number CA–00368]

Presidential Declaration Amendment of a Major Disaster for Public Assistance Only 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 Public Assistance Only for the State of California (FEMA–4683–DR), dated 01/26/2023.

Incident: Severe Winter Storms, Flooding, Landslides, and Mudslides.

Incident Period: 12/27/2022 through 01/31/2023.

DATES: Issued on 02/06/2023.

Physical Loan Application Deadline Date: 03/27/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 10/26/2023.

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 California, dated 01/26/2023, is hereby amended to establish the incident period for this disaster as beginning 12/27/2022 and continuing through 01/31/2023.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Rafaela Monchek,

Acting Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2023–03115 Filed 2–13–23; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17757 and #17758; California Disaster Number CA–00366]

Presidential Declaration Amendment of a Major Disaster for the State of California

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 6.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of California (FEMA–4683–DR), dated 01/14/2023.

Incident: Severe Winter Storms, Flooding, Landslides, and Mudslides.

Incident Period: 12/27/2022 through 01/31/2023.

DATES: Issued on 02/06/2023.

Physical Loan Application Deadline Date: 03/16/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 10/16/2023.

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 01/14/2023, is hereby amended to establish the incident period for this disaster as beginning 12/27/2022 and continuing through 01/31/2023.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Rafaela Monchek,

Acting Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2023–03114 Filed 2–13–23; 8:45 am]

BILLING CODE 8026–09–P

TENNESSEE VALLEY AUTHORITY

Sunshine Act Meetings

TIME AND DATE: 9:00 a.m. CT on February 16, 2023.

PLACE: Marriott Shoals Conference Center, 10 Hightower Place, Florence, Alabama.

STATUS: Open.

MATTERS TO BE CONSIDERED:

Meeting No. 23–01

The TVA Board of Directors will hold a public meeting on February 16, 2023, at the Marriott Shoals Conference Center, 10 Hightower Place, Florence, Alabama.

The meeting will be called to order at 9:00 a.m. CT to consider the agenda items listed below. TVA management will answer questions from the news media following the Board meeting.

On February 15, at the Marriott Shoals Conference Center, the public may comment on any agenda item or subject at a board-hosted public listening session which begins at 2:00 p.m. CT and will last until 4:00 p.m. Preregistration is required to address the Board.

Agenda

1. Chair's Welcome
2. Report of the People and Governance Committee
   A. Board Leadership
3. Report of the Operations and Nuclear Oversight Committee
4. Report of the External Stakeholders and Regulation Committee
5. Report of the Audit, Finance, Risk, and Cybersecurity Committee
6. Governance Item
   A. Committee Assignments
7. Information Items
   A. Arrangements With New Industrial Customers
   B. Minutes of the November 10, 2022 Board Meeting
8. Report From President and CEO

CONTACT PERSON FOR MORE INFORMATION: For more information: Please call Jim Hopson, TVA Media Relations at (865) 632–6000, Knoxville, Tennessee. Anyone who wishes to comment on any of the agenda in writing may send their comments to: TVA Board of Directors, Board Agenda Comments, 400 West Summit Hill Drive, Knoxville, Tennessee 37902.

Dated: February 9, 2023.

Edward C. Meade,

Agency Liaison.

[FR Doc. 2023–03223 Filed 2–10–23; 4:15 pm]

BILLING CODE 8120–08–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2023–0305]

Notice of Public Meeting: Input to Changed Product Rule (CPR) International Authorities Working Group (IAWG) Recommendations

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of public meeting.

SUMMARY: This notice announces a public meeting for input to Changed Product Rule (CPR) International Authorities Working Group (IAWG) recommendations. The purpose of the public meeting is for the FAA to present information on and receive public input on the CPR IAWG recommendations.

DATES: The meeting will be held on Tuesday, February 28, 2023, from 9:00 a.m. to 4:00 p.m. Eastern Time. Requests to attend the meeting must be received by Monday, February 20, 2023. Requests for accommodations to a disability must be received by Monday, February 20, 2023. Materials to be presented during the meeting must be received no later than Monday, February 20, 2023. The FAA will accept input on the IAWG recommendations until March 17, 2023.

ADDRESSES: The meeting will be held at The General Aviation Manufacturers Association, 1400 K Street NW, Suite 801, Washington, DC 20005 and virtually. Members of the public who wish to participate in the meeting must RSVP by emailing *9-AVS-DAH-Info@faa.gov*.

Meeting minutes, transcripts, and other information will be available in the public docket at *Regulations.gov*, unless certain information is protected from disclosure.

Docket: Send comments identified by Docket No. FAA–2023–0137 using any of the following methods:

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

Transportation (DOT), 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

• *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

• *Fax:* Fax comments to Docket Operations at 202–493–2251

Privacy: In addition to the presentations, the FAA will post all comments it receives, without change, to *https://www.regulations.gov/,* including any personal information provided by the commenter. DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478).

FOR FURTHER INFORMATION CONTACT: Sue McCormick, Manager, Strategic Policy for Systems Standards, AIR–619, Strategic Policy Management Branch, Policy and Innovation Division, Aircraft Certification Service, Federal Aviation Administration, 26805 East 68th Avenue, Denver, CO 80249, telephone (206) 231–3242, email *9-AVS-DAH-Info@faa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The FAA issued a notice in the **Federal Register** (87 FR 77671, December 19, 2022), announcing the availability of recommendations from the CPR IAWG, encouraged industry review of the CPR IAWG recommendations, and informed the public on the intent to seek input and comments during a forthcoming public meeting.

A copy of the International Authorities Working Group (IAWG) Changed Product Rule (CPR) Recommendations can be downloaded at: *https://www.faa.gov/aircraft/air_cert/design_approvals/dah/iawg_cpr_recs.*

II. Agenda

At the meeting, the agenda will solicit input on each of the recommendations from the IAWG report in the following manner:

Morning Session

Recommendations applicable to § 21.101 of title 14, Code of Federal Regulations (14 CFR), significant changes to include eliminating impractical exceptions, combining impractical and does not contribute materially to the level of safety exceptions, additional design requirements and conditions, definition of baseline product, cumulative effect and related changes, proposed revisions to § 21.101, and removing secondary changes.

Afternoon Session

Continue discussion on recommendations applicable to § 21.101 significant changes to include the use of system safety methodologies, documentation of certification basis on certificates and recommendations applicable to § 21.19: Substantial Changes. Input that is supported by data, especially quantifiable data, on use of the CPR process is highly encouraged.

The final meeting agenda will be posted on the FAA website *https://www.faa.gov/aircraft/air_cert/design_approvals/dah.*

III. Purpose

The purpose of the public meeting is for the FAA to hear the public's views and obtain information relevant to the CPR IAWG recommendations. The FAA will consider comments made at the public meeting as well as comments submitted to the docket.

IV. Public Participation

The meeting will be open to the public on a first-come, first served basis, as space is limited. The FAA will make every effort to accommodate all persons wishing to attend. Persons wishing to attend this one-time meeting in person are requested to register in advance, due to limited space. Please confirm your attendance with the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Please provide the following information: full legal name, country of citizenship, name of your industry association or applicable affiliation, your intention to attend in person or virtually, and if you intend to present information at the meeting. There will be 10 minutes allotted for oral comments from each member of the public joining the meeting. To accommodate as many speakers as possible, the time for each commenter may be limited. Additionally, the FAA may end sessions early, per the discretion of the facilitator. The FAA will email virtual registrants the meeting access information in a timely manner prior to the meeting.

Members of the press, in addition to registering for this event, must also RSVP by emailing *9-AVS-DAH-Info@faa.gov* by February 20, 2023.

The U.S. Department of Transportation is committed to providing equal access to this meeting for all participants. If you need alternative formats or services because of a disability, such as sign language, interpretation, or other ancillary aids, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Issued in Washington, DC, on February 9, 2023.

Victor Wicklund,

Acting Director, Policy & Innovation Division, Aircraft Certification Service.

[FR Doc. 2023–03098 Filed 2–13–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2023–03]

Petition for Exemption; Summary of Petition Received; AMAC Aerospace Switzerland AG

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Federal Aviation Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before March 6, 2023.

ADDRESSES: Send comments identified by docket number FAA–2022–1802 using any of the following methods:

• *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.

• *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

• *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

• *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments,

without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Deana Stedman, AIR–612, Federal Aviation Administration, 2200 South 216th Street, phone and fax 206–231–3187, email *deana.stedman@faa.gov.*

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on February 8, 2023.

Candace E. Keefe,

Acting Manager, Technical Writing Section.

Petition for Exemption

Docket No.: FAA–2022–1802.

Petitioner: AMAC Aerospace Switzerland AG.

Section(s) of 14 CFR Affected: §§ 25.562(a), 25.785(b), 25.785(h)(2), 25.785(j), 25.791(a), 25.807(e), 25.811(d)(1), 25.812(b)(1)(i) and (ii), 25.813(c)(2)(ii), and 25.858.

Description of Relief Sought: Petitioner is seeking relief from the listed design requirements in order to support a supplemental type certificate (STC) application for a Boeing Model 737–8 airplane. The proposed STC is for the installation of an executive-style interior with multiple rooms.

[FR Doc. 2023–03065 Filed 2–13–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Action on Proposed Project in Georgia, the Rome-Cartersville Development Corridor Project, Bartow County, Georgia

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

ACTION: Notice of limitations on claims for judicial review of action by FHWA and other Federal agencies.

SUMMARY: This notice announces actions taken by FHWA and other Federal agencies that are final. This final agency action relates to the construction of the Rome-Cartersville Development Corridor in Bartow County. The FHWA's Finding of No Significant Impact (FONSI) provides details on the Selected Alternative for the proposed improvements.

DATES: By this notice, FHWA is advising the public of the final agency actions subject to 23 U.S.C. 139(*l*)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before July 14, 2023. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: *For FHWA:* Mr. Aaron Hernandez, Environmental Coordinator, Federal Highway Administration Georgia Division, 61 Forsyth Street SW, Suite 17T100, Atlanta, Georgia 30303; telephone (404) 562–3584; email: *aaron.hernandez@dot.gov.* The FHWA Georgia Division Office's normal business hours are 8:00 a.m. to 5:00 p.m. (Eastern Time) Monday through Friday.

For Georgia Department of Transportation (GDOT): Mr. Eric Duff, State Environmental Administrator, Georgia Department of Transportation, 600 West Peachtree Street NW, 16th Floor, Atlanta, Georgia 30308; telephone (404) 631–1100; email: *eduff@dot.ga.gov.* The GDOT Office of Environmental Service's normal business hours are 8:00 a.m. to 5:00 p.m. (Eastern Time) Monday through Friday.

SUPPLEMENTARY INFORMATION: Notice is hereby given that FHWA has taken a final agency action by issuing a FONSI for the following highway project in the State of Georgia: the Rome-Cartersville Development Corridor Project located in Bartow County, Georgia. The proposed project will improve travel conditions for automobiles and trucks between US 411/US 41 and I–75 in Bartow County by constructing a new location four-lane highway between US 411/US 41 and I–75, constructing a new full-diamond interchange that will replace the existing overpass on Old Grassdale Road at I–75, constructing roundabout intersection controls, and relocating the existing connection with Busch Drive. The route will continue back on existing Old Grassdale Road, ending approximately 0.5-mile northeast of I–75. The purpose of the project is to improve connectivity for commuters and truck traffic needing I–75 access from within Floyd and Bartow counties. The project is included in the Cartersville-Bartow Metropolitan Planning Organization (CB–MPO) Transportation Improvement Program (TIP) as project number CB–512.

The FHWA's action, related actions by other Federal agencies, and the laws under which such actions were taken are described in the Environmental Assessment (EA) approved on August 2, 2022, and the FONSI issued on February 8, 2023, and other documents in the project file. The EA, FONSI, and other project records are available for review by contacting FHWA or the Georgia Department of Transportation at the addresses provided above. The EA and FONSI can also be reviewed and downloaded from the project website at *https://rcdc-0013238-gdot.hub.arcgis.com/.*

This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. General: National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109 and 23 U.S.C. 128].

2. Air: Clean Air Act [42 U.S.C. 7401–7671(q)].

3. Noise: Noise Control Act of 1972 [42 U.S.C. 4901–4918]; 23 CFR part 772.

4. Land: Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303].

5. Wildlife: Endangered Species Act (ESA) [16 U.S.C. 1531–1544 and section 1536]; Fish and Wildlife Coordination Act [16 U.S.C. 661–667d]; Migratory Bird Treaty Act [16 U.S.C. 703–712].

6. Historic and Cultural Resources: Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–470(ll)]; Archeological and Historic Preservation Act [16 U.S.C. 469–469c]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].

7. Social and Economic: Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].

8. Wetlands and Water Resources: Coastal Zone Management Act [16 U.S.C. 1451–1465]; Land and Water Conservation Fund (LWCF) [16 U.S.C. 4601–4604]; Safe Drinking Water Act (SDWA) [42 U.S.C. 300(f)-300(j)(6)]; Wild and Scenic Rivers Act [16 U.S.C. 1271– 1287]; Flood Disaster Protection Act [42 U.S.C. 4001–4128].

9. Hazardous Materials: Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) [42 U.S.C. 9601–9675];

Superfund Amendments and Reauthorization Act of 1986 (SARA); Resource Conservation and Recovery Act (RCRA) [42 U.S.C. 6901–6992(k)].

10. Executive Orders: E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13045 Protection of Children From Environmental Health Risks and Safety Risks; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(l)(1).

Issued on: February 8, 2023.

Sabrina S. David,

Division Administrator, Atlanta, Georgia.

[FR Doc. 2023–03097 Filed 2–13–23; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Action

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of seven individuals that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these individuals are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for effective date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Andrea Gacki, Director, tel.: 202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or the Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Action

On February 9, 2023, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following individuals are blocked under the relevant sanctions authority listed below.

Individuals

1. ISKRITSKY, Mikhail (a.k.a. ''Mty''; a.k.a. ''Tropa''), Moscow, Russia; DOB 05 Nov 1981; nationality Russia; Email Address *wet-dhg@rambler.ru;* Gender Male (individual) [CYBER2].

Designated pursuant to section l(a)(iii)(B) of Executive Order 13694 of April 1, 2015, ''Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities'', 80 FR 18077, 3 CFR, 2015 Comp., p. 297, as amended by Executive Order 13757 of December 28, 2016, ''Taking Additional Steps to Address the National Emergency With Respect to Significant Malicious Cyber-Enabled Activities'', 82 FR 1, 3 CFR, 2016 Comp., p. 659 (E.O. 13694, as amended) for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, an activity described in section 1(a)(ii) of E.O. 13694, as amended.

2. KARYAGIN, Valentin Olegovich (a.k.a. ''Globus''), Volgograd, Russia; DOB 19 Apr 1992; nationality Russia; Email Address *valentin.karyagin@gmail.com;* alt. Email Address *globus290382@yandex.ru;* alt. Email Address *valentinka.ne@mail.ru;* alt. Email Address *v.karyagin@neovox.ru;* Gender Male (individual) [CYBER2].

Designated pursuant to section l(a)(iii)(B) of E.O. 13694, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, an activity described in section 1(a)(ii) of E.O. 13694, as amended.

3. MIKHAILOV, Maksim Sergeevich (a.k.a. ''Baget''), Sevastopol, Ukraine; DOB 29 Jul 1976; nationality Ukraine; Gender Male (individual) [CYBER2].

Designated pursuant to section l(a)(iii)(B) of E.O. 13694, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, an activity described in section 1(a)(ii) of E.O. 13694, as amended.

4. PLESHEVSKIY, Dmitry (a.k.a. ''Iseldor''), Zelenograd, Russia; DOB 30 Jul 1992; nationality Russia; Email Address *pleshevskiy@gmail.com;* alt. Email Address *dmitriy@ideascup.me;* alt. Email Address *support@ideascup.me;* alt. Email Address *pleshevskie@gmail.com;* Gender Male (individual) [CYBER2].

Designated pursuant to section l(a)(iii)(B) of E.O. 13694, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, an activity described in section 1(a)(ii) of E.O. 13694, as amended.

5. SEDLETSKI, Valery (a.k.a. SEDLETSKI, Valery Veniaminovich; a.k.a. ''Strix''), Rostov, Russia; DOB 29 Jul 1974; nationality Russia; Gender Male (individual) [CYBER2].

Designated pursuant to section l(a)(iii)(B) of E.O. 13694, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, an activity described in section 1(a)(ii) of E.O. 13694, as amended.

6. VAKHROMEYEV, Ivan Vasilyevich (a.k.a. VAKROMEEV, Ivan Vasilievich; a.k.a. ''Mushroom''), Naro-Fominsk, Russia; DOB 29 Dec 1988; nationality Russia; Email Address *ivanalert@mail.ru;* Gender Male (individual) [CYBER2].

Designated pursuant to section l(a)(iii)(B) of E.O. 13694, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, an activity described in section 1(a)(ii) of E.O. 13694, as amended.

7. KOVALEV, Vitaly Nikolayevich (a.k.a. KOVALEV, Vitaliy; a.k.a. ''Ben''; a.k.a. ''Bentley''), Russia; DOB 23 Jun 1988; nationality Russia; Gender Male (individual) [CYBER2].

Designated pursuant to section l(a)(iii)(B) of E.O. 13694, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, an activity described in section 1(a)(ii) of E.O. 13694, as amended.

Dated: February 9, 2023.

Andrea Gacki,

Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2023–03118 Filed 2–13–23; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for effective date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Andrea Gacki, Director, tel.: 202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or the Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Action(s)

On February 9, 2023, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authorities listed below.

BILLING CODE 4810–AL–P

Entities

1. AMIR KABIR PETROCHEMICAL COMPANY (Arabic: شركت پتروشيمى امير كبير) (a.k.a. AMIR KABIR PETROCHEMICAL COMPANY PUBLIC JOINT STOCK), P.O. Box 1465835661, Tehran, Iran; Derya Blvd - South Sarafahay Street, Ahmad Nafisi East (23) Street, Block 21, Sa'adat Abad, Tehran 1465835661, Iran; No. 21, Saadat Abad Street, Darya South Srafhay, P.O. Box 1465835661, Tehran, Iran; Website www.akpc.ir; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Established Date 01 Feb 1998; National ID No. 10101807733 (Iran); Business Registration Number 137672 (Iran) [IRAN-EO13846] (Linked To: TRILIANCE PETROCHEMICAL CO. LTD.).

   Designated pursuant to section 1(a)(iii)(B) of Executive Order 13846 of August 6, 2018, "Reimposing Certain Sanctions With Respect to Iran," 83 FR 38939, 3 CFR, 2019 Comp., p. 854 (E.O. 13846) for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, TRILIANCE PETROCHEMICAL CO. LTD, a person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13846.

2. LALEH PETROCHEMICAL COMPANY (Arabic: شركت پتروشيمى لاله), Boulevard Ivanak and Farahzadi Boulevard, Second Phase, No. 18, Tehran, Iran; No. 18, 2nd Alley, 1st Street, Khwarazm Street, Zarafshan Street, Phase 4, Shahrak-e Gharb, Tehran, Iran; Website www.lapc.ir; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Established Date 11 Sep 2002; National ID No. 10102340914 (Iran); Business Registration Number 192133 (Iran) [IRAN-EO13846] (Linked To: MARUN PETROCHEMICAL COMPANY).

   Blocked for being an entity owned in the aggregate, directly or indirectly, 50 percent or more by MARUN PETROCHEMICAL COMPANY.

3. MARUN SEPEHR OFOGH COMPANY (Arabic: شركت افق سپهر مارون), Ground Floor, No. 0, Site 2 Street, Bandar Imam Special Economic Region Street, Special Economic Region, Bandar-e Mahshahr County, Bandar Imam Khomeini, Khuzestan Province, Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Established Date 01 Jun 2014; National ID No. 14004100088 (Iran); Business Registration Number 11121 (Iran) [IRAN-EO13846] (Linked To: MARUN PETROCHEMICAL COMPANY).

   Blocked for being an entity owned in the aggregate, directly or indirectly, 50 percent or more by MARUN PETROCHEMICAL COMPANY.

4. MARUN SUPPLEMENTAL INDUSTRIES COMPANY (Arabic: شركت صنايع تكميلى ماﻠون) (a.k.a. SANAYE TAKMILI MARUN), Bandar Imam Special Economic Region, Site 2, Bandar-e Mashahr, 6353169311, Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Established Date 13 Jul 2016; National ID No. 14005997710 (Iran); Business Registration Number 10260 (Iran) [IRAN-EO13846] (Linked To: MARUN PETROCHEMICAL COMPANY).

   Blocked for being an entity owned in the aggregate, directly or indirectly, 50 percent or more by MARUN PETROCHEMICAL COMPANY.

5. MARUN TADBIR TINA COMPANY (Arabic: شركت تينا تدبير ماﻠون), Ground Floor, No. 0, Site 2 Street, Bandar Imam Special Economic Region Street, Special Economic Region, Bandar-e Mahshahr County, Bandar Imam Khomeini, Khuzestan Province, Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Established Date 03 Jun 2014; National ID No. 14004106839 (Iran); Business Registration Number 11122 (Iran) [IRAN-EO13846] (Linked To: MARUN PETROCHEMICAL COMPANY).

   Blocked for being an entity owned in the aggregate, directly or indirectly, 50 percent or more by MARUN PETROCHEMICAL COMPANY.

6. SIMORGH PETROCHEMICAL COMPANY (Arabic: شركت پتروشيمى سيمرغ) (a.k.a. MAHSHAHR SIMORGH PETROCHEMICAL COMPANY (Arabic: شركت پتروشيمى سيمرغ ماهشهر)), Lower Level 1, No. 21, 23 Shahid Ahmad Nasifi Street, Sa'adat Abad Street, Neighborhood Dariya, Tehran, Tehran Province, Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Established Date 14 Mar 2010; National ID No. 10320204241 (Iran); Business Registration Number 369795 (Iran) [IRAN-EO13846] (Linked To: AMIR KABIR PETROCHEMICAL COMPANY). Blocked for being an entity owned in the aggregate, directly or indirectly, 50 percent or more by AMIR KABIR PETROCHEMICAL COMPANY.

7. ASIA FUEL PTE. LTD., Far East Finance Building, 14 Robinson Road #08-0lA 48545, Singapore, Singapore; Website asiafuel.net; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Established Date 30 Jan 2020; Business Registration Number 202003540C (Singapore) [IRAN-EO13846] (Linked To: TRILIANCE PETROCHEMICAL CO. LTD.)

   Designated pursuant to section 1(a)(iii)(B) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, TRILIANCE PETROCHEMICAL CO. LTD., a person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13846.

8. SENSE SHIPPING AND TRADING SDN. BHD. (f.k.a. EASTCHEM SHIPPING SDN. BHD.), NO 43-M, Jalan Thambypillai off Jalan Tun Sambanthan, Kuala Lumpur, MY-14 50470, Malaysia; P04-18 Impian Meridian Commerze, Jalan Subang 1, USJ 1, Subang Jaya, MY-10 47600, Malaysia; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Established Date 04 May 2021; Business Registration Number

202101016872 (Malaysia) [IRAN-EO13846] (Linked To: TRILIANCE PETROCHEMICAL CO. LTD.).

Designated pursuant to section 1(a)(iii)(B) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, TRILIANCE PETROCHEMICAL CO. LTD., a person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13846.

9. UNICIOUS ENERGY PTE. LTD., Suntec Tower Four, 6 Temasek Boulevard #10-05, 38986, Singapore, Singapore; Website https://unicious.com/; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Established Date 15 Nov 2019; Company Number 98450014F53C71A88A79 (Singapore); Business Registration Number 201938747K (Singapore) [IRAN-EO13846] (Linked To: TRILIANCE PETROCHEMICAL CO. LTD.).

Designated pursuant to section 1(a)(iii)(B) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, TRILIANCE PETROCHEMICAL CO. LTD., a person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13846.

Dated: February 9, 2023.

Andrea Gacki,

Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2023–03094 Filed 2–13–23; 8:45 am]

BILLING CODE 4810–AL–C

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Internal Revenue Service Advisory Council; Renewal of Charter

AGENCY: Internal Revenue Service, Department of Treasury.

ACTION: Notice of charter renewal.

SUMMARY: The Charter for the Internal Revenue Service Advisory Council (IRSAC), has been renewed for two years beginning October 14, 2022, in accordance with the Federal Advisory Committee Act (FACA).

FOR FURTHER INFORMATION CONTACT: Stephanie Burch at (202) 317–4219, or send an email to *publicliaison@irs.gov*.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the charter for the Internal Revenue Service Advisory Council (IRSAC) has been renewed for two years beginning October 14, 2022, in accordance with the Federal Advisory Committee Act (FACA), 5 U.S.C., App. 2.

The purpose of the IRSAC is to provide an organized public forum for discussion of relevant tax administration issues between Internal Revenue Service (IRS) officials and representatives of the public.

The IRSAC proposes enhancements to IRS operations, recommends administrative and policy changes to improve taxpayer service, compliance and tax administration, discusses relevant information reporting issues, addresses matters concerning tax-exempt and government entities and conveys the public's perception of professional standards and best practices for tax professionals.

Conveying the public's perception of IRS activities to Internal Revenue Service officials, the IRSAC is comprised of individuals representing a cross-section of the taxpaying public with substantial, disparate experience in tax preparation for individuals, small businesses and/or large, multi-national corporations; information reporting; tax-exempt and government entities; digital services; and professional standards of tax professionals.

Dated: October 28, 2022.

John A. Lipold,

Designated Federal Official.

[FR Doc. 2023–03064 Filed 2–13–23; 8:45 am]

BILLING CODE 4830–01–P

UNIFIED CARRIER REGISTRATION PLAN

Sunshine Act Meetings

TIME AND DATE: February 16, 2023, 12:00 p.m. to 3:00 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), Meeting ID: 912 2942 8303, to listen and participate in this meeting. The website to participate via Zoom Meeting and Screenshare is *https://kellen.zoom.us/meeting/register/tJUvdeCsrDMpGtfDR_Orjzz3Wwhpx4AWWODG*.

STATUS: This meeting will be open to the public.

MATTERS TO BE CONSIDERED: The Unified Carrier Registration Plan Education and Training 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—UCR Education and Training 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—UCR Education and Training 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 Subcommittee Minutes From the December 8, 2022 Subcommittee Meeting—UCR Education and Training Subcommittee Chair

For Discussion and Possible Subcommittee Action

Draft minutes from the December 8, 2022, Subcommittee meeting will be reviewed. The Subcommittee will consider action to approve.

V. Audit 2 Module—UCR Education and Training Subcommittee Chair

The Subcommittee will review assigned questions from the Audit Training 2 video modules to ensure accuracy of updates to the modules.

VI. State Auditor Onboarding Letter—UCR Education and Training Subcommittee Chair

The Subcommittee Chair will review a draft version and seek comments.

VII. Agency Head Brochure—UCR Education and Training Subcommittee Chair

The Subcommittee Chair will review a draft version and seek comments.

VIII. Module Development—UCR Education and Training Subcommittee Chair

The Subcommittee will identify key reports generated in the NRS system for module consideration.

IX. Other Business—UCR Education and Training Subcommittee Chair

The Subcommittee Chair will call for any other items Subcommittee members would like to discuss.

X. Adjournment—UCR Education and Training Subcommittee Chair

The Subcommittee Chair will adjourn the meeting.

The agenda will be available no later than 5:00 p.m. Eastern time, February 8, 2023 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. 2023–03225 Filed 2–10–23; 4:15 pm]

BILLING CODE 4910–YL–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on the Readjustment of Veterans, Notice of Meeting, Amended

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. 10, that the Advisory Committee on the Readjustment of Veterans will hold a meeting virtually. The meeting will begin, and end as follows, and is open to the public:

Date	Time	Open session
March 7, 2023	2:00 p.m. to 3:00 p.m. EST.	Yes.

The purpose of the Committee is to advise the Department of Veterans Affairs (VA) regarding the provision by VA of benefits and services to assist Veterans in the readjustment to civilian life. In carrying out this duty, the Committee shall take into account the needs of Veterans who served in combat theaters of operation. The Committee assembles, reviews, and assesses information relating to the needs of Veterans readjusting to civilian life and the effectiveness of VA services in assisting Veterans in that readjustment.

The Committee, comprised of 13 subject matter experts, advises the Secretary, through the VA Readjustment Counseling Service, on the provision by VA of benefits and services to assist Veterans in the readjustment to civilian life. In carrying out this duty, the Committee assembles, reviews, and assesses information relating to the needs of Veterans readjusting to civilian life and the effectiveness of VA services in assisting Veterans in that readjustment, specifically taking into account the needs of Veterans who served in combat theaters of operation.

On March 7, 2023, the agenda will include review of the 23rd report, a calendar forecast and discussion over subject matter experts to consider presenting at the next full committee meeting. For public members wishing to join the meeting, please use the following Microsoft Teams link: *https://teams.microsoft.com/l/meetup-join/19%3ameeting_MThmMjExNmUtMGJhYS00MTZiLTg5NzgtNjBmOGY3ODllM2Qy%40thread.v2/0?context=%7b%22Tid%22%3a%22e95f1b23-abaf-45ee-821d-b7ab251ab3bf%22%2c%22Oid%22%3a%228aa84165-5b4e-40e7-8e32-63a80c0bd33a%22%7d.*

No time will be allotted for receiving oral comments from the public; however, the committee will accept written comments from interested parties on issues outlined in the meeting agenda or other issues regarding the readjustment of Veterans. Parties should contact Mr. Richard Barbato via email at *VHA10RCSAction@va.gov,* or by mail at Department of Veterans Affairs, Readjustment Counseling Service (10RCS), 810 Vermont Avenue, Washington, DC 20420. Any member of the public seeking additional information should contact Mr. Barbato at the phone number or email addressed noted above.

Dated: February 9, 2023.

Jelessa M. Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2023–03116 Filed 2–13–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee: National Academic Affiliations Council, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. 10, that a meeting of VA's National Academic Affiliations Council (NAAC) will be held March 22, 2023–March 23, 2023, at the Orlando VA Health Care System, 13800 Veterans Way, Orlando, FL 32827. The meeting sessions will begin and end as follows:

Dates	Times	Locations	Open to public
March 22, 2023	9:00 a.m. to 12:30 p.m. Eastern Standard Time (EST).	Orlando VA Health Care System, 13800 Veterans Way, Orlando, FL 32827.	Yes.
March 22, 2023	12:30 p.m. to 3:00 p.m. EST	Orlando VA Health Care System, 13800 Veterans Way, Orlando, FL 32827.	No.
March 22, 2023	3:00 p.m. to 4:00 p.m. EST	Orlando VA Health Care System, 13800 Veterans Way, Orlando, FL 32827.	Yes.

The meetings are open to the public, except when the NAAC is conducting tours of VA facilities. Tours of VA facilities are closed to protect Veterans' privacy and personal information, in accordance with 5 U.S.C. Sec. 552b(c)(6).

The purpose of the NAAC or ''Council'' is to advise the Secretary on matters affecting partnerships between VA and its academic affiliates.

On March 22, 2023, the Council will convene an open session from 9:00 a.m. to 12:30 p.m. EST. The agenda will include a presentation on Innovative Academic Relationships: A National Perspective. The Council will also have a presentation from VISN 8 and Orlando VA Health Care System on Academic Relationships and Accomplishments and receive updates from the Diversity and Inclusion Subcommittee, the Strategic Academic Advisory Council (SAAC), and VA's Electronic Health Record Modernization Work Group related to education and research. In the afternoon, the Council will begin the closed portion of the meeting from 12:30 p.m. to 3:00 p.m. EST, as it tours the Orlando VA Health Care System. Tours of VA facilities are closed to protect Veterans' privacy and personal information, in accordance with 5 U.S.C. Sec. 552b(c)(6). The Council will reconvene at 3:00 p.m. for discussions and recommendations. The meeting will adjourn day one at 4:00 p.m.

On March 23, 2023, at 12:00 p.m. EST, the Council will reconvene for day two. The day two agenda includes a panel discussion with Orlando VA Health Care System leadership and trainees related to Diversity in Trainee Recruitment and Retention. The Council will have a question-and-answer session, followed by Council discussions and recommendations. The Council will receive public comments from 1:15 p.m. to 1:30 p.m. EST and will adjourn the meeting at 1:45 p.m. EST.

Interested persons may attend and present oral statements to the Council. A sign-in sheet for those who want to give comments will be available at the meeting. Individuals who speak are invited to submit a 1–2-page summary of their comments at the time of the meeting for inclusion in the official meeting record. Oral presentations will be limited to five minutes or less, depending on the number of participants. Interested parties may also provide written comments for review by the Council prior to the meeting, or at any time via email to *Larissa.Emory@va.gov.* Any member of the public wishing to attend or seeking additional information should contact Ms. Emory via email or by phone at (915) 269–0465. Because the meeting will be held in a government building, anyone attending must be prepared to submit to security screening and present a valid photo I.D. Please allow at least 30 minutes prior to the meeting for this process.

Dated: February 8, 2023.

Jelessa M. Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2023–03083 Filed 2–13–23; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

Vol. 88 Tuesday,

No. 30 February 14, 2023

Part II

Department of Housing and Urban Development

24 CFR Parts 5, 92, 93, et al.

Housing Opportunity Through Modernization Act of 2016: Implementation of Sections 102, 103, and 104; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 5, 92, 93, 570, 574, 882, 891, 960, 964, 966, 982

[Docket No FR–6057–F–03]

RIN 2577–AD03

Housing Opportunity Through Modernization Act of 2016: Implementation of Sections 102, 103, and 104

AGENCY: Office of the Deputy Secretary, HUD.

ACTION: Final rule.

SUMMARY: This final rule revises HUD regulations to implement parts of the Housing Opportunity Through Modernization Act of 2016 (HOTMA). In addition to amending regulations for HUD's public housing and Section 8 programs, this final rule revises the program regulations for several other HUD programs. HUD did this in the interest of aligning its requirements across its programs or because the underlying program statute required HUD to make the revisions. These include the regulations for HUD's Community Development Block Grants, HOME Investment Partnerships, Housing Trust Fund, Housing Opportunities for Persons With AIDS, Supportive Housing for the Elderly (Section 202), and Supportive Housing for Persons with Disabilities (Section 811) programs. Since HUD and other Federal agencies may use the regulations revised as part of this rulemaking in the calculation of income for other programs or activities, the public should be aware that the effects of this rulemaking are not limited to the programs listed in this rule and preamble.

DATES: This final rule is effective January 1, 2024, except for the amendments to §§ 5.520(d), 5.628(a), 960.102(b), 960.206(b), 960.253, 960.257(a) and (d), 960.261, 960.507, 960.509, 960.600, 960.601(b), 964.125(a), 966.4(a) and (l), which are effective March 16, 2023.

FOR FURTHER INFORMATION CONTACT:

Public Housing, Housing Choice Voucher (including project-based vouchers), and rehabilitation programs: Michael Dennis, Senior Program Advisor, Office of Public Housing and Voucher Programs, at 202–402–4059 (this is not a toll-free number), or email *HOTMAquestions@hud.gov.*

Multifamily Housing programs: Jennifer Lavorel, Director, Program Administration Office, Office of Asset Management and Portfolio Oversight, at 202–402–2515 (this is not a toll-free number), or email *MFH_HOTMA@hud.gov.*

Community Development Block Grant program: Jessie Kome, Director, Office of Block Grant Assistance, Office of Community Planning and Development, at 202–402–5539 (this is not a toll-free number), or email *CPD_HOTMA@hud.gov.*

HOME Investment Partnerships and Housing Trust Fund programs: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning and Development, at 202–708–2684 (this is not a toll-free number), or email *CPD_HOTMA@hud.gov.*

Housing Opportunities for Persons With AIDS program: Rita Harcrow, Director, Office of HIV/AIDS Housing, Office of Community Planning and Development, at 202–402–5374 (this is not a toll-free number), or email *CPD_HOTMA@hud.gov.*

HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech and communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

The mailing address for each office contact is Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410.

SUPPLEMENTARY INFORMATION:

I. Background

History of the Rule

On July 29, 2016, HOTMA was signed into law (Pub. L. 114–201, 130 Stat. 782). HOTMA makes numerous changes to statutes governing HUD programs, including sections 3, 8, and 16 of the United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*) (1937 Act). HUD published a rule in the **Federal Register** on October 24, 2016 (81 FR 73030), announcing which statutory changes made by HOTMA could be implemented immediately and which statutory changes required further action by HUD.

On November 29, 2016 (81 FR 85996), HUD published a **Federal Register** notice seeking public input on how HUD should determine the income limit for public housing residents pursuant to Section 103 of HOTMA, and this was followed by a July 26, 2018 (83 FR 35490) notice that made some provisions of Section 103 of HOTMA effective.

On January 18, 2017, HUD published a proposed rule (82 FR 5458) that made multiple HOTMA provisions for the Housing Choice Voucher (HCV) program, unrelated to sections 102, 103, and 104, effective and solicited public comment on HUD's implementation methods. The conforming regulatory changes for the HCV program provisions implemented by the January 18, 2017, *rulemaking* are not part of this final rule and are being addressed through a separate rulemaking.[1]

Many of the statutory provisions in HOTMA are intended to streamline administrative processes and reduce burdens on PHAs and owners of housing assisted by Section 8 programs. Sections 102, 103, and 104 of HOTMA require that HUD make changes to its regulations and take other actions—some of which will also reduce burdens on PHAs and private owners once implemented.

On September 17, 2019 (84 FR 48820), HUD published a proposed rule to update its regulations according to HOTMA's statutory mandate and to implement the provisions of Sections 102, 103, and 104 of HOTMA that require rulemaking. Additional details about the proposed rule may be found at 84 FR 48820 (September 17, 2019). That proposed rule has additional information on the proposed regulatory changes and how they relate to HOTMA. In addition, on December 4, 2020 (85 FR 78295), HUD re-opened public comment on specific provisions dealing with families whose income rises above the new cap for residing in public housing. This final rule follows the publication of the September 17, 2019, proposed rule and considers the public comments received, including public comments received in response to HUD's December 4, 2020, notice re-opening public comments.

Summary of Affected Programs

Because a variety of programs use these definitions, HUD offers the following chart showing which programs (other than the public housing and Section 8 programs) are affected by various changes to the income regulatory provisions in 24 CFR part 5:

[1] HUD published a proposed rule to implement HOTMA's provisions on the voucher programs and additional streamlining procedures on October 8, 2020 (85 FR 63664).

	HOPWA (Part 574)	HOME (Part 92)	Housing Trust Fund (Part 93)	202/811
Net Family Assets Definition (§ 5.603).	Yes, except the value of a home of a participant receiving short-term mortgage or utility assistance under § 574.300(b)(6) or other homeownership assistance eligible under HOPWA is excluded (§ 574.310(f)).	Yes, unless the participating jurisdiction chooses to calculate income using the IRS income definition. The value of a homeowner's principal residence is excluded under owner-occupied rehabilitation programs. Income or asset enhancements derived from the HOME-assisted project shall not be considered in calculating assets or annual income (§ 92.203(c)(1) and (e)(1)).	Yes, unless the HTF grantee chooses to calculate income using the IRS income definition. Income or asset enhancements derived from the HTF-assisted project shall not be considered in calculating assets or annual income (§ 93.151(b)(1)(i) and (e)(1)).	Yes.
Annual Income Definition (§ 5.609(a)).	Yes (§ 574.310(d)(1) and (2) and § 574.310(e)(1) and (2)).	Yes, unless the participating jurisdiction uses IRS income definition under § 92.203(c)(2) (§ 92.203(c)(1)).	Yes, unless grantee uses IRS income definition under § 93.151(b)(1)(ii) (§ 93.151(b)(1)(i)).	Yes (as modified in § 891.105).
Annual Income Exclusions (§ 5.609(b)).	Yes (§ 574.310(d)(1) and (2) and § 574.310(e)(1) and (2)).	Yes, unless the participating jurisdiction uses IRS income definition under § 92.203(c)(2) (§ 92.203(c)(1)).	Yes, unless grantee uses IRS income definition under § 93.151(b)(1)(ii) (§ 93.151(b)(1)(i)).	Yes (as modified in § 891.105).
Annual Income Calculation & Reexaminations (§ 5.609(c)).	Yes (§ 574.310(d)(1) and (2) and § 574.310(e)(1) and (2)).	No, unless unit is subject to § 92.203(a)(1) or the participating jurisdiction accepts income determination under § 92.203(a)(2) (§ 92.203(a) & (f)).	No, unless unit is subject to § 93.151(a)(1)–(3) (93.151(a) & (f)).	Yes (as modified in § 891.105).
Adjusted Income Mandatory Deductions (§ 5.611(a)).	Yes (§ 574.310(d)(1))	Yes (§ 92.203(a) & (f))	No, unless unit is subject to § 93.151(a)(1)–(3) (§ 93.151(a) and (f)).	Yes (as modified by the definition of annual income in § 891.105).
Adjusted Income Additional Deductions (§ 5.611(b)).	No (§ 574.310(e)(1)(iv))	No, unless unit is subject to § 92.203(a)(1) or the participating jurisdiction accepts income determination under § 92.203(a)(2) (§ 92.203(a) and (f)).	No, unless unit is subject to § 93.151(a)(1)–(3) (§ 93.151(a) and (f)).	No.
Adjusted Income Financial Hardship Exemptions (§ 5.611(c)).	Yes, if the grantee elects to grant financial hardship exemptions (§ 574.310(e)(1)(v)).	Yes, if the participating jurisdiction elects to do so under § 92.203(f)(1)(i), if unit is subject to § 92.203(a)(1), or if income determination is accepted under § 92.203(a)(2), (§ 92.203(a) and (f)).	No, unless unit is subject to § 93.151(a)(1)–(3) (§ 93.151(a) and (f)).	Yes.
Asset restriction (§ 5.618).	Yes, but only for housing activities subject to the resident rent payment requirements in § 574.310(d) (§ 574.310(f)).	No	No	No.

II. Changes at the Final Rule Stage

A. Definitions

New and Revised Definitions

HUD edits the definition of ''earned income'' in § 5.100. In this final rule, HUD expands the proposed definition of ''earned income'' to explain that ''transfer payments'' (which are not included in earned income) mean payments made or income received in which no goods or services are being paid for, such as welfare, social security, and governmental subsidies for certain benefits.

The proposed rule definition of ''earned income'' in § 5.100 largely mirrored the definition of ''earned income'' currently in § 984.103; however, unlike the definition of ''earned income'' in § 984.103, the proposed rule did not specify that ''funds deposited in or accrued interest on the FSS program escrow account established by a PHA on behalf of a participating family'' is excluded from ''earned income.'' In the context of both the proposed rule and in this final rule, HUD determined it would be inappropriate to define Family Self-Sufficiency (FSS) escrow deposits as either earned or unearned income because FSS participants do not actually receive FSS escrow funds until the PHA disburses the funds to the family in accordance with FSS requirements. Income earned on amounts placed in a family's FSS account are excluded from family income pursuant to a new exclusion at 24 CFR 5.609(b)(27). Additionally, the value of FSS accounts is excluded by 24 CFR 5.603 from the calculation of net family assets.

HUD has also added the corresponding definition of ''unearned income'' in § 5.100. The definition of unearned income specifies that the term is broad, encompassing any annual income, as calculated under § 5.609, that is not earned income. The definition of ''Real property'' in § 5.100 is also slightly modified from the proposed rule to have the same meaning as real property as provided under the State law in which the property is located.[2]

[2] Where the term ''State'' is used throughout the Part 5 regulations, it includes Territories and Possessions of the United States. This is consistent with the definition of ''State'' in section 3(b)(7) of the U.S. Housing Act of 1937 which ''includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and the Trust Territory of the Pacific Islands.''

HUD is revising the definition ''medical expenses'' in § 5.603 to be ''health and medical care expenses'' consistent with the language used in HOTMA. HUD is also revising the definition to reflect the Internal Revenue Service (IRS) definition of the term and provide additional clarity without using the term to define itself. In addition, this final rule then adds ''long-term care premiums'' as an example of what is included in the definition of health and medical care expenses. The prior regulation in § 5.603(b) specifically included ''medical insurance premiums'' as an example of health and medical care expenses, and the proposed rule did not propose to alter this existing example of what counts as health and medical care expenses. In this final rule, HUD is adding a reference to long-term care in the regulatory language to conform with existing practices and policies and to add clarity. For example, the HUD Handbook *Occupancy Requirements of Subsidized Multifamily Housing Programs* (4350.3) (''Multifamily Occupancy Handbook'') states that ''long-term care premiums (not prorated)'' are examples of deductible health and medical care expenses (see exhibit 5–3 of that Handbook).[3]

HUD also amends the definition of ''net family assets'' in § 5.603 in response to questions and requests for clarification submitted in public comments. Initially, HUD clarifies that net family assets do not include the value of all non-necessary items of personal property with a total combined value of $50,000 or less, as adjusted annually by an inflationary factor. HUD will issue guidance for PHAs, owners, and grantees to determine whether an item is a ''necessary item of personal property'' or whether the value of the item should be included in calculating the value of all non-necessary items of personal property for the $50,000 threshold. In addition, HUD is specifying that because negative equity in real property does not preclude a family from selling the property, negative equity alone does not justify excluding such a property from net family assets. The definition of ''net family assets'' also excludes Federal tax refunds or refundable tax credits for a period of 12 months after receipt by the family. HUD adds this language to align with 26 U.S.C. 6409, which states that any Federal tax refund (or advance payment with respect to a refundable credit) made to any individual ''shall not be taken into account as resources for a period of 12 months from receipt, for purposes of determining the eligibility of such individual'' for benefits or assistance under any Federal program or State or local program financed with Federal funds. HUD also clarifies the definition of ''net family assets'' to provide that in cases where a trust fund has been established and the trust is not revocable by, or under the control of, any member of the family or household, the trust fund is not a family asset and the value of the trust is not included in the calculation of net family assets, so long as the fund continues to be held in a trust that is not revocable by, or under the control of, any member of the family or household. Finally, as explained later in this preamble, HUD excludes from the calculation of ''net family assets'' the value of any ''baby bond'' account created, authorized, or funded by Federal, State, or local government.

As a result of adding a new income exclusion for ''nonrecurring income'' (see below), HUD is including definitions for ''day laborer,'' ''independent contractor,'' and ''seasonal worker'' in § 5.603, all of which are referenced in the new income exclusion. HUD expects that adding these new definitions will help PHAs and owners better determine what income must be included when determining the family's rent for the upcoming year by narrowing the definition of nonrecurring income.

Foster Children and Adults

In § 5.603, HUD is amending the definition of ''foster adults'' from what was proposed. HUD also adds a definition of ''foster child'' and is revising the definition of ''dependent.'' These definitions provide additional details on the characteristics of foster adults and foster children for purposes of determining members of a household. However, while foster adults and foster children are members of the household (and therefore will be considered when determining appropriate unit size and utility allowance), they are not considered members of the family for purposes of determining either annual and adjusted income or net family assets, nor are the assets of foster adults or foster children taken into consideration for purposes of the asset limitations in HUD programs covered by these definitions.

These revised definitions will result in a change in the treatment of foster children and foster adults residing in units assisted under Multifamily Housing programs because the Office of Multifamily Housing Programs has treated foster children and foster adults as family members. In finalizing this rule, HUD determined that, because the definition of ''family'' applies to all 1937 Act programs, it was necessary to clarify for HUD programs covered by this rule that a foster child or adult is a member of the household but not a member of the assisted family (similar to a live-in aide). HUD also determined that there are practical considerations that weigh in favor of this clarification across all programs. For example, § 5.403 states that ''a child who is temporarily away from the home because of placement in foster care is considered a member of the family.'' If an assisted family temporarily housed this foster child and counted the child as a member of their family, then the child would be considered a family member of two assisted families at the same time.

HUD will update its existing Multifamily Housing guidance on foster families, including chapter 3 of the Multifamily Occupancy Handbook, to conform with this final rule. Upon the effective date of this final rule, these regulations supersede conflicting Multifamily Housing guidance.

Fostering Stable Housing Opportunities

This final rule updates the definition of ''family'' in § 5.403. The definition in this final rule incorporates revisions made to the 1937 Act by the Fostering Stable Housing Opportunities provisions of the Consolidated Appropriations Act, 2021,[4] which expands the definition of Single Persons. Due to the modification of the 1937 Act prior to this final rule, HUD is making a conforming change to § 5.403 to align with the new statutory language.

Specifically, youth who are between the ages of 18 and 24, who have either left foster care or will leave foster care within 90 days, and who are homeless or at risk of becoming homeless at age 16 or older, will be considered ''single persons'' for the purposes of Section 8 and public housing under the 1937 Act. Currently, HUD's regulations at § 5.403 do not include this separate category of eligible youth within the definition of ''family.'' This final rule updates this definition. Because HUD has no discretion regarding this modification, HUD believes this is an appropriate conforming change to incorporate into the final rule.

[3] U.S. Department of Housing and Urban Development, *HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Programs* (Nov. 2013), *https://www.hud.gov/sites/documents/43503HSGH.PDF.*

[4] Public Law 116–260, div. Q, tit. I, Section 103 (Dec. 27, 2020).

Definitions Related to Over-Income Families in Public Housing (§ 960.102)

HOTMA amended the 1937 Act with new and expanded provisions related to families who are residing in public housing units while being over the newly created over-income (OI) limit for that program. HUD is including in this final rule additional definitions related to such families to facilitate the use of consistent terminology throughout provisions in the regulations:

Alternative non-public housing rent. This is the monthly amount PHAs must charge non-public housing over-income (NPHOI) families, allowed by PHA policy to remain in a public housing unit and who have completed the 24 consecutive month grace period. The alternative rent is defined as the higher of Fair Market Rent (FMR) or subsidy.

Covered person. Because the new § 960.509 borrows heavily from the existing lease provisions in § 966.4, which use the term ''covered person,'' HUD is inserting the definition of ''covered person'' into § 960.102 to indicate that lease provisions cover the tenant, members of the tenant's household, guests, or others under the tenant's control.

Non-public housing over-income family. This is the defined term for a family that is above the OI limit but is remaining in their unit, paying the alternative non-public housing rent. These families will no longer be public housing program (PHP) participants.

Over-income family. This was an existing term that previously referred to a family that is not a low-income family. The term has been revised in the final rule to now mean a family whose income exceeds the OI limit.

Over-income limit. This term was discussed and defined in the notice published by HUD on July 26, 2018 (83 FR 35490) and its September 17, 2019, proposed rule, but was not proposed to be codified as a defined term in the proposed rule. Upon reconsideration, HUD is codifying this definition in § 960.102. This limit is set by multiplying the very low-income level for the applicable area by a factor of 2.4.

Technical Amendments

This final rule also updates an outdated citation in the definition of ''Income'' in § 570.3. The definition of income in that section incorporates three separate definitions of ''income'' and allows Community Development Block Grant program grantees and Section 108 Loan Guarantee program borrowers to choose which definition to use to determine whether a family or household is low- or moderate-income. One option available to grantees is the definition of annual income ''as defined under the Section 8 Housing Assistance Payments program at 24 CFR 813.106[.]'' However, the Section 8 Housing Assistance Payments program was incorporated into part 5 in 1996, and the definition of ''Annual Income'' was moved from § 813.106 to § 5.609. Therefore, this citation is out of date. HUD has allowed grantees to use the definition at § 5.609 despite the outdated citation because it is the clear definition applicable ''under the Section 8 Housing Assistance Payments program.'' This final rule updates the citation from § 813.106 to § 5.609. Because grantees are already authorized to use the definition under § 5.609, this change is technical in nature and will not affect grantees in a substantive manner. Therefore, HUD believes this is an appropriate technical correction to incorporate into the final rule.

HUD also adds cross-references to certain newly added and revised definitions described in part 5 to parts 92 (HOME Program), 93 (HTF Program), and 891 (Section 202 and Section 811 Programs) for consistency across HUD programs.

B. Income

Applicability of Subpart F

Subpart F of part 5 addresses the common definitions and provisions addressing income for multiple HUD programs. In this final rule, HUD is further revising § 5.601 to remove references to the Rent Supplement program (Rent Supp) and Rental Assistance Program (RAP), because all contracts assisted under those programs have either expired or, pursuant to the authority provided under HUD's Rental Assistance Demonstration program, been converted to Section 8 contracts.

Definition of Income

HUD is revising the definition of annual income in § 5.609(a) for clarity. In paragraph (a)(1), HUD relies on the definition of excluded income under § 5.609(b) to provide the scope of what is included in income. In addition, HUD is modifying paragraph (a)(2) to specify that when net family assets are valued over $50,000 (as adjusted by inflation) and actual returns cannot be calculated, imputed returns are included in income. All actual returns that can be calculated continue to be included in income.

Exclusions From Income

This final rule makes changes from what was proposed to the exclusions from income in § 5.609(b). Changes to the exclusions related to foster children and adults, financial aid, and distributions from trusts are discussed elsewhere within this preamble. The remaining changes are discussed here.

In § 5.609(b)(1), HUD is including the corollary to the specification in the definition of income that imputed returns for net family assets valued over $50,000 are included as income. In § 5.609(b)(1), imputed returns for net family assets valued at or below $50,000 are explicitly excluded from income. PHAs, owners, and grantees are therefore not required to calculate and may not include imputed returns as family income when a family's net family assets are valued at or below $50,000 (as such amount is annually adjusted by an inflationary factor). Actual returns from net family assets continue to be included in income.

In this final rule, HUD revises § 5.609(b)(2) to exclude from income various types of trust distributions. For an irrevocable trust or a revocable trust outside the control of the family or household excluded from the definition of net family assets under § 5.603(b), the final rule excludes from income distributions of the principal or corpus of the trust, and distributions of income from the trust when the distributions are used to pay the costs of health and medical care expenses for a minor. For a revocable trust or a trust that is under the control of the family or household, any distributions from the trust are excluded from income, except that any actual income earned by the trust, regardless of whether it is distributed, shall be considered income to the family at the time it is received. Please see the discussion elsewhere in this preamble (section III. On public comments and HUD's responses, Section ''E. Trust Distributions'' under the header ''Income Exclusions'') for a detailed discussion of distributions of income or principal from trusts. HUD is also modifying § 5.609(b)(3) to remove references to income from foster children and adults and to incorporate the new defined term ''earned income.'' This has the effect of continuing to specifically exclude earned income of all children under the age of 18 within assisted households. This income is currently excluded under 24 CFR 5.609(c)(1) of HUD's income regulations and will remain excluded under this final rule.

Section 5.609(b)(4) excludes from income payments received for the care of foster children or adults, and the proposed rule proposed language expanding the exclusion to State kinship or guardianship care payments. In this final rule, HUD is clarifying that the exclusion should also apply to

Tribal kinship or guardianship care payments.

Section 5.609(b)(5) excludes from income insurance payments and settlements for personal or property loss. In this final rule, HUD is clarifying that these payments and settlements include, but are not limited to, ''payments through health insurance, motor vehicle insurance, and workers' compensation.'' HUD believes that explicitly including these examples will help address questions about what is covered by this exclusion.

In this final rule, HUD excludes ''income earned by, government contributions to, and distributions from 'baby bond' accounts created, authorized, or funded by Federal, State, or local government'' from income in § 5.609(b)(10). HUD also revised 24 CFR 5.603 to exclude the ''value of any 'baby bond' account created, authorized, or funded by Federal, State, or local government'' from the calculation of net family assets. HUD makes these revisions in recognition of the fact that ''baby bonds'' (money held in trust by the government for children until they are adults) are being authorized in various States and localities in an effort to combat the wealth gap and address systemic poverty. In this final rule, HUD makes other revisions to the proposed § 5.609(b)(10). Specifically, § 5.609(b)(10) now excludes ''income and distributions from'' rather than the ambiguous ''amounts from'' any Coverdell education savings account under Section 530 of the Internal Revenue Code of 1986 or any qualified tuition program under Section 529 of such Code.

The proposed rule at § 5.609(b)(10) excluded from annual income any amounts from ABLE accounts under section 529A of the Internal Revenue Code of 1986. With this exclusion, HUD intended to codify a mandatory income exclusion in the Achieving Better Life Experience (ABLE) Act (Pub. L. 113–295). However, HUD has since determined that the income exclusion in the proposed rule did not comply with the statutorily mandated income exclusion and was also inconsistent with Notice PIH 2019–09/H–2019–06 (issued April 26, 2019), *Treatment of ABLE accounts in HUD-Assisted Programs.*[5] Upon further review of the statutorily mandated income exclusion in the ABLE Act, HUD decided that income exclusions related to ABLE accounts are too nuanced to capture in a succinct, general income exclusion. Therefore, in this final rule, HUD declines to provide an enumerated income exclusion related to ABLE accounts. Instead, the mandatory income exclusion related to ABLE accounts is provided pursuant to § 5.609(b)(22), which covers amounts that HUD is required by Federal statute to exclude from income and further provides that HUD will publish a notice in the **Federal Register** to identify the benefits that qualify for this exclusion. PHAs, owners, and grantees may refer to Notice PIH 2019–09/H–2019–06 for details about when ABLE account income is excluded. Though HUD is not including an enumerated income exclusion related to ABLE accounts, HUD is retaining language excluding the value of ABLE accounts from the definition of ''net family assets'' in § 5.603.

In § 5.609(b)(12)(iv), incremental earnings and benefits from various specific employment training programs are excluded from income. In the proposed rule, HUD inadvertently omitted Federal and Tribal employment training programs from the list of income exclusions and included only State and local employment training programs. Therefore, in this final rule, HUD is adding language to also exclude payments from training programs funded by HUD or qualifying Federal, State, Tribal, or local employment training programs (including training programs not affiliated with a local government) and payments from training of a family member as resident management staff from the family's income.

In this final rule, HUD is revising the wording of the income exclusions of earned income of dependent full-time students (§ 5.609(b)(14)) and of adoption assistance payments (§ 5.609(b)(15)) to provide greater clarity as to the amount excluded. In both cases, the amount excluded from income was intended to be the amount in excess of the dependent deduction in § 5.611 (understanding that under HOTMA the dependent deduction will be adjusted annually for inflation). Under the proposed rule, rather than simply identifying the amount of the dependent full-time student's earned income that was specifically excluded from income, HUD identified the amount of the dependent full-time student's earned income that ''shall be considered income'' (which was the amount equal to the dependent deduction). HUD is revising both § 5.609(b)(14) and § 5.609(b)(15) to explicitly state that the income exclusion is the earned income in excess of the amount of the deduction for a dependent in § 5.611. Since the dependent deduction under § 5.611 provides for this annual adjustment, HUD believes that the intended purpose of the regulation will be better understood as a result of the revisions in the final rule.

Section 5.609(b)(19) excludes payments to keep family members with disabilities living at home. In the proposed rule, HUD proposed to exclude only payments from State Medicaid-managed care systems to keep a family member who has any disability (not just a developmental disability) living at home. The intent behind these changes was both to expand the existing exclusion to include those with a disability other than a developmental disability and to clarify the types of payments that are excluded from income. Many States provide benefits to individuals with a variety of disabilities, which allow such individuals to remain at home rather than reside in institutional settings such as hospitals, nursing homes, or other institutional or segregated settings, and there was no reason to limit the exclusion to persons with a certain type of disability.

The proposed rule also removed the qualifying language regarding such payments to ''offset the cost of services and equipment provided.'' HUD is aware that payments under these programs are not limited to reimbursement of specific services and equipment in order to keep a family member with a disability living at home.

In response to public comments that State Medicaid agencies provide in-home supports through a range of delivery structures, such as fee-for-services, not just managed care, HUD is expanding the language in the final rule to exclude all payments from State Medicaid agencies for in-home supports. Federal Medicaid rules allow States to cover a wide range of institutional and home and community-based long-term services and supports (LTSS), but the type of services, populations covered, and delivery models differ substantially across States based on their individual Medicaid program structure.

Additionally, in response to public comments pointing out that there are similar payments from States that are not connected to Medicaid, HUD is expanding the language in the final rule to also exclude payments from or authorized by State agencies for States that use a source of funding other than Medicaid to provide for in-home support.

HUD is also adding payments made or authorized by a Federal agency for this purpose so as not to inadvertently make such payments ineligible for this exclusion. HUD will issue guidance to

[5] Available at: *https://www.hud.gov/sites/dfiles/PIH/documents/PIH-2019-09.pdf.*

PHAs and owners on any payments made by Federal agencies that would be covered by this exclusion. HUD is clarifying in the final rule that payments may be made directly by the State Medicaid agency (including through a managed care entity) or other State or Federal agency, or made by another entity authorized by the State Medicaid agency, State agency, or Federal agency to make such payments on its behalf.

Public commenters also described how in many cases the government agency directly pays the person providing the services. For instance, an adult providing personal care services for a parent or other family member with a disability could receive direct payments from the State agency for performing those services. HUD is adding language in the final rule that amounts paid directly to a member of the assisted family by the State Medicaid agency (including through a managed care entity) or other State or Federal agency (or other entities authorized by the agencies to make such payments) to enable a family member who has a disability who wishes to remain living in the assisted unit, under the applicable terms and conditions for the family member to be eligible for such payments, are excluded from the family's income. This income exclusion applies only to payments to the family member for caregiving services for another member of the family residing in the assisted unit. For example, payments to the family member for caregiving services for someone who is not a member of the assisted family (such as for a relative that resides elsewhere) are not excluded from income. Furthermore, if the agency was making payments for caregiving services to the family member for not only another member of the assisted family but also for a person outside of the assisted family, only the payments attributable to the caregiving services for the caregiver's assisted family member would be excluded from income.

HUD is revising § 5.609(b)(20), which excludes loan proceeds from income. The revisions specify that the exclusion also covers amounts disbursed to or on behalf of a borrower, or loan proceeds received by a third party instead of the family. Examples of loan proceeds excluded by this new definition can include payments from student loans, car loans, or amounts received from a Home Equity Conversion Mortgage (if the assisted family is in a program that allows for assistance to homeowners *e.g.,* HOME).

In § 5.609(b)(21), HUD is modifying the exclusion of payments received by Tribal members resulting from mismanagement of assets held in trust by the United States. In addition to using the term ''Tribal member'' instead of ''Indian persons,'' § 5.609(b)(21) now covers payments excluded from income under Federal law other than the Internal Revenue Code. These payments were always required to be excluded under HUD income exclusion requirements because they are excluded from income for eligibility and determining the amount of assistance under Federal law, but they are now explicitly referenced in § 5.609(b)(21).

HUD also simplified § 5.609(b)(22), which addresses income exclusions required by other Federal statutes. Rather than distributing notices updating the list to PHAs, the final rule commits HUD to publishing the notice in the **Federal Register**.

Section 5.609(b)(23) excludes ''gap'' payments made pursuant to 49 CFR part 24. These are a form of relocation assistance payments made to displaced persons under the Uniform Relocation and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. 4601 *et seq.*) (URA). The ''gap'' payment pays for the difference in costs associated with moving from one form of housing assistance to another and/or from one dwelling unit to another as a result of permanent displacement for a Federal program or project, as defined under the URA. The final rule revises the exclusion for clarity without making substantive changes.

In the proposed rule, HUD proposed removing the exclusion of ''temporary, nonrecurring or sporadic income.'' This was the result of much confusion over what exactly the exclusion covered. However, after reviewing public comments and additional consideration, HUD has realized the utility of including a broad exemption for income that a family may have received previously but does not anticipate for the coming year. This is particularly needed because under HOTMA, PHAs and owners are to use the family's income from the previous year in making an income determination for the upcoming year, with adjustments as the PHA or owner determines necessary to reflect current income. Therefore, HUD is restoring, in § 5.609(b)(24) of this final rule, a general exclusion of ''nonrecurring income.'' To address some of the issues that have arisen under the previous broad exemption, HUD is defining nonrecurring income as income that will not be repeated in the coming year, based on information that the family provides. The exclusion also specifically states that income earned as an independent contractor, day laborer, or seasonal worker does not count as ''nonrecurring'' income.

Additionally, to address other forms of sporadic income that would have been excluded under the previous blanket exclusion, HUD is including additional information on what ''nonrecurring income'' consists of and offering specific examples: payments from the U.S. Census Bureau for work on the decennial Census or the American Community Survey that is less than 180 days and does not result in a permanent position; direct Federal or State payments intended for economic stimulus or recovery; amounts received directly by the family as a result of State or Federal refundable tax credits or refunds at the time they are received; gifts for holidays, birthdays, or significant life events or milestones; non-monetary, in-kind donations from food banks or similar organizations; and lump-sum additions to assets such as lottery or other contest winnings.

Under 26 U.S.C. 6409, Federal tax refunds are excluded from the calculation of income for Federal programs. HUD is therefore adding Federal refundable tax credits and Federal tax refunds at the time they are received to the exclusions from annual income at § 5.609(b)(24)(iv), as they are a form of nonrecurring income that is specifically excluded from family income by statute. Until this rulemaking, refunds of State taxes have not been specifically identified as excluded from a family's annual income in HUD's regulations. HUD is clarifying that this is a form of nonrecurring income that must be excluded from a family's annual income. HUD is now excluding amounts directly received by the family as a result of State refundable tax credits or State tax refunds at the time that they are received in § 5.609(b)(24)(iii).

HUD notes that the reason why the passages at § 5.609(b)(24)(iii) and (iv) read as refundable tax credits or tax refunds ''at the time they are received'' is because a family's annual income may have already included the amounts the family received in the year that the taxes were paid. In those instances, the refund of taxes paid does not represent any new or additional money paid to the family. Moreover, there are some forms of refundable tax credits that may be provided to a family in advance of filing taxes. In order to avoid any confusion and to ensure that PHAs and owners are not counting the same income more than once, HUD has added the modifier ''at the time they are received'' for the exclusion of both Federal and State refundable tax credits and refunds.

HUD has used the current exclusion in § 5.609(c)(3) to exclude from income lump-sum additions to assets that the family may have received as a result of a resolution of a civil rights matter. This may include amounts received as a result of litigation or other actions, such as conciliation agreements, voluntary compliance agreements, consent orders, other forms of settlement agreements, or administrative or judicial orders under the Fair Housing Act, Title VI of the Civil Rights Act, section 504 of the Rehabilitation Act (Section 504), the Americans with Disabilities Act, or any other civil rights or fair housing statute or requirement. HUD does not intend to change the practice of excluding this income, but because there has been confusion, HUD is adding a new income exclusion in § 5.609(b)(25) that broadly excludes from income any amounts the family may receive from civil rights settlements or judgments regardless of how the settlement or judgment is structured. This reflects the fact that sometimes settlements or judgments of this nature are not lump-sum payments but instead may have a payment schedule.

HUD is also adding at § 5.609(b)(25) language stating that back pay received by the family pursuant to a civil rights settlement or judgment is excluded from income. HUD believes it would be unfair to treat back pay received by a family pursuant to a civil rights settlement or judgment differently than other amounts received under such settlements or judgments. The treatment of back pay is different from the future payments the family receives as a result of the raise or promotion under the terms of the civil rights settlement or judgment, which would be included in income.

While these civil rights settlement or judgment amounts are excluded from income, the settlement or judgment amounts will generally be counted toward the family's net family assets (*e.g.,* if the funds are deposited into the family's savings account or a revocable trust under the control of the family).

Income generated on the settlement or judgment amount after it has become a net family asset is not excluded from income. For example, if the family received a settlement or back pay and deposited the money in an interest-bearing savings account, the interest from that account would be income at the time the interest is received. As an example, consider a family with no net family assets that receives a civil rights settlement in the amount of $20,000. Upon receiving the settlement, the family's assets increased to $20,000, but the $20,000 settlement is not included in the family's income. At the family's next income examination, any actual income earned from the $20,000 (*e.g.,* interest or investment income) will be included in the family's income. For instance, if at the family's next annual income examination after the family received the $20,000 civil rights settlement, the actual income earned from investing the $20,000 is $500, then $500 will be included in the family's income.

Furthermore, if a civil rights settlement or judgment increases the family's net family assets such that they exceed $50,000 (as annually adjusted by an inflationary factor), then income will be imputed on the net family assets pursuant to 24 CFR 5.609(a)(2) in this final rule. If the imputed income, which HUD considers unearned income, increases the family's annual adjusted income by ten percent or more, then an interim reexamination of income will be required unless the addition to the family's net family assets occurs within the last 3 months of the family's income certification period and the PHA or owner chooses not to conduct the examination.

Finally, a large addition to net family assets may impact the family's eligibility for public housing or Section 8 assistance if the net family assets exceed $100,000 (as annually adjusted by an inflationary factor) per 24 CFR 5.618.

In this final rule, HUD adds new income exclusions at § 5.609(b)(26) and (b)(27). Section 5.609(b)(26) excludes income received from any account under a retirement plan recognized as such by the IRS, including individual retirement arrangements (IRAs), employer retirement plans, and retirement plans for self-employed individuals. However, any distribution of periodic payments from these retirement accounts shall be income at the time they are received by the family. This revision aligns with, and clarifies, HUD's current policy regarding the treatment of income earned and distributions from retirement accounts. For example, current § 5.609(b)(4) states that income includes the full amount of periodic amounts received by retirement funds and pensions. A new income exclusion at § 5.609(b)(27) excludes income earned on amounts placed in a family's FSS account. This exclusion is consistent with how HUD currently treats income earned on FSS accounts. The exclusion does not address distributions from a family's FSS account, because such distributions (either as a final or interim distribution under the terms of the Contract of Participation) will be excluded from income under § 5.609(b)(24)(vii) as a lump-sum addition to net family assets.

With these revisions and additions, HUD intends to exclude from income sources of funds that cannot be relied upon to pay for a family's housing needs, while providing additional clarity to PHAs and owners about what funds must still be considered income, given the broad definition contained in HOTMA.

In § 5.609(b)(28), HUD is codifying the current requirements for considering self-employment income and income from the operation of a business, which are currently codified in § 5.609(b)(2). Under § 5.609(b)(28), gross income that a family member receives through self-employment or operation of a business is excluded from a family member's income, as gross income is not reflective of the costs of operating a business of being self-employed. Instead, HUD is requiring that the net income from the operation of a business be considered income in § 5.609(b)(28)(i). As provided by currently codified § 5.609(b)(2), HUD does not consider expenditures for business expansion of amortization of capital indebtedness to be deductible when determining the new income from a business. An allowance for depreciation of assets used in a business or profession may be deducted, based on a straight-line depreciation, as provide in IRS regulations, as is the case under the current rule. Under § 5.609(b)(28)(ii), HUD shall consider the withdrawal of cash or assets from the operation of a business to be income except to the extent that such withdrawal is to reimburse the family member for cash or assets that the family has invested in the operation of the business. This treatment is no different than the current treatment under the regulations and represents a continuation of existing policy.

Student Financial Assistance

HOTMA mandates the exclusion of certain earned income for full-time dependent students and grant-in-aid, or scholarship amounts for such students. Although not required by the HOTMA statute, the proposed rule proposed the previous exclusion of financial aid, which also codified the treatment of financial assistance under longstanding appropriations act provisions for Section 8 families (including persons over the age of 23 with dependent children). However, the proposed rule was still not entirely clear regarding what constitutes financial assistance. Furthermore, the proposed rule did not codify a Federally mandated income exclusion in section 479B of the Higher Education Act of 1965 (20 U.S.C.

1087uu) (HEA). This exclusion is currently included in the list of Federally mandated exclusions from income, which HUD published on May 20, 2014 (79 FR 28938). HUD has determined this exclusion should be codified in the final rule because of the extent of its impact in calculating family incomes. Finally, considering the required exclusion in section 479B of the HEA, HUD concludes it cannot, as part of this rulemaking, codify the Section 8 student financial assistance limitations provided annually in HUD appropriations (see Section 210(b) of Division L of Public Law 117–103 for the provision in the 2022 Consolidated Appropriations Act), although these limitations will continue to apply to funds from any year in which the limitations are enacted in an appropriations act.[6]

Therefore, in this final rule, in § 5.609(b)(9), HUD codifies the Federally mandated income exclusion in section 479B of the HEA. HUD also expands on the proposed regulatory language, calling upon interpretations of the previous regulatory text, IRS definitions, and relevant statutory language. Section 5.609(b)(9) includes two income exclusions related to assistance provided to students. First, § 5.609(b)(9)(i) excludes any assistance that section 479B of the HEA requires to be excluded from a family's income. Second, § 5.609(b)(9)(ii) excludes student financial assistance, not otherwise excluded by § 5.609(b)(9)(i), for tuition, books, and supplies, room and board, and other fees required and charged to a student by an institution of higher education.

Section 5.609(b)(9)(i) addresses the mandatory income exclusion in section 479B of the HEA, which states ''[n]otwithstanding any other provision of law, student financial assistance received under this title, or under Bureau of Indian Affairs student assistance programs, shall not be taken into account in determining the need or eligibility of any person for benefits or assistance, or the amount of such benefits or assistance, under any Federal, State, or local program financed in whole or in part with Federal funds.'' Under Section 701 of Division FF of Public Law 116–260, entitled ''FAFSA Simplification Act,'' Section 479B of the HEA has been modified slightly to exclude student financial assistance under the Bureau of Indian Education (instead of the Bureau of Indian Affairs) and to expand the forms of excluded income to include income earned in employment and training programs under Section 134 of the Workforce Innovation and Opportunity Act (WIOA) (29 U.S.C. 3174 *et seq.*). As per Section 101 of Division R of Public Law 117–103, this revised provision shall become effective on July 1, 2024. Until July 1, 2024, PHAs, owners, and grantees shall exclude from income amounts received for the forms of assistance listed in the current version of Section 479B of the HEA. Beginning July 1, 2024, PHAs, owners, and grantees shall exclude from income amounts received for the forms of assistance listed in the revised version of Section 479B of the HEA. Current examples of student financial assistance received under Title IV of HEA include but are not limited to: Federal Pell Grants, Teach Grants, Federal Work-Study Programs, Federal Perkins Loans, among many others. Current examples of student financial assistance under the Bureau of Indian Education include the Higher Education Tribal Grant and the Tribally Controlled Colleges or Universities Grant Program. Current employment training programs under Section 134 of the WIOA that are to be excluded from income when the revised statute comes into effect are workforce investment activities for adults and workers dislocated as a result of permanent closure or mass layoff at a plant, facility, or enterprise, or a natural or other disaster that results in mass job dislocation, in order to assist such adults or workers in obtaining reemployment as soon as possible.

Section 479B of the HEA requires that all assistance under Title IV of the HEA (as well as Bureau of Indian Affairs student financial assistance), even assistance provided to students in excess of tuition and required fees or charges, be excluded from HUD income calculations. However, for more than a decade, enacted on a year-by-year basis, HUD appropriations have included a provision that has created an exception to section 479B for Section 8 income calculations. For example, the FY2022 Appropriations Act (Pub. L. 117–103) states that, ''[f]or purposes of determining the eligibility of a person to receive assistance under Section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f), any financial assistance (in excess of amounts received for tuition and any other required fees and charges) that an individual receives under the Higher Education Act of 1965 (20 U.S.C. 1001 *et seq.*), from private sources, or from an institution of higher education (as defined under Section 102 of the Higher Education Act of 1965 (20 U.S.C. 1002)), shall be considered income to that individual, except for a person over the age of 23 with dependent children.'' Thus, for any year that this language appears in HUD appropriations, it requires that certain assistance, including assistance under Title IV of the HEA, in excess of tuition and other required fees and charges, be included in income calculations for Section 8 students who are age 23 and under or without dependent children. In a notice titled *Eligibility of Students for Assisted Housing Under Section 8 of the U.S. Housing Act of 1937; Supplementary Guidance,* HUD interpreted this limitation as applying when the student is the head of household or spouse, but not when the student resides with parents in a Section 8 unit. (April 10, 2006, 71 FR 18146).

Although the proposed rule sought to codify this appropriations requirement, HUD has since determined that it does not have the authority to publish a rule that contradicts section 479B of the HEA without explicit statutory authority.

For any funds from a year where HUD's appropriations acts include Section 8 student financial assistance limitations similar to those in FY2022, those limitations will still apply with respect to Section 8 participants, even if the appropriations contradict section 479B of the HEA. As discussed directly below, any student financial assistance that is not excluded pursuant to § 5.609(b)(9)(i) is subject to § 5.609(b)(9)(ii). Thus, a PHA or owner must perform the calculation for a Section 8 student head of household or spouse who is either 23 and under or without dependent children in 5.609(b)(ii) *including* the student assistance that would have been excluded in 5.609(b)(i) but is not because the Section 8 funds come from a year where the HUD appropriations act provisions included the Section 8

[6] The HEA is an authorizing statute whereas appropriations acts are temporary in nature, applying only to the funds from the year that the appropriations are in effect. HUD acknowledges that HUD's current rule at 24 CFR 5.609(b)(9) codifies the Section 8 student financial assistance appropriations language, notwithstanding section 479B of the HEA, but notes that this rulemaking was authorized by the FY 2006 Appropriations Act (Pub. L. 109–115); section 327 of that Act directed HUD to issue a final rule to ''to carry out'' the Section 8 appropriations student restrictions. Since 2006, HOTMA passed without the language from the student restrictions in the annual appropriations text, and a newer version of the HEA passed. Moreover, recent appropriations acts do not include a requirement that would enable HUD to codify a requirement in this final rule contradicting this latest version of the HEA, an authorizing statute. Notwithstanding the foregoing interpretation about the treatment of student assistance under section 479B of the HEA as excluded income, HUD's current Section 8 eligibility rule at 24 CFR 5.612, also codified pursuant to the FY 2006 Appropriation Act rulemaking authority, is not part of this rulemaking and is therefore still in effect.

student financial assistance limitations. HUD plans to issue guidance about how to treat student financial assistance in income calculations.

Section 5.609(b)(9)(ii) of the final rule recognizes that student financial assistance can take a variety of forms and come from a variety of sources to both full and part-time students. For example, HUD considered that not all assistance provided to students is assistance provided under Title IV of the HEA or through the Bureau of Indian Affairs. The final rule provides that student financial assistance, for purposes of § 5.609(b)(9)(ii), means a grant or scholarship received from the Federal government, a State, Tribal, or local government, a private foundation registered as a nonprofit under 26 U.S.C. 501(c)(3), a business entity (such as a corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, or nonprofit entity), or an institution of higher education. A grant would include a qualified tuition remission, reduction, waiver, or reimbursement (*i.e.,* amounts received as reimbursement for the student's paid costs of tuition, books, and fees, etc.) by the educational institution, such as for an employee of the institution of higher education or an eligible family member of that employee. A grant would also include assistance provided by an employer as part of an employee educational assistance program or tuition reimbursement program. The final rule also states that student financial assistance, for purposes of § 5.609(b)(9)(ii), does not include any assistance that is excluded from income pursuant to § 5.609(b)(9)(i). Thus, assistance provided to students under Title IV of the HEA or under Bureau of Indian Affairs student assistance programs is not subject to § 5.609(b)(9)(ii).

The language included in the final rule is also intended to clarify that student financial assistance excluded from income under § 5.609(b)(9)(ii) must be for educational expenses and does not include payments obtained through work study, money from friends or family, or funds that exceed the actual education expenses to the student. Amounts received under work study may still be excluded under § 5.609(b)(9)(i) (if provided pursuant to Title IV of the HEA) or § 5.609(b)(14) (to the extent that the work study is being performed by a dependent full-time student). Loan proceeds for educational expenses, though considered student financial assistance if provided under a loan program in Title IV of the HEA, are not considered student financial assistance for purposes of § 5.609(b)(9)(ii) and are already excluded from income under § 5.609(b)(20). In addition, HUD is adding language in § 5.609(b)(9)(ii)(D) that states if student financial assistance is paid to the student, the responsible entity (as defined in §§ 5.100 and 5.603) must verify that the assistance meets the requirements in the paragraph.

HUD sought in this final rule to craft regulatory text that provides for the consistent treatment of students receiving student financial assistance, as defined in § 5.609(b)(9)(ii). HUD's goal in this regard was primarily to provide for the equitable treatment of such students. The current regulation, consistent with Section 8 appropriations limitations, provides that financial assistance in excess of amounts received for tuition and any other required fees and charges (hereafter ''excess'' amounts) was excluded from income to an individual unless the individual was a Section 8 participant who was either age 23 or under or without dependents.

In the final rule, such ''excess'' amounts are not considered student financial assistance to be excluded from income under § 5.609(b)(9)(ii). Though the change will have the effect of eliminating an income exclusion for certain families (*i.e.,* all non-Section 8 families, and Section 8 families with a head of household or spouse that is student who is over 23 with dependent children), HUD believes that this change is justified in terms of fairness. For example, consider two public housing residents who are both part-time students over the age of 18 and receive student financial assistance that is not excluded pursuant to § 5.609(b)(9)(i). One receives ''excess'' amounts of student financial assistance and the other does not, instead earning the same amount of income from employment (that is not excluded from income calculations). Before HUD changed the rule through this rulemaking, the student that had the excess amount of student financial assistance would have had that excess amount of student financial assistance excluded from their family's income. On the other hand, the student with an equal amount of wages (that are not excluded from income) would have had those wages included in their family's income. The result would have been that the family of the student who worked and received wages would pay a higher rent than the family of the student that received an equal amount of excess student financial assistance. The rule, as revised, would treat both the excess amounts of student financial assistance and the earned income of the students in the example above as income.

Specifically, the final rule provides at § 5.609(b)(9)(ii)(B)(*4*) that student financial assistance (other than assistance provided to students under Title IV of the HEA or under Bureau of Indian Affairs student assistance programs) does not include any amount of the scholarship or grant that either by itself or when in combination with the excluded financial assistance under 479B of the HEA, exceeds the actual cost of tuition, books and supplies (including supplies and equipment to support students with learning disabilities or other disabilities), room and board, or other fees required and charged to a student by the education institution, and for a student who is not the head of household or spouse, the reasonable and actual costs of housing while attending the institution of higher education and not residing in an assisted unit (*i.e.,* the student is living in off-campus/non-college owned housing while away at school instead of a dorm or college owned housing). HUD refers to all of these costs as the ''actual covered costs'' in the regulation and preamble.

The final rule includes a new paragraph at § 5.609(b)(9)(ii)(E) that explains how to determine the amount of assistance that exceeds these actual covered costs when the student is receiving assistance excluded from income under section 479B of the HEA as well as student financial assistance from other sources. As noted earlier, all assistance under section 479B of the HEA is excluded from income, regardless of whether those amounts exceed the actual covered costs described above. The new paragraph at § 5.609(b)(9)(ii)(E) provides that when determining the amount of assistance in excess of actual covered costs, as required under § 5.609(b)(9)(ii)(B)(*4*), the assistance provided under section 479B of the HEA will be the first assistance deducted from the actual covered costs. This is because assistance under section 479B of the HEA is intended to pay the actual covered costs, and so HUD has determined that these amounts must be the first amounts subtracted from actual covered costs before any student financial assistance that HUD is excluding under HUD's discretionary exclusion authority.

If the amount of assistance excluded under section 479B of the HEA exceeds the student's actual covered costs, then all of the amounts received from all other grants or scholarships the student is receiving from other sources would be in excess of actual covered costs and would not be considered student

financial assistance that is excluded from income. For example, assume a student received $26,000 in assistance excluded under section 479B of the HEA and another $5,000 from a scholarship that is not excluded under section 479B of the HEA. If the student's actual covered costs were $25,000, the entire $26,000 in assistance excluded under section 479B of the HEA would still be excluded from income. However, the $5,000 from the other scholarship would not be considered student financial assistance under § 5.609(b)(9)(ii), because it is assistance in excess of actual covered costs and would not be excluded from income under that paragraph.

On the other hand, if the amount of assistance excluded under section 479B of the HEA is less than the student's actual covered costs, then some or all of the other scholarships and grants would be excluded from income. The amount that HUD considers student financial assistance under § 5.609(b)(9)(ii) excluded from income is the lower of either (1) the total amount of scholarships and grants the student received that are not excluded under section 479B of the HEA or (2) the amount by which the student's actual covered costs exceeds the assistance the student received that is excluded under section 479B of the HEA. For example, assume a student received $15,000 in assistance from assistance excluded under 479B of the HEA and another $5,000 from a scholarship not excluded under section 479B of the HEA. The entire $15,000 excluded under section 479B of the HEA is excluded from income. If the student's actual covered costs are $22,000, then the entire amount of the $5,000 scholarship that is not excluded under section 479B of the HEA would also be student financial assistance that is excluded from income, as the amount of the scholarship combined with the assistance excluded under section 479B of the HEA ($20,000) is still less than the student's actual covered costs ($22,000). But if the student's actual covered costs are only $18,000, the amount of the scholarship that is considered student financial assistance under § 5.609(b)(9)(ii) and excluded from income would be $3,000. This is because the $3,000 by which the student's actual covered cost exceeds the assistance excluded under section 479B ($18,000–$15,000) is less than the scholarship amount that is not excluded under 479B of the HEA ($5,000). Consequently, the amount of that scholarship that is in excess of the student's actual covered costs ($2,000) is not student financial assistance and is not excluded under § 5.609(b)(9)(ii).

Safe Harbor

This final rule revises the provision in § 5.609(c)(3) that states that PHAs and owners may, but are not required to, use income calculation information from other programs or agencies to determine a family's income prior to applying deductions under § 5.611. Based on suggestions received in public comments, HUD adds the following to the list of means-tested forms of public assistance that PHAs and owners may rely upon: the Low-Income Housing Credit (LIHTC); the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC); and Supplemental Security Income (SSI). In addition to these specific forms of public assistance, HUD is including other HUD programs, other means-tested forms of Federal public assistance for which HUD establishes a memorandum of understanding, and other means-tested forms of Federal public assistance that HUD may announce through a **Federal Register** notice.

In response to questions received in public comments, HUD is also adding regulatory language specifying how PHAs or owners that choose to use income determinations from other programs are to verify the information. PHAs or owners are to use third-party verification, which must include the tenant's family size and composition and state the family's annual income. The verification must also be dated within the time frame specified for the type of verification, including within the previous 12-month period for purposes of the specified means-tested forms of Federal public assistance. If the PHA or owner cannot obtain the required third-party verification, or if the family disputes the determination, the PHA or owner must calculate the family's annual income using the methods established in § 5.609(c)(1) and (2) or in the applicable program regulations.

Permissive Deductions

This final rule clarifies that PHAs administering the public housing, HCV, and Section 8 moderate rehabilitation programs are authorized to adopt additional deductions under HOTMA in accordance with the terms and conditions at § 5.611(b). Additionally, the final rule states that only PHAs, not owners that happen to also be PHAs, may adopt additional deductions. The proposed rule stated that permissive deductions could be adopted when a PHA is an owner in the Section 8 project-based rental assistance (PBRA) program, but HUD has since determined that such a policy would not comport with HOTMA. Even if a PHA owns a PBRA property, it does so as any other PBRA owner, and without any special status conveyed upon it just because it is a PHA. Thus, because HOTMA permits only PHAs, and not owners, to adopt additional deductions, HUD concludes that a PBRA owner that is a PHA is precluded from adopting permissive deductions at a PBRA property.

This final rule updates § 5.611(b) to explain how permissive deductions are established under each applicable program and splits § 5.611(b)(1) into paragraphs (i) and (ii) for the public housing and the applicable Section 8 programs (HCV, moderate rehabilitation, and moderate rehabilitation Single-Room Occupancy (SRO) programs), respectively.

HUD is also adding additional language clarifying how HUD will ensure compliance with the amended 1937 Act's requirement that permissive deductions not ''materially increase Federal expenditures.'' PHAs can respond to community needs by using a wide range of permissive deductions, including permissive deductions to provide incentives to work. However, given the statutory requirement that permissive deductions may not materially increase Federal expenditures, HUD does not want to reduce funding for all PHAs by factoring in permissive deductions prior to allocating PHA Operating Funds or Section 8 funds. Therefore, HUD will not be revising the public housing Operating Fund formula to account for any decrease in PHA revenue attributable to implementing permissive deductions in accordance with § 5.611. The subsidy costs attributable to permissive deductions will not be taken into consideration in determining the PHA's HCV renewal funding or moderate rehabilitation funding. When establishing permissive deductions, PHAs are still subject to Federal nondiscrimination requirements, including the obligation to provide reasonable accommodations that may be necessary for households with family members with disabilities.

These permissive deductions impact the calculation of the family's adjusted income that is then used to determine the Total Tenant Payment (TTP), which is then used to calculate the tenant rent in the public housing and moderate rehabilitation programs and the family share in the HCV program. Permissive deductions do not affect the family's annual income and consequently have

no impact on the family's income eligibility for the public housing, HCV, or moderate rehabilitation programs.

Hardship Exemptions

As discussed in section III of this preamble, HUD received numerous comments on the structure and form of hardship exemptions for unreimbursed health and medical care and reasonable attendant care and auxiliary apparatus expenses and child care expenses in § 5.611(c). HUD therefore is revising the language in this final rule to provide additional clarity and to ease burdens on families experiencing financial hardships, including reorganizing the financial hardship exemption sections from what was included in the proposed rule. Hardship exemptions for unreimbursed health and medical care and reasonable attendant care and auxiliary apparatus expenses are now defined in § 5.611(c). Hardship exemptions for child care expenses are now defined in § 5.611(d). Finally, hardship policy requirements are now described in § 5.611(e).

The final rule provides two types of hardship exemptions to the new ten percent threshold for unreimbursed health and medical care expenses (for elderly and disabled families) and reasonable attendant care and auxiliary apparatus expenses (for families that includes a person with disabilities).

The first category, defined in § 5.611(c)(1), is for families eligible for and taking the unreimbursed health and medical care expenses and reasonable attendant care and auxiliary apparatus expenses deduction in effect prior to this final rule. The second category, defined in § 5.611(c)(2), is for families that can demonstrate that the family's health and medical care expenses or reasonable attendant care and auxiliary apparatus expenses increased, or the family's financial hardship is a result of a change in circumstances that would not otherwise trigger an interim reexamination.

HUD is adding this second category in the final rule in recognition that the change from the three percent threshold to the new ten percent threshold for unreimbursed health and medical care expenses and/or reasonable attendant care and auxiliary apparatus expenses may result in financial hardship for families, including those families who were not receiving the deduction or may not even have been receiving housing assistance at the time this rule went into effect. For example, a family may have had health and medical care and reasonable attendant care and auxiliary apparatus expenses that did not exceed three percent on the effective date of the rule, but their health and medical care expenses may have subsequently increased although those expenses do not exceed the now effective ten percent threshold. This family may receive temporary hardship relief if their health and medical care expenses or reasonable attendant care and auxiliary apparatus expenses exceed 5 percent of the family's income, as discussed in detail below. Another example is a case where the family's health and medical care expenses and reasonable attendant care and auxiliary apparatus expenses have not increased, but the family has had a decrease in income or increase in other expenses that has resulted in the family's financial hardship. In such a circumstance the family may receive temporary hardship relief if their health and medical care expenses or reasonable attendant care and auxiliary apparatus expenses exceed 5 percent of the family's income. The second category may also include families that either qualified under the first category but have exhausted the relief in that exemption or have chosen to apply for relief under the second category before completing the transition to the ten percent threshold in accordance with the terms and conditions discussed below, so long as they independently qualify under § 5.611(c)(2).

Under the first category at § 5.611(c)(1), the responsible entity must deduct eligible expenses exceeding 5 percent of the family's income for the first year. The second year, the responsible entity must deduct expenses exceeding 7.5 percent of the family's annual income. However, beginning with the third year, the responsible entity must deduct only the expenses that exceed ten percent of the family's annual income, unless the family qualifies for a new exemption under the other eligible category of health and medical care and reasonable attendant care and auxiliary apparatus expense hardships defined in § 5.611(c)(2).

Under the second category defined in § 5.611(c)(2), a family may also qualify for hardship exemptions for health and medical care expenses or reasonable attendant care and auxiliary apparatus expenses if the family can demonstrate that the family's applicable health and medical care expenses or reasonable attendant care and auxiliary apparatus expenses increased or the family's financial hardship is a result of a change in circumstances (as defined by the responsible entity). For these families, the responsible entity deducts the eligible expenses in excess of 5 percent of the family's income for a period of up to 90 days. Responsible entities may extend such exemptions for additional 90-day periods at their discretion, based on the family's circumstances. As in the proposed rule, a responsible entity may also terminate the hardship exemption if the responsible entity determines that the family no longer needs the exemption.

In some circumstances, a family that is still receiving the health and medical care and reasonable attendant care and auxiliary apparatus expense hardship relief under the first category (a family that was receiving the health and medical care and/or reasonable attendant care and auxiliary apparatus expense deduction on the effective date of the rule and is transitioning to the new ten percent threshold) may request relief under the second category of hardship relief. During the second year of the transition, the responsible entity deducts expenses exceeding 7.5 percent of the family's annual income if they are obtaining relief under § 5.611(c)(1). If the family can demonstrate that the family's applicable health and medical care and/or reasonable attendant care and auxiliary apparatus expenses increased or the family's financial hardship is a result of a change in circumstances (as defined by the responsible entity) other than the transition to the higher threshold under the hardship relief policy of § 5.611(c)(1), the family may be granted hardship relief under the second category of hardship relief in § 5.611(c)(2). In this case, the responsible entity would deduct expenses exceeding 5 percent of the family's annual income instead of 7.5 percent. However, § 5.611(c)(2) provides relief only for a period of up to 90 days (unless extended by the responsible entity at their discretion), and a family granted hardship relief under the second category is no longer eligible for relief under the first category, as per § 5.611(c)(1)(D). In other words, at the end of the relief period for the second category that is defined in § 5.611(c)(2), the family would be subject to the regular health and medical care expenses or reasonable attendant care and auxiliary apparatus expenses deduction threshold of ten percent, regardless of whether they fully transitioned to the ten percent threshold under § 5.611(c)(1) before receiving hardship relief under the second category.

HUD reminds responsible entities that they must comply with the Health Insurance Portability and Accountability Act (HIPAA) (Pub. L. 104–191, 110 Stat. 1936) and the Privacy Act of 1974 (Pub. L. 93–579, 88 Stat. 1896) when requesting documentation to determine eligibility

for a financial hardship exemption for unreimbursed health and medical care expenses. Responsible entities may not request documentation beyond what is sufficient to determine anticipated health and medical care and/or reasonable attendant care and auxiliary apparatus costs or when a change in circumstances took place. Before placing bills and documentation in the tenant file, the responsible entity must redact all personally identifiable information. Responsible entities must also comply with all Federal nondiscrimination and civil rights statutes and requirements, including, but not limited to, the Fair Housing Act, Title VI of the Civil Rights Act, Section 504, and the Americans with Disabilities Act, as applicable. Among other obligations, this includes providing for reasonable accommodations that may be necessary for persons with disabilities.

HUD also includes language in § 5.611(d) creating a 90-day time frame for the hardship exemption to the child care income deduction in this final rule. Responsible entities may extend the hardship for additional 90-day periods if the family demonstrates to the responsible entity's satisfaction that the family is unable to pay their rent because of loss of the child care expense deduction, and the child care expense is still necessary even though the family member is no longer employed or furthering his or her education. The 90-day time frame for the child care hardship in § 5.611(d) is similar to the 90-day time frame for the second hardship exemption for health and medical care expenses or reasonable attendant care and auxiliary apparatus expenses and is also consistent with the 90-day length of time provided for minimum rent hardship exemptions under § 5.630(b)(2). As in the proposed rule, responsible entities may also terminate the hardship exemption if the responsible entity determines that the family no longer needs the exemption. HUD believes that this 90-day term is fairer to families than the proposed rule's reliance on the family's next regular reexamination, where the applicability of the child care hardship exemption could vary significantly in length depending on when the event requiring the child care hardship occurred in relationship to the effective date of the family's next regular reexamination.

For example, assume a family no longer qualifies for the child care deduction because the child care is no longer necessary to enable a member of the family to be employed or to further his or her education. The family member who was employed has left their job in order to provide uncompensated care to an elderly friend who is severally ill and lives across town. Under the proposed rule, the length of time that the hardship exception for the child care deduction could continue (assuming the need continued to exist) would depend on the timing of the next regular reexamination. Under the final rule, the hardship exemption and the resulting alternative adjusted income calculation must remain in place for a period of up to 90 days, regardless of the relationship of the timing of the circumstance to the need for the hardship exemption and the next regular reexamination. In addition, the final rule provides that responsible entities have the discretion to extend the hardship exemption for additional 90-day periods based on family circumstances.

In what is § 5.611(e) in this final rule, HUD has included the proposed provisions related to how responsible entities are to establish hardship policies and requirements for notifying families, which are moved but largely unchanged from what was included in the proposed rule. In addition to correcting some cross citations that have changed, the only difference is that HUD has revised the provision to reflect that hardship exemptions are either phased (§ 5.611(c)(1)) or expire within 90 days (§ 5.611(c)(2) and (d)), rather than at the next regular income reexamination, or when the responsible entity determines the hardship exemption is no longer necessary.

C. Assets

Income From Assets

HOTMA specifically includes actual income from assets in the definition of income. Therefore, any actual income received must be counted as family income. In § 5.609(a)(2) of this final rule, HUD clarifies the regulatory language regarding income from assets to help PHAs and owners determine what income from assets should be included in the family's annual income, while also minimizing the burden on PHAs, owners, and families. This final rule includes language in § 5.609(a)(2) to indicate that the imputed return on assets of a combined value of more than $50,000 must be calculated if no actual income can be computed. In addition, if the actual income can be computed for some assets, but not all assets, housing providers must compute the actual income for those assets, calculate the imputed income for all remaining assets where the actual income cannot be computed, and combine both amounts to account for assets of a combined value of over $50,000.

Limitation on Eligibility for Assistance Based on Assets

Per requirements in HOTMA, § 5.618 creates a restriction on the eligibility of a family to receive assistance if the family owns real property that is suitable for occupancy by the family as a residence or has assets in excess of $100,000, as adjusted annually in accordance with the Consumer Price Index for Urban Wage Earners and Clerical Workers. The proposed rule included an exception to the restriction against owning real property suitable for occupancy by the family as a residence if the property does not meet the disability-related needs for all members of the family, including physical accessibility requirements. In response to public comment, HUD is adding language clarifying that the example of physical accessibility requirements is not the sole type of disability-related need that the property must meet for all family members. There are various circumstances where a property may not be suitable for occupancy for a household with a household member with disabilities. Other examples include, but are not limited to, a disability-related need for additional bedrooms, proximity to accessible transportation, etc.

HUD is also adding clarifying language throughout the section, including in § 5.618(a), on the programs covered by the section. In § 5.618(a)(1)(ii), the final rule adds language that clarifies the ability to sell is based on the State and local laws of the jurisdiction where the property is located. HUD has revised § 5.618(a)(1)(ii)(B) to clarify that asset limitations do not apply to a member of a family that jointly owns real property with another non-household member that does not reside with the family when that non-household member lives in the jointly owned property. This can apply in instances where a family member owns a fractional interest of a property with other relatives that do not reside with the family.

HUD has revised § 5.618(a)(2) since the proposed rule to add clarifications and examples of different ways in which a property will be considered ''suitable for occupancy'' under the amended 1937 Act. These clarifications and examples indicate that if a property is geographically located so that the distance or commuting time between the property and the family's place of work or a family member's educational institution would create a hardship for the family, as determined by the PHA or

owner, it may not be suitable. These clarifications and examples also specify that a property is considered unsafe to reside in when the property's physical condition poses a risk to the family's health and safety and the condition of the property cannot be easily remedied. This could include where environmental factors outside the control of the family are contributing to the unsafe condition or where the alterations necessary to make the physical condition of the property safe are cost prohibitive.

HUD is also adding a new provision at § 5.618(a)(2)(v) to clarify that, for purposes of the asset limitation, a property that a family may not reside in under State or local laws of the jurisdiction where the property is located is not a property that is suitable for occupancy by the family as a residence. This can happen when an assisted family owns a commercial property that cannot legally be occupied as a residence by the family, such as a convenience store or a retail establishment. While owning such a property is not the form of property ownership prohibited under HOTMA, HUD notes that the real property would be considered an asset for purposes of determining: net family assets under § 5.603; annual income from net family assets under § 5.609(a)(2); and for purposes of determining if the family owns net family assets in excess of $100,000 under 5.618(a)(1)(i). The real property's value under these regulations is the net cash value of the real property after deducting reasonable costs that would be incurred in disposing of the family's real property, which would include repayment of any mortgage debt or other monetary liens on the real property.

HUD is changing the paragraph header in § 5.618(b) from ''*Self-certification*'' to ''*Acceptable documentation; confidentiality*'' for clarity.

Finally, in § 5.618(d), HUD adds language that states that while the PHA or owner has six months to begin eviction or termination proceedings for families that have excess or prohibited assets, the PHA or owner is still bound by other provisions of law.

For clarity, HUD is also adding a cross-reference to the new restrictions in § 5.618 in the regulations for denial or termination of assistance for the Section 8 moderate rehabilitation, HCV, and public housing programs at §§ 882.515(d), 982.552(b), 960.201(a) and 966.4(l)(2), respectively.

D. HOME Investment Partnerships Program (HOME) Changes

Definitions

Section 92.2 is being amended to add the term *Live-in aide,* which has the same meaning given that term in § 5.403. Section 92.2 is also amended by adding the terms *Foster adult, Foster child, Full-time student,* and *Net family assets,* which are defined in § 5.603. HUD believes that this will help participating jurisdictions (PJs) locate the applicable regulatory definitions for these new or revised terms.

Use of Annual Income in the HOME Program

To determine whether a family is eligible to participate in HOME program activities, a PJ must calculate a family's annual income. HOME program activities include the support and development of affordable rental and homeownership housing, homebuyer downpayment assistance, rehabilitation of owner-occupied housing, and tenant-based rental assistance (TBRA) for very low-income and low-income families as defined in § 92.2. A PJ uses a family's annual income to determine eligibility for: occupancy of HOME-assisted rental unit, purchase of a homeownership unit, receiving homebuyer downpayment assistance, and obtaining rental assistance in TBRA.

The HOME regulations at § 92.203 permit a PJ to use one of two definitions for annual income for each rental project or program assisted with HOME funds: (1) adjusted gross income in IRA Form 1040 Individual Income Tax Return (IRS Form 1040) or (2) annual income as defined at § 5.609. The definition of adjusted gross income in the IRS Form 1040 is not changed in this rulemaking and will continue to align with the definition of adjusted gross income developed by the Department of Treasury. HUD is revising the definition of annual income at § 5.609 as part of this rulemaking and the changes will apply to income calculations made after the effective date of this final rule.

In this final rule, HUD is revising §§ 92.203 and 92.252 to align with the income and net family assets provisions amended by HOTMA and to reduce the administrative burden of calculating income when HOME funds are layered with other HUD programs. The final rule also clarifies who is considered a member of the family for the purpose of calculating income; identifies three cases where a PJ must calculate a tenant's adjusted income; and removes references to and the applicability of the disallowance of earned income at § 5.617 from the HOME program regulations two years after the effective date of the rule in conformity with the revisions to program regulations subject to the 1937 Act.

Use of Adjusted Income in the HOME Program

Under certain circumstances, the HOME program also uses the definition of adjusted income in § 5.611. This definition is used for the calculation of the maximum subsidy allowable for a family receiving TBRA, for the calculation of a family's Low HOME rent in accordance with § 92.252(b)(2), and for the calculation of rent for over-income tenants, in accordance with § 92.252(i)(2).

Annual Income Determinations in the HOME Program

HUD is amending paragraph § 92.203(a) to add the subheading ''*Methods of determining annual income*'' to clarify the section's intent and add new paragraphs (a)(1), (a)(2), and (a)(3) to describe new requirements for how a PJ must determine the annual income of families living in HOME-assisted rental units.

In accordance with new § 92.203(a)(1), a PJ must accept a PHA, owner, or rental subsidy provider's income determinations, in accordance with § 5.609, if a family is applying for or living in a HOME-assisted rental unit and the unit is being assisted by Federal project-based rental subsidy. Similarly, a PJ must accept a State project-based rental subsidy provider's income determination under the rules of that State program. Prior to this rulemaking, this requirement was only described in § 92.252(b)(2). This aligns the calculation of a family's income under the HOME program with the calculation of a family's income in other rental assistance or subsidy programs that assist the same unit. The requirement to accept a PHA's or owner's income determination applies when HOME funds are used in a project where units also receive a Federal project-based rental subsidy such as Section 8 Project-Based Rental Assistance, PBV, project-based assistance under HUD–VASH Vouchers, or rental assistance provided in conjunction with the Section 202 Supportive Housing for the Elderly Program (Section 202) or the Section 811 Supportive Housing for Persons with Disabilities Program (Section 811). For these units, the family's income must be calculated in accordance with the rules of the program providing the rental assistance or subsidy.

In accordance with § 92.203(a)(1), PJs must accept the PHA, owner, or rental

subsidy provider's determinations of annual and adjusted income conducted at initial occupancy, interim reexaminations, and annual reviews of eligibility, as applicable under that program's rules. For subsequent income determinations during the HOME affordability period, a PJ must continue to accept the income determinations performed by the PHA, owner, or rental subsidy provider in accordance with the rules of those programs.

In an effort to further align HOME with the HCV Program as well as other forms of Federal tenant-based rental assistance, HUD is providing a new flexibility for PJs in § 92.203(a)(2). This new flexibility allows a PJ to accept a Federal tenant-based rental assistance provider's income determinations if the family is applying for or living in a HOME-assisted rental unit and the family is being assisted by a Federal tenant-based rental assistance program. This flexibility is an option when tenants in HOME-assisted units are assisted by programs that provide Federal tenant-based rental assistance such as the HCV program (including special purpose vouchers such as HUD–VASH vouchers), HOME-American Rescue Plan (HOME–ARP) Program, Emergency Solutions Grants Program (ESG), and the Housing Opportunities for Persons with AIDS (HOPWA) Program. For these units, the PJ may accept the income determinations made for the family in accordance with the rules of the program providing the rental assistance. When exercising this option, the PJ may accept determinations of annual and adjusted income conducted at initial occupancy, interim reexaminations, and annual reviews of eligibility, as applicable under that program's rules. However, a PJ must ensure these units comply with HOME rent limitations at § 92.252 (*e.g.,* High HOME, Low HOME, and SROs).

This rule does not change the requirement that a PJ enter into agreement with the owner, developer, or sponsor of rental housing to commit HOME funds and impose the HOME affordability restrictions. However, HUD recommends that a PJ also enter into an agreement with the PHA, owner, or rental subsidy provider for Federal or State project-based rental subsidy programs, or with the rental assistance provider for Federal tenant-based rental assistance programs, to facilitate the sharing of income and rent determinations when income will be calculated in accordance with § 92.203(a)(1) or (2). This will ensure the project is able to meet the HOME rental occupancy requirements established in the HOME written agreement and 24 CFR part 92 (*e.g.,* fixed or floating, High HOME, and Low HOME unit mix).

For HOME-assisted units not assisted by Federal or State project-based rental subsidy or where a PJ has chosen not to accept a PHA, owner, or rental subsidy provider's determination of annual income, the PJ is subject to § 92.203(a)(3) and must continue to comply with the HOME requirements regarding determination of income in § 92.203(b) through (f), as applicable.

In applying § 92.203(a)(1) and (2), the PJ must accept a PHA's, owner, rental subsidy provider, or rental assistance provider's determination of annual and adjusted income under the rules of the applicable program. For HUD project-based rental subsidy programs, this includes but is not limited to the determination to: make the deductions under § 5.611(a), provide any permissive deductions under § 5.611(b), grant financial hardship exemptions to the family under § 5.611(c) through (e), and allow for any disallowance of earned income made under those program rules in accordance with § 5.617 (while those provisions remain in place). HUD also reminds PJs that, when applying § 92.203(a)(1) and (2), there are new flexibilities in § 5.609(c)(3) allowing PHAs administering HCV and owners of projects with project-based rental subsidies a safe harbor that allows them to accept annual income determinations made by administrators of means-tested forms of Federal public assistance such as Temporary Assistance for Needy Families (TANF) or Supplemental Nutrition Assistance Program (SNAP). To reduce burden and preserve program alignment, HUD is requiring that where the PHA or owner has accepted such a determination pursuant to § 5.609(c)(3), the PJ must also accept the PHA or owner's determination of annual and (as applicable) adjusted income regardless of whether the safe harbor was used in making that determination.

Furthermore, HUD similarly reminds PJs that though the HOME program does not incorporate asset limitations because there is no statutory basis to exclude families from the HOME program based upon the amount of assets that are held by those families, families that are subject to the asset limitations under § 5.618 because of their participation in a different program may be denied continued assistance under that program. PJs are under no requirement under the HOME program to exclude these families from participation and must continue to follow the tenant protection requirements in § 92.253(c) even if the families may no longer receive assistance under other HUD programs because of the family's assets. A HOME PJ may only terminate the tenancy or refuse to renew the lease of a tenant of rental housing assisted with HOME funds for good cause, as defined in § 92.253(c), which does not include having the type of assets or an amount of assets in excess of the limitations in § 5.618.

Where the PHA or owner enforces the asset limitations and terminates assistance to the unit or the family because the family's net family assets exceed the asset limitations in § 5.618, the family may remain in the HOME-assisted rental unit and the PJ must determine the family's annual income in accordance with § 92.203(b) through (e); calculate the family's adjusted income, if applicable, in accordance with § 92.203(f); and charge a rent in accordance with § 92.252(a) through (i).

Required Documentation for Annual Income Calculations in the HOME Program

Unless a PJ falls into one of the exceptions listed in § 92.203(a)(1) or (2), a PJ must calculate annual and (as applicable) adjusted income each year for HOME-assisted families in accordance with § 92.203(a)(3) and (f). HUD is not changing the requirements for what evidence a PJ must use for the first year the family is assisted or the documentation options available to the PJ in subsequent years. However, due to the changes discussed above, HUD is redesignating these options from § 92.203(a)(1) and (a)(2) to paragraphs § 92.203(b)(1) and (b)(2) and redesignating the introductory text to a new paragraph (b) and revises the new paragraph (b)(1) to update the reference to the new paragraph § 92.203(b)(1)(i). HUD also revises the paragraph to add the heading ''*Required Documentation for Annual Income Calculations.*''

Defining Income for Eligibility in the HOME Program

While HUD is not changing the two options of calculating annual income as part of this rulemaking, HUD is redesignating the paragraph explaining the two options of calculating annual income from § 92.203(b) to § 92.203(c), is revising new paragraph § 92.203(c) to add subheading *Defining income for eligibility,* and is incorporating revisions made to the definitions of annual income at § 5.609(a) and (b). Notably, this revision in § 92.203(c)(1) does not incorporate § 5.609(c), which describes how to calculate annual income in the public housing or Section 8 programs and is therefore not applicable to the HOME program. Section 92.203(c)

retains the reference to the definition of net family assets at § 5.603 used to determine the imputed income on assets over $50,000 based on the current passbook savings rate in § 5.609(a), as the new definition has no impact on HOME-funded owner rehabilitation activities. For HOME-assisted owner-occupied rehabilitation activities, a PJ would continue to exclude the value of a homeowner's principal residence pursuant to new paragraph § 92.203(c)(1) from the calculation of net family assets, as defined in § 5.603.

Using Income Definitions in the HOME Program

HUD is also redesignating the paragraph explaining that PJs have the option of using one of these two income definitions from § 92.203(c) to § 92.203(d), and adding a clarification of existing policy in the redesignated § 92.203(d). This clarification explains that though a PJ has the option to use either the definition of adjusted gross income contained in the IRS Form 1040 or the definition of annual income in § 5.609 as the definition of annual income for each rental project, there are some cases where a PJ will be required to use the definition of annual income in § 5.609 for the calculation of income for a rental project. This is because for rental housing projects containing units assisted by a Federal or State project-based rental subsidy, the PJ must accept the determination of annual and adjusted income made by the PHA, owner, or rental subsidy provider under that program's rules. Moreover, in cases where the PJ is accepting the calculations of a rental assistance provider's determination of annual and adjusted income for tenants receiving Federal tenant-based rental assistance, the PJ must calculate income in accordance with the rules of that program. For HUD-assisted tenant-based rental assistance and project-based rental subsidy programs, this would generally be the calculation of annual income under § 5.609. While this has been a longstanding HUD policy contained in § 92.252, HUD is making this clarification in the income regulations at § 92.203 to help PJs align the HOME program with project-based rental assistance programs.

Determining Family Composition and Projecting Income in the HOME Program

HUD is redesignating paragraph (d) in § 92.203 as paragraph (e) and adding the heading ''*Determining Family Composition and Projecting Income*'' to the redesignated paragraph (e). HUD is also adding clarifications of existing policy that annual income includes income from all persons living in the household except live-in aides, foster children, and foster adults. PJs must project annual income based on the requirements in § 92.203(e) regardless of which definition of annual income in § 92.203(c) the PJ applies to its HOME-funded programs or to each HOME-assisted rental project (§ 5.609 or IRS Form 1040).

In § 92.203(e)(1), HUD is also permitting grantees to use the certification process established in § 5.618(b) when imputing income for families whose net family assets, as defined in § 5.603, do not exceed $50,000 without taking further steps to verify the accuracy of the declaration. HUD is also clarifying that when families are homeowners applying for homeowner rehabilitation assistance under the HOME program, they may also exclude the value of their principal residence from the calculation of their Net Family Assets for purposes of the certification. This rule also clarifies, in § 92.203(e)(1), that the PJ must exclude the Federal tenant-based rental assistance provided to the family or any Federal or State project-based rental subsidy provided to the HOME rental housing unit from the calculation of annual income when determining eligibility for occupancy of HOME-assisted rental housing units.

The redesignated paragraph § 92.203(e)(3) restates the requirement that PJs continue to disallow increases in earned income of persons with disabilities occupying HOME-assisted rental units or receiving TBRA in accordance with § 5.617 until the elimination of the requirement. This requirement is derived from § 5.617(e). As § 5.617 will lapse two years after the effective date of this rule, HUD is revising paragraph § 92.203(e)(3), to explain that the requirements of § 92.203(e)(3) shall lapse on January 1, 2026.

Determining Adjusted Income in the HOME Program

In § 92.203, HUD redesignates paragraph (e) as paragraph (f), revises new paragraph (f), and adds subheading *Determining Adjusted Income.* HUD also clarifies the three scenarios in which the PJ must calculate a tenant's adjusted income and added new paragraphs (f)(1)(i), (f)(1)(ii), (f)(1)(iii), and (f)(2). The new paragraph (f)(1)(i) incorporates the revisions to the definition of adjusted income at § 5.611(a) and (c) and requires the PJ to apply the deductions at § 5.611(a) for families in HOME TBRA. The PJ may grant financial hardship exemptions according to the requirements of the revised § 5.611(c) through (c) to families affected by the statutory increase in the threshold to receive health and medical care expense and reasonable attendant care and auxiliary apparatus expenses deductions from annual income under § 5.611(a)(3), as well as families that apply for a continued child care expense deduction. To use the authority, the PJ must develop policies and procedures for qualifying and granting hardship exemptions in accordance with the requirements contained in § 5.611(e).

The new paragraph (f)(1)(ii) requires the PJ to apply the mandatory deductions from income established at § 5.611(a) when determining a family's adjusted income for the purpose of calculating the rent applicable to a tenant in Low HOME Rent unit that is subject to the provisions of new paragraph § 92.252(b)(2)(i). Furthermore, the PJ may grant financial hardship exemptions according to the requirements of § 5.611(c) through (e) to families affected by the statutory increase in the threshold to receive health and medical care expense and reasonable attendant care and auxiliary apparatus expenses deductions from annual income under § 5.611(a)(3), as well as families that apply for a continued child care expense deduction. To use the authority, the PJ must develop policies and procedures for qualifying and granting the hardship exemptions in accordance with the requirements contained in § 5.611(e).

The new paragraph (f)(1)(iii) requires the PJ to apply the mandatory deductions from income established at § 5.611(a) when determining a family's adjusted income for the purpose of calculating the rent applicable to over-income tenants in accordance with § 92.252(i)(2).

Similar to earlier sections of the rule, the new paragraph (f)(2) clarifies that for Low HOME Rent units that receive Federal or State project-based rental subsidy, the PJ does not have to calculate the family's adjusted income and must accept the PHA, owner, or rental subsidy provider's determination of adjusted income under that program's rules.

Qualification as Affordable Housing: Rental Housing in the HOME Program

While HUD is not changing the definitions of the High or Low HOME rents, HUD is revising § 92.252(b)(2) by splitting it into two paragraphs. Section 92.252(b) states that a PJ has the option of charging a family either (1) a rent that does not exceed 30 percent of the annual income of a family whose

income equals 50 percent of the median income for the area, as determined by HUD, or (2) a rent that is equal to 30 percent of a family's adjusted income. This final rule separates into new § 92.252(b)(2)(ii) the conditions that a HOME-assisted unit that also receives Federal or State project-based rental subsidy must meet in order for a project owner to charge the maximum rent allowable under the Federal or State project-based rental subsidy program.

To conform HOME requirements for subsequent income determinations, HUD is revising paragraph (h) of § 92.252 to update the cross references from § 92.203 to § 92.203(b)(1), from § 92.203(a)(1)(i) to § 92.203(b)(1)(i), and from § 92.203(a)(1)(ii) to § 92.203(b)(1)(ii). In the sixth year of a HOME rental project's affordability period, a PJ is not required to review source documentation for families whose incomes are determined in accordance with § 92.203(a)(1) and (2). HUD further specifies that if rental housing projects contain units assisted by a Federal or State project-based rental subsidy, the PJ must accept the determination of annual and adjusted income made by the PHA, owner, or rental subsidy provider under that program's rules. The revisions also permit a PJ to accept a rental assistance provider's income determination if the family is living in a HOME-assisted rental unit and the family is being assisted by Federal tenant-based rental assistance.

E. Housing Trust Fund (HTF) Changes

Definitions

Section 93.2 is being amended to add the term *Live-in aide,* which has the same meaning given that term in § 5.403. Section 93.2 is also amended by adding the terms *Foster adult, Foster child, Full-time student,* and *Net family assets,* which are defined in § 5.603. HUD is also adding a definition of *Public Housing Agency (PHA)* that provides that this term has the same meaning as the definition provided in § 5.100. HUD believes that this will help HTF grantees locate and use the applicable regulatory definitions in calculating income.

Use of Annual Income in the HTF Program

To determine whether a family is eligible to participate in HTF program activities, the HTF grantee must calculate the family's annual income. HTF program activities include the support and development of affordable rental and homeownership housing and homebuyer downpayment assistance for extremely low-income and very low-income families as defined in § 93.2. An HTF grantee uses a family's annual income to determine eligibility for occupancy of an HTF-assisted rental unit, purchase of a homeownership unit, and receiving homebuyer downpayment assistance.

In this final rule, HUD is revising § 93.151 and § 93.302 to align with HOTMA's income and net family assets provisions and reduce the administrative burden of calculating income when HTF funds are layered with other HUD programs. This final rule also codifies existing program requirements regarding income calculations, establishes who is considered a member of the family, explains how to determine the annual income of a family (projecting income), sets a limit on how long income determinations are good for, and clarifies that income or assets enhancement derived from the investment of HTF funds in a project cannot be included when calculating annual income. Although HUD aligned HTF with other HUD rental programs as much as possible, the Department codified these requirements to avoid confusion on which income requirements in the final rule applied to the HTF program.

Annual Income Determinations in the HTF Program

HUD is revising § 93.151(a) to describe how grantees must determine the annual income of families living in HTF-assisted rental units. In § 93.151(a)(1), HUD specifies that if a family is applying for or living in an HTF-assisted rental unit, and the unit is assisted under the PHP, then an HTF grantee must accept the PHA's determination of the family's annual income and adjusted income under §§ 5.609 and 5.611, respectively. This requirement applies when HTF funds are used in projects that also include public housing funding in accordance with § 93.203.

In § 93.151(a)(2), HUD explains that if a family is applying for or living in an HTF-assisted rental unit, and the family is assisted under a Federal tenant-based rental assistance program, then an HTF grantee must accept the rental assistance provider's determination of the family's annual income and adjusted income under the rules of that program. This requirement applies when HTF funds are used in projects that also include families that receive Federal tenant-based rental assistance such as HOME TBRA, HOME–ARP TBRA, HCVs, ESG, CDBG–CV, HUD–VASH, and HOPWA assistance.

Section 93.151(a)(3) explains that if a family is applying for or living in an HTF-assisted rental unit and the unit is assisted with a Federal or State project-based rental subsidy, then an HTF grantee must accept the PHA, owner, or rental subsidy provider's determination of the family's annual income and adjusted income under that program's rules. This requirement applies when HTF funds are used in projects that also receive Federal or State project-based rental subsidy such as Section 8 Project-Based Rental Assistance, PBV, project-based assistance under HUD–VASH Vouchers, or rental assistance provided in conjunction with the Section 202 and Section 811 Programs. This aligns the calculation of a family's income under the HTF program with the calculation of a family's income in other rental assistance or project-based rental subsidy programs that assist the same family or unit as the HTF assistance.

In accordance with § 93.151(a)(1) through (3), HTF grantees must accept examinations of a family's annual and adjusted income conducted at initial occupancy, interim reexaminations, and annual reviews of eligibility, as applicable under that program's rules. This includes but is not limited to the determination to: make the deductions under § 5.611(a), provide any permissive deductions under § 5.611(b), grant financial hardship exemptions to the family under § 5.611(c) through (e), and allow for any disallowance of earned income made under those program rules in accordance with § 5.617 (while those provisions remain in place).

This rule does not change the requirement that an HTF grantee enter into an agreement with the recipient (owner or developer) of rental housing to commit HTF funds and impose the HTF affordability restrictions. However, HUD recommends that an HTF grantee also enter into agreement with the PHA, rental assistance provider, rental subsidy provider, or owner, as applicable, to facilitate the sharing of income and rent determinations to ensure the project is able to meet the HTF rental occupancy requirements established in the HTF written agreement and 24 CFR part 93 (*e.g.,* fixed or floating and applicable HTF rents).

HUD also reminds HTF grantees that § 5.609(c)(3) contains new flexibilities allowing PHAs administering HCV and public housing and owners of projects with project-based rental subsidies a safe harbor that allows them to accept annual income determinations made by administrators of means-tested forms of Federal public assistance such as TANF

or SNAP. To reduce burden and preserve program alignment, HUD is requiring that where the PHA or owner has accepted such determination pursuant to § 5.609(c)(3), the HTF grantee must also accept the PHA or owner's determination of annual and (as applicable) adjusted income regardless of whether the safe harbor was used in making that determination.

HUD similarly reminds HTF grantees that though the HTF program does not incorporate asset limitations because there is no statutory basis to exclude families from the HTF program based upon the amount of assets that are held by those families, families that are subject to the asset limitations under § 5.618 because of their participation in a different program may be denied continued assistance under that program. HTF grantees are under no requirement under the HTF program to exclude these families from participation and must continue to follow the tenant protection requirements in § 93.303(c) even if the families no longer receive assistance under other HUD programs because of the family's assets. An HTF grantee may only terminate the tenancy or refuse to renew the lease of a tenant of rental housing assisted with HTF funds for good cause under § 93.303(c), which does not include having the type of assets or an amount of assets in excess of the limitations in § 5.618.

Where the PHA or owner enforces the asset limitations and terminates assistance to the unit or the family because the family's net family assets exceed the asset limitations in § 5.618, the family may remain in the HTF-assisted rental unit and the grantee must determine the family's annual income in accordance with § 93.151(b) through (e) and charge a rent in accordance with § 93.302(b).

Under § 93.151(a)(4), for HTF-assisted units not assisted by the PHP or Federal or State project-based rental subsidy, and for families that are not assisted by Federal tenant-based rental assistance, a grantee must (a) continue to comply with the HTF requirements to determine annual income of families by examining at least 2 months of source documents at initial occupancy and every six years of the HTF period of affordability, (b) project the prevailing rate of income of the family, (c) specify which of three methods to determine annual income (*i.e.,* source, self-certification, written statement) will apply to subsequent income determinations (other than at initial occupancy and every six years) during the HTF affordability period.

While HUD is not changing the two options of calculating annual income as part of this rulemaking, HUD is revising § 93.151(b)(1) to incorporate HUD's revisions to the definition of income at § 5.609(a) and (b), which is the definition of income provided by HOTMA. Notably, this requirement does not fully incorporate § 5.609(c), which describes how to calculate annual income in the public housing or Section 8 programs. The section does incorporate revisions to the definition of Net Family Assets at § 5.603 that are used to determine the imputed income on assets over $50,000 based on the current passbook saving rate in § 5.609(a).

HUD is also revising § 93.151(b)(2) to add a clarification of existing policy. An HTF grantee has the option to use either the definition of adjusted gross income contained in the IRS Form 1040 or the definition of annual income in § 5.609 as the definition of annual income for each rental project. While the provisions addressing the use of the IRS Form 1040 are not changing, HUD is revising the provisions allowing grantees to use the definition of annual income in § 5.609 to specify that there are some cases where an HTF grantee will be required to use the definition of annual income in § 5.609 for the calculation of income for a rental project. This is because for rental housing projects containing units assisted through the PHP, a Federal or State project-based rental subsidy, or through a Federal tenant-based rental assistance program, the HTF grantee must accept the determination of annual and adjusted income made under that program's rules. While this has been a HUD policy in § 93.302(b)(2) for units assisted by a Federal or State project-based rental subsidy, HUD is expanding this policy to also align HTF with the public housing and other Federal tenant-based rental assistance programs in response to public comment and HUD's policy of aligning HUD programs. HUD is making this clarification in the income regulations at § 93.151 to better help HTF grantees in complying with HTF program requirements.

HUD is also revising the header for paragraph (d) of § 93.151 to read as ''*Required documentation for Annual Income calculations*'' to clarify the intent of the paragraphs and align with the HOME income rules.

Determining Family Composition and Projecting Income in the HTF Program

HUD is revising § 93.151 to add a new paragraph (e), entitled ''*Determining Family Composition and Projecting Income*'' to clarify existing HUD policy that grantees must calculate annual income by projecting the prevailing rate of income of the family at the time the grantee determines that the family is income eligible. In addition, HUD clarifies that annual income includes income from all persons living in the family except live-in aides, foster children, and foster adults regardless of which definition of annual income the grantee applies to its HTF-assisted programs or projects. HUD also clarifies that income determinations made in the HTF program are valid for a period of 6 months. Unless the HTF grantee is exempt from projecting a family's annual income because it is accepting the annual income calculation performed pursuant to § 93.151(a)(1) through (3), the grantee may not assist a family whose income determination was made more than 6 months prior to the provision of HTF assistance. In § 93.151(e)(1), HUD is also permitting grantees to use the certification process established in § 5.618(b) when imputing income for families whose net family assets, as defined in § 5.603, do not exceed $50,000, without taking further steps to verify the accuracy of the declaration. Lastly, HUD clarifies that for families living in HTF-assisted rental housing units, any rental assistance provided to the family under a Federal tenant-based rental assistance program or any Federal or State project-based rental subsidy provided to the HTF rental housing unit is not tenant income for purposes of determining annual income.

Use of Adjusted Income in the HTF Program

HUD also revises § 93.151 to add a new paragraph (f) to clarify that grantees do not have to calculate adjusted income in the HTF program. This paragraph explains that the only time a tenant's adjusted income is relevant to the HTF program is if a family or unit is assisted with Federal tenant-based rental assistance (*e.g.,* HCV program, HOME tenant-based rental assistance, etc.), public housing, or by a Federal or State project-based rental subsidy. In those cases a grantee must then accept the determination of adjusted income made under that program's rules.

Qualification as Affordable Housing: Rental Housing Under the HTF Program

HUD revises § 93.302(e)(1) to update the reference to § 93.151(c) to read as § 93.151(d). In addition, HUD revises § 93.302(e)(2) to conform to the new requirement that grantees must continue to accept annual and adjusted income determinations performed under the rules of those programs for subsequent income determinations during the HTF affordability period for HTF-assisted

units where the unit is assisted by the PHP, through Federal or State project-based rental assistance subsidies, or where the tenant is assisted by Federal tenant-based rental assistance. In the sixth year of an HTF rental project's affordability period, a grantee is not required to review source documentation for families assisted under the PHP, a Federal tenant based rental assistance program, or by a Federal or State project-based rental subsidy. Additionally, HUD notes that § 93.302(b) of the HTF regulation already specifies that for projects with project-based rental subsidies, the HTF grantee may continue to permit the project owner to charge the maximum rent allowable under the Federal or State project-based rental subsidy program. Lastly, HUD amends the last sentence of paragraph (e) to update the reference to § 93.151(a)(1)(iii) to read as § 93.151(d)(2).

F. HOPWA Program Changes

HOPWA Income Determinations

This final rule makes various changes to clarify how jurisdictions should make income determinations for the HOPWA program for resident rent payments. As explained in the proposed rule's preamble, Section 859 of the AIDS Housing Opportunity Act (42 U.S.C. 12908) requires that HOPWA rental assistance ''be provided to the extent practicable in the manner'' of the Section 8 program. Accordingly, the changes this final rule makes to the HOPWA regulations in 24 CFR part 574 generally track the changes this final rule makes regarding income determinations, income examinations, income reexaminations, net family asset requirements, and de minimis errors for the HCV program, the Section 8 program that is the most practicable for the largest share of HOPWA-funded projects to track. Accordingly, HOPWA has adopted most of the provisions in §§ 5.609, 5.611, 5.617, and 5.618, where practicable, in addition to many of the changes in part 982. Although HUD recognizes additional regulatory changes could be made to bring HOPWA rental assistance into closer alignment with the Section 8 program, HUD has determined some changes are not practicable to implement in HOPWA, as explained below, and other changes would require a separate rulemaking because they are beyond the scope of this particular rulemaking.

As discussed in the proposed rule, this final rule revises part 574 to apply the part 5 definition of net family assets in HOTMA as applied to the Section 8 program, except the value of a home of a participant receiving short-term mortgage or utility assistance under § 574.300(b)(6) or other assistance for which homeowners are eligible under the HOPWA program is excluded from the definition.

Section 574.310(d) is being revised to clarify the use of annual and adjusted income in the calculation of resident rent payments for persons receiving rental assistance or residing in any rental housing assisted under the HOPWA program, excluding short-term supported housing. Section 574.310(d) requires that the resident rent payments shall be the higher of three options. HUD is clarifying that for option one, the rent payment including utilities would be 30 percent of the family's monthly adjusted income. Option two is clarified as ten percent of the family's monthly income. Option three, which applies if a family receives welfare assistance from a public agency, remains unchanged.

As stated in § 574.310(e)(1)(i), references to PHAs and responsible entities in §§ 5.609 and 5.611 are understood to refer to the grantees or project sponsors that are determining income. This provision has been added to provide clarity to the HOPWA grantees on their roles and responsibilities.

HUD has determined that it is not practicable to permit permissive deductions in the HOPWA program as this final rule permits PHAs to do in the HCV program under § 5.611(b). HOTMA amends section 3 of the 1937 Act to provide PHAs with the ability to apply permissive deductions in the public housing, HCV, and Section 8 moderate rehabilitation programs. Other entities, even when administering the 1937 Act programs, were not provided this statutory authority. Likewise, HUD does not see any intent or justification in either HOTMA or the HOPWA program statute to give all HOPWA grantees and project sponsors the same ability and accountability as PHAs with developing and administering permissive deductions. Moreover, unlike in the HCV program, PHAs are just one subset of the entities that may administer HOPWA-funded rental assistance and housing, and HUD sees no intent or justification in HOTMA or the HOPWA program statute to provide PHAs with greater ability or accountability than other HOPWA grantees in administering HOPWA assistance. Accordingly, the HOPWA rule does not incorporate the part 5 provision on permissive deductions.

Additionally, unlike the Section 8 programs that make hardship exemptions mandatory, this final rule allows HOPWA grantees to make their own determination on whether to grant hardship exemptions. If a grantee implements hardship exemptions in their program, the grantee must follow the requirements of the revised § 5.611(c) through (e) for families affected by the statutory increase in the threshold to receive health and medical care expense and reasonable attendant care and auxiliary apparatus expenses deductions from annual income under § 5.611(a)(3), as well as families that apply for a continued child care expense deduction. To use the authority, the grantee must develop policies and procedures for qualifying and granting hardship exemptions in accordance with the requirements contained in § 5.611(c) through (e). Given the amount of administrative work required to institute these hardship exemptions as provided for the Section 8 programs, HUD has determined that it is practicable only to apply § 5.611(c)–(e) to HOPWA grantees who determine they have the capacity and choose to make available the hardship exemption as provided by § 5.611(c)–(e). In addition to the grantee's discretion to grant hardship exceptions, grantees are subject to Federal nondiscrimination requirements, including the obligation to provide reasonable accommodations that may be necessary for households with family members with disabilities.

This rule also revises part 574 to incorporate HOTMA's provisions for restrictions on assistance to families with certain assets but only for activities subject to the resident rent payment requirements.

Section 574.310(e)(1)(vi) restates the requirement that grantees disallow increases in earned income of persons with disabilities occupying HOPWA-assisted rental units as stated in § 5.617(e). As HUD is removing the requirement in § 5.617 two years after the effective date of this rule, HUD is only requiring that grantees follow § 5.617 during that time period.

Section 574.310(e)(3) details requirements for obtaining and documenting third-party income verification consistent with the provisions in § 982.516(a), aligning HOPWA requirements with the HCV program to the extent practicable. HUD recognizes that grantees do not have access to the same information that PHAs do; however, HUD believes the flexibility built into the regulation still makes it practicable for HOPWA grantees and project sponsors to comply with third-party verification requirements.

Lastly, § 574.310(e)(4)(v) allows a HOPWA grantee to provide a family with retroactive rent decreases in the event that the family fails to provide a grantee with timely information about a decrease in income that would trigger an interim reexamination. In these instances, just as in the HCV program, HOPWA grantees will have the option of retroactively adjusting rent as of the date of the change leading to the interim reexamination of family income or the effective date of the family's most recent previous interim or annual reexamination (or initial examination if that was the family's last examination). To provide a retroactive rent decrease to an eligible family, the HOPWA grantee must develop a written policy allowing for retroactive rent decreases. HUD believes that these revisions may be made to the HOPWA regulations because they are consistent with changes in the HCV program and because HUD has determined that it is practicable to allow HOPWA grantees the same discretion to apply rent decreases retroactively, as is performed in the HCV program. For more information on how this provision operates, please see the extended Preamble discussion on Interim Reexaminations below.

G. Supportive Housing for the Elderly (Section 202) and Supportive Housing for Persons With Disabilities (Section 811) Programs

Definitions

This final rule updates certain definitions in the Section 202 and Section 811 program regulations to revise outdated references, clarify ambiguous terms, and consistently apply Section 8 provisions in part 5 of this title to the Section 202 and Section 811 programs. HUD is adding a definition of ''Net family asset'' to § 891.105 and defining it consistently with § 5.603. HUD is also revising the defined term ''Tenant payment to Owner'' at § 891.105 to ''Tenant rent'' while maintaining its definition. HUD is updating the corresponding instances of ''tenant payment'' (in part 891 that do not mean ''Total tenant payment'') to ''Tenant rent.'' This change does not affect the use of the defined term and merely avoids confusion between ''tenant payment'' and ''Total tenant payment.'' HUD is defining ''Gross rent'' for all Section 202 and Section 811 projects at § 891.105 consistent with the Section 8 Housing Assistance Payment program at § 880.603(c)(3). HUD is therefore removing the project-specific definitions of ''Gross rent'' for Section 202/8 projects at § 891.520 and for Section 202/162 projects at § 891.655.

Use of Section 8 Income Reexamination and Eligibility Requirements in the Section 202 and Section 811 Programs

The Section 202 and Section 811 programs have income eligibility requirements, including income reexamination requirements, that follow Section 8 requirements. In this final rule, HUD is revising §§ 891.410(g)(1) and (3) (Section 202 program) and §§ 891.610(g)(1) and (3) (Section 811 program) to replace outdated cross references to part 813 of this chapter, which HUD removed in a final rule that took effect November 18, 1996 (61 FR 54492), with references to the Section 8 project-based assistance program at § 5.657. These references provide the regular income reexamination requirements as well as the income eligibility requirements. HUD is further revising the interim reexamination requirements at § 891.410(g)(2) and § 891.610(g)(2) by replacing the references to lease provisions with references to the Section 8 project-based assistance program at § 5.657. These changes provide for consistent application of Section 8 requirements in part 5 to the Section 202 and Section 811 programs and do not substantively change the requirements for grantees. Finally, HUD is revising § 891.410(g)(3)(i) to clarify that termination of eligibility for project rental assistance payment does not mean removal of the unit or residential space from the Project Rental Assistance Contract (PRAC).

Technical Amendments

HUD is making several technical amendments to part 891 in this final rule. This final rule updates outdated citations in the Section 202 and Section 811 program regulations. HUD is removing and reserving § 891.230 because it purports to apply selection preferences in part 5, subpart D, but there are no longer selection preferences defined in part 5 (including subpart D). HUD is making editorial revisions to § 810.410(g)(1) to discuss changes to payment amounts in one sentence and changes to the unit size in another sentence. HUD is also removing the reference to § 5.410(g) for informal review provisions for the denial of a Federal preference at § 891.610(e) because § 5.410(g) was removed. These changes will not affect grantees in a substantive manner, because the references are to provisions previously eliminated by statute and removed by HUD in a final rule that took effect April 28, 2000 (65 FR 16720).

This final rule also clarifies that the new ''Net family assets'' definition this rule adds to § 5.603 is applicable to the Section 202 and Section 811 programs, and there is no discretion to use the IRS income definition as suggested in the ''HOTMA Section 102'' chart in the proposed rule. The proposed rule's chart referenced the IRS definition; this was a drafting error. This final rule also clarifies that the hardship exemptions provided at § 5.611(c) through (e) are applicable to the Section 202 and Section 811 programs. The ''HOTMA Section 102'' chart in the proposed rule mistakenly stated that the hardship exemptions were not applicable; this error resulted from HUD conflating ''adjusted income'' and ''minimum rent.''

Finally, this final rule replaces ''should'' with ''must'' in § 891.440 regarding Section 202/811 owners providing utility data as part of a utility allowance analysis. This change clarifies that providing these data is a requirement, which is not a substantive change because the utility allowance analysis has always treated this as a requirement.

H. PHA Requirements

Over-Income Families in Public Housing

Based on the public comments received during the reopened comment period, HUD makes changes to the new § 960.507, adds a new § 960.509, and inserts cross-references accordingly in §§ 5.520, 5.628, 960.253(a)(3) and (f)(1), 960.257(a)(5) and (b)(4) and 966.4(a) and (l). HUD also adds new or amended definitions at § 960.102, including ''alternative non-public housing rent'' (alternative rent), ''covered person,'' ''non-public housing over-income family'' (NPHOI family), and ''over-income family'' (OI family) which are discussed above. Small additional changes for clarity are also added throughout. Additionally, HUD adds a sentence regarding compliance for NPHOI families to § 960.600.

In § 960.206, HUD adds a new paragraph (b)(6) stating that the PHA may adopt a preference for admission of current NPHOI families who become a low-income family as defined in § 5.603(b) and are eligible for admission to the PHP. PHAs whose policy is to terminate OI families after the 24 consecutive month grace period may not use this preference because this preference may not be applied to current public housing families or families who have vacated the public housing project.

In § 960.253(a), HUD adds a new paragraph (3) in relation to the choice of rent for NPHOI families. The intent of this new paragraph is to make clear that, if allowed by PHA policy to remain in a public housing unit, NPHOI families will not have a choice in rent and instead must pay the alternative rent as defined in § 960.102. Paragraph (f)(1) of § 960.253 has been revised to address the new requirements for PHAs when conducting reexamination of family income for families paying the flat rent after a family is determined to be OI. Currently, the PHA conducts a reexamination of family income and composition at least once every three years for a family paying the flat rent. In the proposed rule, this paragraph had been modified to make clear that once a PHA determines a family is OI, the PHA must follow the income examination, documentation, and notification requirements under § 960.507(c) including conducting a reexamination of family income annually instead of once every three years.

In § 960.257(a)(5), HUD makes clear that the PHA may not conduct an annual reexamination of family income for NPHOI families. In § 960.257(b)(4), HUD clarifies that when OI families are in the period of up to six months before their tenancy is terminated, the PHA must conduct an interim reexamination of family income as otherwise required because the OI family is still a program participant prior to termination. However, the resulting income determination will not make the family eligible to remain in the PHP beyond the period defined by PHA policy.

HUD is making extensive changes to the proposed § 960.507. Throughout the sections addressing OI families, HUD clarifies that the period of time a family has to reside in their unit before having to vacate or pay a higher rent is 24 consecutive months, rather than 2 years.

HUD also includes a new § 960.509, covering the provisions that must be in leases provided to NPHOI families paying the alternative rent. HUD also makes conforming edits to use defined terms or terms more understood as part of the PHP, rather than introducing new terminology.

In § 960.507(a)(1), HUD clarifies that the OI provisions at § 960.507 apply to all families in the PHP, including families in the FSS program, or receiving the Earned Income Disregard (EID). In paragraph (a)(1), HUD has added language specifying the following: (1) mixed families (as defined in § 5.504) who are NPHOI families pay the alternative rent in accordance with the continued occupancy policy for OI families; (2) NPHOI families cannot participate in public housing resident councils; (3) NPHOI families cannot participate in programs only for public housing or low-income families; and (4) NPHOI families cannot receive Federal assistance, including a utility allowance, from PHAs.

In paragraph (a)(2), HUD states that PHAs must implement the requirements of § 960.507 by amending all applicable admission and continued occupancy policies according to the provisions in 24 CFR part 903. All PHAs must have effective OI policies, consistent with § 960.507, no later than 120 days after the date of publication of this final rule in the **Federal Register**. HUD has determined that this requirement is fair to PHAs considering PHAs have had years of prior notice that these policies will be required as detailed in HUD's July 26, 2018 notice (83 FR 35490) (2018 FR Notice) and Notice PIH–2019–11(HA) issued May 3, 2019.[7] The 2018 FR Notice announced the official applicable effective date of the provisions of Section 103 of HOTMA as September 24, 2018, and instructed PHAs to complete the process for amending their OI policy within six months after the applicable date of the 2018 FR Notice or by March 24, 2019.

It should be noted that OI families who have already exceeded the 24 consecutive month grace period, in accordance with a continued occupancy policy established in compliance with the 2018 FR Notice, are not entitled to another 24 consecutive month grace period when the rule is published. However, until this rule is effective, HUD will not enforce any requirement to terminate OI families who exceed the OI limit for 24 consecutive months. If a PHA chooses not to enforce an established termination policy, then the PHA must continue to treat such OI families as public housing families and offer the option of paying the income-based rent or a flat rent. For PHAs that adopted OI related waivers under HUD's CARES Act notice (Notice PIH 2021–14),[8] guidance on the status of OI families and the amount of rent to charge the family is detailed in the Navigating CARES Act Waiver Expiration factsheet.[9]

Consistent with the proposed rule, § 960.507(b) describes how to determine the OI limit. The OI limit is determined by multiplying the applicable income limit for a very low-income family as defined in § 5.603(b), by a factor of 2.4. In paragraph (c), HUD provides additional details on the procedures a PHA must follow in notifying OI families of their status. HUD is removing proposed language referring to multiple ways for the PHA to become aware of a family's OI status, instead specifying that OI procedures are triggered by annual or interim reexaminations, in order to reduce burden on PHAs and provide clarity on exactly how a PHA is to determine that a family is OI. When a PHA determines that a family is OI, the PHA must notify the family in writing of the family's OI status at that time, in accordance with paragraph (c)(1).

If a family continues to exceed the income limit for 12 consecutive months after receiving the first OI determination, the PHA must provide a second notice in accordance with § 960.507(c)(2). This second notice informs the family that they have been OI for 12 consecutive months and, if the family continues to be OI for another 12 consecutive months, the PHA will follow its continued occupancy policies for OI families in accordance with § 960.507(d). This notification must be provided within 30 days after the income examination that led the PHA to determine that the family has been OI for 12 consecutive months. The notice must also include the estimated alternative rent (*i.e.,* based on data current to the date of the notice), when a PHA's OI policy permits NPHOI families to remain in a public housing unit paying the alternative rent.

For families that maintain their OI status for a further 12 consecutive months (24 consecutive months in total), the PHA must provide the family with a third notice in accordance with § 960.507(c)(3). The third notice informs the family that it has exceeded the OI limit for 24 consecutive months. The third notice also states that the family must either pay the alternative rent as an NPHOI family or have their tenancy terminated in no more than six months, depending on the PHA's continued occupancy policy for OI families. If the family is allowed to stay as a NPHOI family under the PHA's OI policy, the PHA must also present the family with a new NPHOI lease under the terms contained in the new § 960.509 and inform the family that the least must be executed no later than 60 days of the date of the notice or at the next lease renewal, whichever is sooner.

Furthermore, HUD specifies in § 960.507(c)(4) that if a family falls below the OI limit at any time during the 24 consecutive months, the family is

[7] Available at: *https://www.hud.gov/sites/dfiles/OCHCO/documents/2019-11pihn.pdf.*

[8] Available at: *https://www.hud.gov/sites/dfiles/PIH/documents/PIH2021-14.pdf.*

[9] Available at: *https://www.hud.gov/sites/dfiles/PIH/documents/CaresAct_Occupancy_Policiesv2.pdf.*

entitled to a new 24 consecutive month grace period, and the notification cycle starts over.

HUD is modifying and clarifying, in what is now § 960.507(d), the requirements for PHAs after a family has exceeded the OI limit for 24 consecutive months. Rather than specify how to determine the alternative non-public housing rent in that provision, HUD has moved that detail into the definition of the term ''alternative non-public housing rent'' (or ''alternative rent'') and instead simply states that the PHA must charge NPHOI families the alternative rent within 60 days of, or terminate the family's tenancy within six months after, the third notification to the family (pursuant to § 960.507(c)(3)), in accordance with the PHA's policies and State and local laws. If a PHA is terminating the family's tenancy, the PHA must continue to charge the families their public housing rent during the period prior to the termination.

In § 960.507(e), HUD clarifies the status of OI families once the 24-month grace period ends. The family's status will depend on the continued occupancy policy of the PHA. For PHAs that have a policy to terminate OI families, those families will still be PHP participants until their tenancy is terminated in the time frame established by the PHA (up to 6 months). During that time, the family may request an interim reexamination of income to potentially reduce their rent burden. However, the resulting income determination will not make the family eligible to remain in the PHP beyond the period before termination as defined by PHA policy.

For PHAs that have a policy to allow OI families to pay the alternative rent, those families will no longer be PHP participants once the 24-month grace period ends, and they execute a NPHOI lease. In other words, the OI family members will continue to be PHP participants until their tenancy is terminated or they execute the NPHOI lease. Section 960.509(a) states that the OI family must execute a NPHOI lease no later than the earlier of the next lease renewal or 60 days after the PHA notifies the family, pursuant to § 960.507(c)(3), that they have been OI for 24 consecutive months. If the family does not execute the NPHOI lease within this period, per § 960.509(a), the PHA must terminate the tenancy of the family no more than 6 months after the notification under § 960.507(c)(3) in accordance with § 960.507(d)(2). Notwithstanding, pursuant to § 960.509(a), the PHA may permit, in accordance with its OI policies, an OI family to execute the lease after the deadline, but before termination of the tenancy, if the OI family pays the PHA the total difference between the alternative non-public housing rent and their public housing rent dating back to the lease execution deadline. HUD largely retains the reporting requirements in the proposed rule, now found in § 960.507(f), for PHAs. HUD has only added language that would allow HUD to request other information on OI families from PHAs.

As a response to requests and comments that HUD received, both upon the initial proposed rule and the reopening of public comment, HUD is adding in this final rule a new § 960.509, which sets forth the lease requirements for OI families that are remaining in a public housing unit and paying the alternative rent as NPHOI families. This new section pulls heavily from existing regulations governing public housing leases in § 966.4, with adjustments made as needed to accommodate the fact that these families are not public housing participants. Notwithstanding, PHAs must still comply with Federal nondiscrimination requirements, including but not limited to, the Fair Housing Act, Title VI of the Civil Rights Act, Section 504, and Title II of the Americans with Disabilities Act (ADA), as applicable. In response to the public comment regarding reasonable accommodations, PHAs still have a legal obligation to provide for reasonable accommodations that may be necessary for individuals with disabilities. PHAs do not have discretion whether to provide reasonable accommodations. Moreover, in the context of unit transfers for a family when repairs to improve the life, health, or safety of a resident cannot be made within a reasonable time, consistent with fair housing and civil rights obligations, PHAs must provide comparable alternative accommodations having the appropriate number of bedrooms based on the family's need and accessible accommodations and reasonable accommodations for persons with disabilities.

Section 960.509(a) states that families who will remain as tenants paying the alternative rent must execute the lease for the NPHOI family no later than the earlier of the next lease renewal or 60 days after the third OI notification as described in § 960.507(c)(3). If the family does not execute the lease within this time, the PHA shall terminate the tenancy of the OI family pursuant to 960.507(d)(2).

In paragraph (b), HUD specifies the various provisions that must be in leases for NPHOI families, such as information on who is a party to the lease, how long the lease is for, what the costs covered by the lease are, how the lease is to be renewed or terminated, the tenant's rent and possible charges, tenant rights for use, the responsibilities of both the PHA and the tenant, repair and access obligations, procedures around lease termination and grievances, and how leases are to be modified.

The regulations at § 960.600 have been revised to include an additional sentence confirming that NPHOI families are not required to comply with the Community Service and Self-Sufficiency Requirements (CSSR). In the revised § 960.601, the definition of individuals exempt from the community service requirements is updated to reflect that members of NPHOI families are also exempt from those requirements. It should be noted that OI families, in the period before termination of tenancy or prior to becoming NPHOI families, are still PHP participants and so must remain compliant with all PHP requirements including the community service and self-sufficiency requirements (CSSR). New language in an amended § 964.125 clarifies that members of a NPHOI family are not eligible to be members of a public housing resident council organized in accordance with 24 CFR part 964, subpart B.

HUD has made conforming changes to the lease requirements provision under § 966.4(a)(2) regarding the term of the public housing lease for PHAs that have a continued occupancy policy under § 960.507(d)(2). This change requires the public housing lease to convert to a month-to-month term to account for the period before tenancy termination as determined by PHA policy.

The regulation at § 966.4(l)(2)(ii) has also been revised to remove the reference to § 960.261 as one of the grounds for termination of tenancy and replaced it with a reference to § 960.507. To conform to HOTMA, this final rule also removes the existing § 960.261 from HUD's regulations, which provides that PHAs may not evict or terminate the tenancy of a family that is over the income limit for public housing if the family is participating in the FSS program, or if they receive EID.

Section 960.261 has been removed as a part of the rulemaking process for two reasons. First, the reference made in § 960.261 to families who are over income is currently understood to mean a family whose annual income exceeds the limit for a low-income family at the time of initial occupancy which is 80 percent of the area median income (AMI) or lower. However, with HOTMA, Congress established a statutory

framework of how PHAs must treat OI families. Additionally, HOTMA does not establish the OI limit at 80 percent of AMI. Therefore, HUD has determined that § 960.261 must be removed because the HOTMA OI limitations, as well as these implementing regulations, supersede the prior regulation provision at § 960.261. As a result of removing § 960.261, a PHA may not evict or terminate the tenancy of OI families in the PHP based on income until they have been over 120 percent AMI for 24 consecutive months and the PHA has implemented an OI policy in their written policies. Some PHAs may need to amend their written policies if they previously had a policy to not allow families to stay in the PHP if their income exceeded 80 percent of AMI.

Second, § 960.261 has been deleted to remove the exception to evict or terminate the tenancy of a family solely because the family is OI provided the family has a valid contract for participation in an FSS program under part 984 or if the family receives EID. With this final rule, HUD intends for there to be no exceptions to the HOTMA OI provision.

Enterprise Income Verification (EIV)

This final rule revises § 5.233(a)(2)(i) to clarify that the use of EIV is required only at annual reexaminations, and not at interim reexaminations. However, PHAs and owners may use EIV for interim reexaminations if desired. Prior to this final rule, HUD interpreted ''reexaminations'' in § 5.233(a)(2)(i), which required the use of EIV at all reexaminations, to include interim reexaminations. However, since the EIV Income Report can take up to 90 days to be updated, it often is not helpful during an interim reexamination. This change also decreases PHAs' and owners' administrative burden.

Consent Forms

The final rule changes § 5.230 to clarify that, except in enumerated circumstances, on or after this final rule's effective date, once an applicant has signed and submitted a new consent form, they are not required to do so again at the next interim or regularly scheduled income examination.

Additionally, this rule retains in large part the new paragraph (c) added by the proposed rule to § 5.232 but removes the reference to the PHA's Annual Plan as the proper place for a PHA to establish policies regarding an applicant, participant, or family member's revocation of consent to access financial records. Since the PHA's Annual Plan is not the appropriate place for such a policy, the final rule changes this and allows PHAs to address this within an admission and continued occupancy policy instead. As discussed in the preamble to the proposed rule, HOTMA provides PHAs with the discretion to determine whether applicants or recipients are ineligible for benefits if they, or their family members, refuse to provide or revoke the authorization to obtain financial records. The revision to § 5.232 is therefore necessary to clarify that the penalties described in that section will not apply if applicants or participants or their family members revoke their consent for the PHA to access financial records unless the PHA has established a policy that revocation of consent to access financial records will result in denial or termination of assistance or admission.

I. General Requirements

Inflationary Index

For consistency, this final rule specifies in the following regulatory provisions that the inflationary index for all necessary adjustments will be based on the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W): [10] §§ 5.603(b)(3)(ii); 5.609(a)(2) and (b)(1); 5.611(a)(1) and (2); 5.618(a)(1)(i) and (b)(1); 5.659(e); 574.310(e)(3)(ii) and (f); 882.515(a), 882.808(i)(1), 960.259(c)(2); and 982.516(a)(3). HUD has chosen to use the CPI–W based on public comments and because HUD believes this publicly available index is an accurate measure of inflation to use in making income and asset determinations in HUD programs. Moreover, the Cost-of-Living Adjustment (COLA) adjustment for Social Security and SSI benefits for approximately 70 million Americans is based on increases in the CPI–W and consequently many PHAs, owners, grantees, and families are familiar with it.

In this final rule, annual inflationary adjustments will be established by rounding to the nearest dollar except that annual inflationary adjustments for the dependent deduction (§ 5.611(a)(1)) and the elderly or disabled family deduction ((§ 5.611(a)(2)) will be rounded to the next lowest multiple of $25. HUD makes this differentiation because HOTMA requires HUD to determine the dependent and elderly or disabled family deductions for each year by ''rounding such amount to the next lowest multiple of $25.'' HUD notes that the amounts described in the income exclusions in § 5.609(b)(14) and (15) both reference the dependent deduction, which is required to be rounded to the lowest multiple of $25. HUD declines to round to the next lowest multiple of $25 elsewhere in this final rule.

In general, HUD expects to make the revised amounts effective January 1st of each year for the following requirements in accordance with the inflationary adjustments covered by this final rule: the value cap on net family asset cap for imputing returns (§ 5.609(a)(2) and (b)(1)); the mandatory deduction for elderly and disabled families (§ 5.611(a)(2)); the restriction on the net family assets (§§ 5.618(a)(1)(i), 574.310(f)); the amount of net assets the PHA or owner may determine based on a certification by the family (§§ 5.618(b)(1), 5.659(e), 92.203(e); 93.151(e); 574.310(e)(3)(ii); 960.259(c)(2), and 982.516(a)(3)); and the mandatory deduction for a dependent ((§ 5.611(a)(1)), which is also used to calculate the income exclusion for earned income of dependent students (§ 5.609(b)(14)) and adoption assistance payments (§ 5.609(b)(15)).

De Minimis Errors

HUD revises provisions in this final rule (in §§ 5.609(c)(4), 5.657(f), 574.310(h), 882.515(f), 882.808(i)(5), 960.257(f), and 982.516(f)) to define a de minimis error as an error that results in a difference in the determination of a family's adjusted income of $30 or less per month. This change from defining a de minimis error as a percentage error will enable a PHA or owner to make de minimis determinations on a family-by-family basis rather than having to do a full portfolio review to determine if a PHA, owner, or grantee exceeds the threshold. In addition, using a dollar amount instead of a percentage will make de minimis errors easier to calculate. However, HUD also provides that through issuance of a **Federal Register** notice for comment, HUD may re-define de minimis errors.

In addition, to clarify that the de minimis protections apply to all calculations of income, not just during interim reexaminations, HUD moves the language about the de minimis safe harbor into its own paragraph in each location in which it is included in the regulations.

HUD also adds language to clarify that where a PHA or owner has made a mistake resulting in the family underpaying their rent, the family will not be held liable for the underpaid rent. This is in addition to language that was included in the proposed rule that would require PHAs and owners to repay families that were overcharged due to miscalculation errors.

[10] Social Security Administration, *CPI For Urban Wage Earners And Clerical Workers, https://www.ssa.gov/oact/STATS/cpiw.html.*

Interim Reexaminations

In response to public comments asking for additional clarification on interim reexaminations, this final rule ensures that the language in §§ 5.657(c), 574.310(e)(4), 960.257(b), 882.515(b), and 982.516(c) is as consistent as possible. HUD also revises the language to clarify that the threshold for when a PHA, owner, or grantee must conduct a reexamination due to decreases in a family's income is a change of ten percent or a lower threshold set by the PHA or owner. Further, in most circumstances, PHAs, owners, or grantees must conduct interim reexaminations if a family's income has increased by ten percent or more, or such other amount established by HUD through notice.

HUD also adds language in each instance clarifying that ''reasonable'' interim reexamination processing time should be based on the amount of time it takes to verify information, but generally should not be longer than 30 days after changes in income are reported. HUD does not add more specific language in § 960.253(g), which addresses the ability of a public housing tenant to switch from flat rents to income-based rents due to a hardship, as it is beyond this rulemaking's scope. However, HUD expects that PHAs will follow a similar time frame for changing rent determination methods due to hardship as they do for other hardship evaluations. HUD also did not add the more specific language to § 574.310(e)(4) because the HOPWA program rule does not provide for flat rents.

Finally, HUD adds language in each location regarding the effective dates of any changes in rent due to an interim reexamination. If the tenant complies with the interim reporting requirements, the PHA, owner, or grantee must give the tenant 30 days advance notice of any rent increase, and the rent increase will be effective the first of the month commencing after the end of the 30-day period. If the tenant has complied with the interim reporting requirement and the tenant's rent will decrease, the change in rent is effective on the first day of the month after the date of action that caused the interim certification, for example the first of the month after the date of loss of employment. A 30-day notice is not required for these rent decreases.

If the tenant does not comply with the interim reporting requirements, and the PHA, owner, or grantee discovers the tenant has failed to report changes as required, the PHA, owner, or grantee must initiate an interim reexamination and implement rent changes as follows:PHAs, owners, or grantees must implement any resulting rent increase retroactive to the first of the month following the date that the action occurred, and any resulting rent decrease must be implemented no later than the effective date of the first rent period following completion of the reexamination.

However, rent or family share decreases may also be applied retroactively at the PHA's, owner's, or grantee's discretion, in accordance with the conditions established by the PHA, owner, or grantee in written policy. For example, a PHA, owner, or grantee may adopt a policy that would make the effective date of an interim reexamination retroactive to the first of the month following the date of the actual decrease in income as opposed to the first of the month following the interim reexamination. However, the final rule clarifies that a retroactive rent or family share decrease may not be applied prior to the later of the first of the month following the date of the change leading to the interim reexamination or the first of the month following the effective date of the family's most recent previous income examination (either interim or annual reexamination, or the first of the month following the family's initial examination if that was family's only income examination before the interim reexamination in question). In other words, a family's failure to report the change at a previous examination or reexamination may not be taken into consideration in applying the effective date of the interim reexamination.

The PHA, owner, or grantee may also choose to establish conditions or requirements for when such a retroactive application would apply (for example, where a family's ability to report a change in income promptly may have been hampered due to extenuating circumstances such as a natural disaster or disruptions to the PHA's, owner's, or grantee's management operations). In applying a retroactive change in rent or family share as the result of an interim reexamination, the PHA or owner must clearly communicate the impact of the retroactive adjustment to the family so there is no confusion over the amount of the rent that is the family's responsibility. In the HCV program, moderate rehabilitation program, and HOPWA's project- or tenant-based rental assistance programs, the PHA or grantee must also clearly communicate the impact of the retroactive adjustment to the owner as well. These policies may reduce the potential hardship on families and eliminate or significantly reduce the amount a family may owe for back rent if the family has had difficulty in making timely rent payments during the time between loss of income and the interim reexamination.

HUD anticipates that questions may arise about whether the retroactive rent regulations may apply back to decreases in income occurring before the effective date of this final rule. Any interim reexamination conducted under this final rule may not be applied retroactively to any period of time prior to the effective date of the final rule.

HUD intends to issue additional guidance in the future on retroactively applying interim reexaminations for PHAs and owners that may be interested in permitting retroactive rent decreases.

In § 960.257(c) and (d), HUD inserts the word ''continued'' to clarify that the policies PHAs are required to adopt regarding annual and interim reexaminations are part of the PHA's admission and continued occupancy policies. This brings the language in those paragraphs in line with language referring to the same policies in § 960.507(d) to create consistency when referring to the same things.

HUD intends to publish additional guidance to PHAs and owners on how they may use self-certifications from tenants and how PHAs and owners may help their tenants determine if any income change meets the threshold. HUD does acknowledge, however, that depending on the PHA's or owner's policies, the PHA or owner may be required to do extensive reviews of income to determine if the change in income meets the relevant threshold to trigger an interim reexamination.

Other Guidance

This final rule and this preamble reference additional guidance that HUD will publish relating to implementation. Such guidance will be issued for the various HUD programs impacted by this final rule and will also include the applicable requirements for PHAs and owners, including fair housing and civil rights requirements, to ensure administration and implementation of HOTMA's statutory mandates and this final rule.

In addition to the HOTMA Section 102 provisions implemented through this final rule, Section 102 further provides in section 3(a)(7)(e) of the USHA that HUD shall develop a mechanism for disclosing information to a PHA for the purpose of verifying the employment and income of individuals and families in accordance with section 453(j)(7)(E) of the Social Security Act (42 U.S.C. 653(j)(7)(E)), and shall ensure PHAs have access to information

contained in the 'Do Not Pay' system established by section 5 of the Improper Payments Elimination and Recovery Improvement Act of 2012 (Pub. L. 112–248; 126 Stat. 2392). HUD will issue guidance on this provision regarding how and what information PHAs may access consistent with the Section 102 effective date established by this final rule of January 1, 2024.

J. Conforming Changes to Section 8 Moderate Rehabilitation Regulations at 24 CFR Part 882

HUD is using this final rule to conform its moderate rehabilitation program and moderate rehabilitation SRO programs to HOTMA Section 102 and 104. While HUD's proposed rule inadvertently omitted proposed conforming changes to the moderate rehabilitation regulations at § 882.515 and the moderate rehabilitation SRO regulations at § 882.808 that it included for the public housing and other Section 8 programs, HUD has a solid justification for making these changes in this final rule.

Initially, Sections 102 and 104 of HOTMA amend the 1937 Act, respectively, to revise the frequency of family income reviews and calculations of income in HUD's public housing and Section 8 programs and to set limits on the assets that families residing in public housing and families receiving assistance under Section 8 may own. These HOTMA changes impact all Section 8 programs, including the Section 8 moderate rehabilitation program and the Section 8 moderate rehabilitation SRO program. Equally important, with respect to the income calculations, income reexaminations, and eligibility determinations, HUD's moderate rehabilitation programs function in the same manner as its HCV program. Specifically, the PHA (as opposed to the owner) is responsible for conducting income reviews and adjusting the tenant rent and housing assistance payment accordingly and is likewise responsible for issues related to a tenant's eligibility for admission to the program and continued assistance under the program. The owner does not have any role in income calculations, reexaminations, and eligibility determinations. Because of this similarity in functional roles and responsibilities to the HCV program, HUD believes that the public comments submitted in response to the proposed rule on these topics, which were presented as uniform polices impacting the public housing and all Section 8 programs in the same manner in the preamble discussion, provide HUD with a solid basis to make conforming changes to its moderate rehabilitation program and moderate rehabilitation SRO program regulations. In this regard, the interests of the parties most affected by HUD conforming changes—PHAs and program participants—are substantially identical to the parties impacted by the changes made to the HCV program. Finally, most of the HOTMA income changes impacting the moderate rehabilitation programs are implemented by revisions to part 5 of this final rule. The ability to use these part 5 changes in accordance with other interrelated HOTMA Section 102 and 104 requirements would be hindered without conforming changes to part 882. For example, while the PHA could apply the asset limitation under the new part 5, it could not rely on the statutorily permitted self-certification of the family that they have less than $50,000 in assets.

As a result, this final rule makes conforming changes to HUD's moderate rehabilitation regulations. These conforming changes are largely identical to those made to HUD's HCV program regulations at § 982.516. A discussion of the specific revisions to §§ 882.515 and 882.880 follows.

§§ 882.515(a) and § 882.808(i)(1)—Self-Certification of Net Family Assets

HUD is making conforming amendments to § 882.515(a) and § 882.808(i) for the moderate rehabilitation programs regarding the amendments made by HOTMA to allow families to self-certify when their combined net family assets are $50,000 or less, with that amount adjusted by an inflationary factor. As discussed in the preamble of the proposed rule, Section 104 of HOTMA not only establishes a limitation on the amount and type of assets that a family residing in public housing or assisted under the Section 8 programs may own but also provides that the PHA or owner could determine the net assets of a family based on a certification by the family that their net family assets do not exceed $50,000. This self-certification is codified at § 5.618(b). Under this final rule, HUD is also adding language on the self-certification of net family assets to moderate rehabilitation program regulations, consistent with the language added to the regulations specific to the other Section 8 programs. For more information on these Section 8 program changes, please see the discussion of the public comments received on the asset limitation and the self-certification under Section III, Income—Income from Assets, and Assets—Value of Assets, of this preamble.

§§ 882.515(b) and (e), and 882.808(i)(4)—Timing of Interim Reexaminations

HUD is making conforming changes to § 882.515(b), adding a new paragraph (e) to § 882.515, and adding a new paragraph (4) to § 882.808(i) for the moderate rehabilitation programs regarding the amendments made by HOTMA on requirements related to the timing of interim reexaminations. As discussed in the proposed rule, Section 102 of HOTMA deals with income reviews in HUD's public housing and Section 8 programs, including interim reexaminations. HUD is revising these regulations, consistent with revisions made for the program specific regulations for public housing and the other Section 8 programs, to implement requirements related to when interim reexaminations are conducted under HOTMA, what qualifies as a reasonable time for the PHA to conduct the interim reexamination, and the effective date of the rent changes. For more information on these Section 8 program changes, please see the discussion of public comments received related to interim reexamination issues under Section III—Interim Reexamination of Income, of this preamble.

§§ 882.515(f) and § 882.808(i)(5)—De Minimis Errors

HUD is making conforming changes by adding new paragraphs at § 882.515(f) and § 882.808(i)(5) for the moderate rehabilitation program and moderate rehabilitation SRO program regarding the amendments made by HOTMA for de minimis errors made by the PHA in calculating income. As discussed in the proposed rule, HOTMA provides that a PHA or owner will not be out of compliance with the statute's new provisions regarding income review and income calculation solely due to any de minimis errors made by the agency or owner in calculating family income. HUD is revising these regulations, consistent with revisions made for the program specific regulations for public housing and other Section 8 programs. For more information on these Section 8 program changes, please see the discussion of public comments received related to de minimis errors under Section III- De minimis errors, of this preamble.

III. The Public Comments

General Comments

Commenters submitted comments that were not on a specific proposal, but about the rulemaking in general. Some commenters expressed general support,

while others expressed a general opposition to the changes.

Some commenters suggested that HUD should choose between competing priorities by choosing alternatives that most reduce burdens or increase the likelihood that tenants can pay their rent. A commenter also expressed concerns that the proposed changes will hurt those who access HUD programs, particularly those with disabilities, and will price them out of extremely low-income programs. One commenter stated that the proposed rule would increase the difficulty for low-income populations supported with Federal housing funding.

A commenter stated that HUD should start an analysis to model HOTMA to determine the extent of adverse changes in PHA funding sources resulting from the changes and report the results to Congress prior to the changes going into effect.

HUD Response: HUD appreciates all the members of the public who submitted comments. This rulemaking is required due to statutory changes brought about by the enactment of HOTMA. HUD is sensitive to the needs of all populations participating in HUD programs and has considered the needs of all groups when making any discretionary changes. HUD therefore believes that this final rule appropriately balances the need for flexibility in HUD programs with the interest of protecting the investment of government funding involved.

Effective Date

Commenters stated that HUD should create an extended time after publication of the final rule before the rule is effective. Some suggested allowing PHAs up to 2 years to enforce the rule, while allowing PHAs to proceed earlier if they wish. Others stated that HUD should make the effective date 120 days after publication to allow for revision of training materials and to ease the transition for households.

HUD Response: HUD agrees that additional time after this final rule's publication will be appropriate before the provisions are effective; HOTMA also specifies that some of the statutory changes are not effective until the beginning of the calendar year after HUD issues implementing regulations. In addition to allowing PHAs and owners time to decide on how to exercise their discretionary authorities, HUD will need time to adjust its systems to properly account for these changes. Therefore, HUD established an effective date for the majority of this final rule of January 1, 2024. However, because HUD has taken extensive comments and issued previous implementation direction for the provisions regarding public housing tenants who exceed the income limit, those regulatory provisions will be effective 30 days after the publication of this final rule.

Program Alignment

A. General

Commenters supported the idea of HUD aligning rules and regulations across HUD programs where possible. The commenters stated that such alignment would ensure consistency, minimize errors and duplicate work, and reduce administrative burdens, particularly where projects blend multiple forms of assistance. Some commenters stated specifically that HUD should work with the IRS to streamline HUD programs with the LIHTC program.

Commenters also stated that when HUD cannot align rules across HUD programs, HUD should describe the differences between the programs and have a rule specifying what rule takes precedence when programs conflict and multiple funding sources are being used for the same household.

HUD Response: HUD agrees with commenters advocating for aligned regulations. In this rule, HUD, to the extent practicable and allowed by statute, is aligning programmatic regulations and requirements across HUD programs. Aligning with LIHTC is outside this rule's scope, but HUD would note that income for tenants occupying LIHTC projects is calculated in accordance with 26 U.S.C. 42(g)(4) (referencing 26 U.S.C. 142(d)(2)(B)), which says ''income of individuals and area median gross income shall be determined by the Secretary in a manner consistent with determinations of lower income families and area median gross income under section 8 of the United States Housing Act of 1937.'' Section 1.42–5(b)(1)(vii) of title 26, Code of Federal Regulations, has similar language that states, ''[t]enant income is calculated in a manner consistent with the determination of annual income under Section 8 of the United States Housing Act of 1937 ('Section 8').'' Therefore, HUD believes that LIHTC and HUD program income calculations are currently aligned and will continue to be aligned when the changes in HOTMA are codified.

When a project is using multiple sources of HUD funding, HUD already has in place programmatic policies and requirements on how to combine and administer those multiple sources. For example, MFH addresses tenant rent issues for units with LIHTC financing and HAP assistance in the Multifamily Occupancy Handbook. PHAs and owners should continue to follow such policies.

B. HOME

Generally, commenters were in favor of aligning requirements between the HOME and other programs. Commenters stated that HUD should apply all revisions to adjusted income when combining HOME and other Federal programs. Commenters stated that HUD should adopt financial hardship exemptions for families receiving HOME TBRA but should do so through a separate process to ensure that all interested stakeholders have the opportunity to comment.

Others wrote that HUD should apply asset restrictions for any program funded by HOME to align regulations across the programs. However, one commenter stated that agencies that combine HOME funds with other program funds should be allowed to not enforce asset limitations.

A commenter asked for clarity on which entities are required to determine rent for HOME units receiving Federal or State subsidy, as the proposed rule seemed to require participating jurisdictions to do so, rather than the subsidy provider.

A commenter stated that, when a unit receives a Federal or State project-based rental subsidy, participating jurisdictions should rely on the other program's determination of adjusted income and rent calculations rather than requiring the participating jurisdiction to determine adjusted income.

HUD Response: HUD agrees with commenters that, to the extent possible, requirements between HUD programs should be aligned. That is why at § 92.203(a)(1) of the final rule HUD requires the PJ to accept the income determinations (initial, interim, and annual reexaminations or recertifications) performed by the PHA, owner, or rental subsidy provider when families applying for or living in HOME-assisted units receive Federal or State project-based rental subsidies. In addition, at § 92.203(a)(2) of this final rule, HUD permits PJs to accept the rental assistance provider's income determinations when families are applying for or living in HOME-assisted units and are also assisted by a Federal tenant-based rental assistance program. These revisions align HOME with other HUD programs when a responsible entity has made hardship deductions pursuant to the process established in § 5.611(c) through (e), as PJs must accept

the determination of annual and adjusted income performed under those program rules. For HOME TBRA, the proposed rule included the option for PJs to provide hardship exemptions in accordance with the process established in § 5.611, and those provisions are still included in this final rule.

There is no HOME statutory requirement to limit a family's assets or to remove a family from the HOME program if the family's net family assets exceed a threshold. HUD solicited public comment on whether HUD should impose asset limitations in the proposed rule to align with other programs. However, after due consideration and examination of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12701 *et seq.*), HUD has determined that it will not impose asset limitations through this rulemaking. Section 225(b) of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12755(b)), which provides tenant protections in the HOME program, states in relevant part that ''[a]n owner shall not terminate the tenancy or refuse to renew the lease of a tenant of rental housing assisted under this subchapter except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause.'' HUD has never interpreted holding a certain level or type of assets as sufficient good cause for an owner to terminate a tenancy under the HOME statute and declines to do so in this rulemaking.

Similarly, HUD has determined that there is no statutory basis for excluding families from participating in HOME homeownership activities because of the amount or types of assets they own, and that imposing an asset limitation for the HOME program would be counter to Congressional intent. The HOME program serves a broader group of beneficiaries through activities not authorized under many other HUD programs, and it is appropriate that potential homebuyers and homeowners seeking rehabilitation assistance have higher incomes and more assets than Section 8 families or public housing residents so that they can sustain homeownership. Applying an asset restriction to the HOME program would impact potential beneficiaries of HOME-funded activities and would result in fewer families being assisted. Also, applying an asset restriction to only one or two HOME sub-programs (*e.g.,* rental housing, HOME TBRA) would create inconsistencies within the HOME program, be administratively burdensome to implement, and cause potential noncompliance.

PJs are responsible for ensuring compliance with rent and income requirements applicable to rental housing assisted with HOME funds even if the rent and income eligibility determinations are conducted by entities under contract with the PJ or the PJ's housing partners (*e.g.,* owner of a HOME rental housing project, subrecipient administering HOME TBRA, etc.). In accordance with § 92.252(f)(2), which is unchanged in this final rule, owners of rental housing must annually provide the PJ with information on rents and occupancy of HOME-assisted units to demonstrate compliance and the PJ must review rents for compliance and approve or disapprove them every year. Under the newly revised § 92.203(a)(1) and (2), where a PJ must accept or chooses to accept the income determinations made in accordance with the rules of those programs, the PJ may rely upon that income determination and is not required to perform further income calculations under the remainder of § 92.203. The PJ must document the income determination made by the PHA, owner, rental subsidy provider, or rental assistance provider, as applicable, in their files to demonstrate compliance with §§ 92.203 and 92.508(a)(3)(v).

C. HOPWA

Commenters asked for the Housing Opportunities for Persons with AIDS (HOPWA) program to have flexibility to not adopt some of the changes to the larger Section 8 program. A commenter stated support for the idea of having discretion not to enforce restrictions based on net assets and ownership of properties; the commenter stated that supportive housing programs like HOPWA should remain focused on achieving positive health outcomes, not excluding households from participation based on an arbitrary definition of wealth. A commenter also opposed applying the calculation of income changes to HOPWA, as the proposed rule separates income eligibility certifications and recertifications from income examinations and reexaminations for rental assistance activities, which would create confusion for HOPWA project sponsors. The commenter specifically cited the example that it is unclear if current income should be used for annual income eligibility certification, but old income should be used to determine rental assistance calculations.

Commenters stated that with the final rule, HUD should release an updated HOPWA income resident rent calculation spreadsheet.

HUD Response: As discussed throughout HUD's responses to comment, HUD believes that it is in the public's best interest for HUD program requirements to be aligned, where practicable. Because HUD uses asset limitations in § 5.618, and the determination of net family assets to impute income for income determinations made in accordance with § 5.609(a)(2) in the HCV program, HUD is also adopting similar provisions at § 574.310(e) for HOPWA activities that use the income calculation method in 24 CFR part 5 to determine resident rent payment. However, the unique nature, purpose, and statutory basis of certain HOPWA activities, such as short-term supported housing, do justify limited exceptions, some of which are made in this rule and some of which may be proposed in a separate rulemaking.

HUD allows, but does not require, grantees to calculate income as provided by § 5.609 for the purposes of determining income eligibility. Due to the unique nature of the HOPWA program and its activities, HUD has determined that remaining flexible about the method used to determine income for eligibility purposes will best enable grantees to meet the needs of the program's intended beneficiaries regardless of the type of assistance an individual or family is seeking. However, HUD has determined it is generally practicable to align HOPWA with the HCV program in determining how to calculate resident rent payments. So § 574.310(e) will generally require HOPWA grantees to calculate income in accordance with § 5.609 for the purposes of determining the resident rent payment under 574.310(d). At initial occupancy, §§ 574.310 and 5.609(c)(1) require grantees to estimate a family's income for the upcoming 12-month period to determine the family's resident rent payment. For subsequent reexaminations of income, §§ 574.310 and 5.609(c)(2) require that a grantee calculate examine family's prior-year income (including any redetermination of income that took place during the year) and make adjustments to reflect current income if there was a change in income during the previous 12-month period that was not accounted for in a redetermination of income. This process, which is also being used in the HCV program, is explained in greater detail in the section of this preamble entitled ''Prior-year income.''

HUD also agrees that additional guidance and support can be offered to HOPWA project sponsors to add clarity to this final rule and will be providing guidance after publication of the rule.

D. HTF

Commenters requested that HUD align the HTF program's income calculation with other HUD programs as many properties have combined HTF with HOME or Section 8 assistance. Commenters were divided about whether asset restrictions should be applied to the HTF program. Some stated that homeownership programs should not have asset restrictions. Others supported adopting asset restrictions for housing programs funded with the HTF.

HUD Response: HUD agrees with commenters that, to the extent possible, requirements between programs should be aligned. That is why at § 93.151(a)(1) through (3) in the final rule HUD requires the HTF grantee to accept the income determinations (initial, interim, annual reexaminations or recertifications) performed by the PHA, owner, rental subsidy provider, or rental assistance provider when families applying for or living in HTF-assisted units are assisted under the PHP, a Federal or State project-based rental assistance program, or a Federal tenant-based rental assistance program. This should provide greater alignment between HTF, Section 8, and the HOME programs.

The HTF program serves beneficiaries through activities not authorized under many other HUD programs, and it is appropriate that potential homebuyers seeking homebuyer assistance have more assets than Section 8 families or public housing residents so that they can sustain homeownership. Applying an asset restriction to the HTF Program would impact potential beneficiaries of HTF-funded homebuyer activities and would result in fewer families being assisted. Because there is no statutory restriction on a family's assets in the HTF program, HUD declines to add any restrictions with this rulemaking.

Income

A. General

Commenters asked HUD to eliminate deductions and exclusions in income, in order to streamline determinations. A commenter stated that the proposed definition of ''income'' was too vague and asked for additional information on the interaction between seasonal and inconsistent income and its relationship to annual income for purposes of interim reexaminations. Another commenter stated that the suggested language defining ''income'' did not clarify anything.

A commenter stated that HOTMA's use of ''determination of income'' when referring to prior-year income instead of ''estimation of income'' for the upcoming year indicates that PHAs and owners may be expected to use different income calculation methods based on the time period covered. The commenter stated that using two methods would lead to increased errors when performing reexaminations, increasing the burden of operating the voucher program.

HUD Response: The statutory language of the 1937 Act, as amended by HOTMA, requires that deductions and exclusions be applied to determinations of income. In addition, HOTMA creates a very broad statutory definition of income. Given that the statutory definition encompasses such a wide range of monetary receipts, HUD believes that it is more appropriate to use the broad definition of income, and instead define the specific items that are *excluded* from income.

HUD recognizes how the language surrounding income determinations in different circumstances may be confusing, and HUD will consider whether to issue further guidance with more information in the future. However, HOTMA requires a different method for calculating income at different stages. For initial occupancy, as well as for interim reexaminations, PHAs and owners must estimate the family's income for the upcoming year (see, § 5.609(c)(1)). However, for annual reexaminations, PHAs and owners must generally use the family's income from the preceding year (see, § 5.609(c)(2)(i)).

B. Income From Assets

Commenters stated that income from assets should be based on self-certification for all assets under $50,000 after the family's admittance to the housing program.

Commenters also asked for additional guidance on what to do when there has been some change in the asset values (such as changes to the value of a stock portfolio) that cannot be computed.

Several commenters asked HUD to use the passbook savings rate, either by disregarding imputed returns on assets and only using the passbook rate on the totality of the family's assets or for imputing asset returns.

Commenters asked if HUD intended PHAs and owners to only use imputed income for assets if the PHA or owner cannot calculate any income from assets.

Commenters stated that the withdrawal of earned interest should continue to count as income.

HUD Response: HOTMA specifically includes actual income from assets in the definition of income. Therefore, any actual income received must be counted as family income. In § 5.609(a)(2) of this final rule, HUD has worked to clarify the regulatory language regarding income from assets to help PHAs and owners determine what income from assets should be included in the family's annual income while also minimizing the burden on PHAs, owners, and families.

When the combined value of all net family assets has a total value of $50,000 or less, the family must include, on its self-certification that the net family assets do not exceed $50,000, the amount of actual income the family expects to receive from such assets, and that this amount is to be included in the family's income. The PHA or owner may determine both the value of the net family assets and the amount of actual income the family expects to receive from such assets based on the family's self-certification (see, § 5.618(b)).

When net family assets have a total value over $50,000, if the PHA or owner can compute actual income for some assets, but not all assets, the PHA or owner must compute the actual income for those assets where possible, calculate the imputed income for all remaining assets where the actual income cannot be computed, and combine both amounts to determine the family's income for all assets. The PHA or owner must calculate the imputed return on all net family assets when net family assets are over $50,000 if *no* actual income can be computed. In all cases where a return is to be imputed for some or all net family assets, the current passbook savings rate, as determined by HUD, must be used.

This final rule does not change the requirement that PHAs and owners count earned interest as income.

C. HOPWA

A commenter stated that any lack of clarity and standardization of the application of a COLA for streamlined income determinations will lead to inconsistent applications and errors in rent calculations, and therefore HUD should provide standardized, updated sources for COLA calculation, an updated HOPWA rent calculator, and training. Without these additional resources, the commenter stated that HUD should allow jurisdictions to continue to recertify based on documentation of fixed-income sources such as benefit letters.

HUD Response: HUD agrees that additional guidance will be useful for the consistent application of COLAs and that such guidance will assist in avoiding errors. Therefore, additional guidance is forthcoming.

In addition, throughout this final rule, HUD has specified that amounts that are statutorily required to change due to inflation will be adjusted by HUD using the CPI–W.

Outside Determinations of Income

A. General

Commenters stated that the use of income determinations from other programs should be discretionary. Other commenters stated that allowing PHAs and owners to use income determinations from other forms of assistance would reduce administrative burden and the time required to verify income. A commenter stated that the level of administrative relief from this policy will depend on the level of PHA discretion to determine which program information to use. A commenter stated that HUD should require PHAs and owners to adopt written, publicly available policies stating the circumstances under which they will use income determinations from other programs and then apply the policies consistently.

A commenter stated that it is not clear that HOTMA allows PHAs and owners to completely substitute another program's definition of income for the definition in the 1937 Act; allowing such a substitution would be a fundamental and far-reaching policy change.

A commenter stated that a PHA should not be required to recalculate income if the tenant has failed to provide the documentation needed within a timely manner and the PHA has had to use an outside determination of income. Another commenter stated that entitlement municipalities that provide rental assistance and non-PHA nonprofits should also be able to use outside income determinations.

Commenters asked if the ability to use an outside determination of income would allow a PHA or owner to obtain IRS records, including tax returns. A commenter stated that tenants should not be required to obtain the income determinations themselves. A commenter stated that HUD should add language to the consent form to authorize the PHA or owner to obtain income determination information from the relevant local administrators.

Another commenter stated that tenants should be made aware of what income reporting will affect their rent; specifically, the tenant should know whether reporting income changes to a LIHTC owner will result in that information being passed along to a PHA.

Commenters also expressed concerns about using income determinations by other agencies. One commenter stated that other forms of assistance may take income information at face value without additional verification and expressed concern that if there is a difference between information from EIV and the other agency, the PHA may receive an audit finding. Another stated that there may be errors or other inconsistencies in the income calculation by other agencies that may affect participation in HUD programs, especially if there was fraud involved in the original calculation of income. A commenter also stated that differences between States and between programs will result in inequities in determining rents.

HUD Response: HUD appreciates all the public comments. HOTMA added language to the 1937 Act that allows, but does not require, PHAs and owners to use determinations of a family's income prior to applying any deductions based on timely income determinations made for the purposes of means-tested Federal public assistance. Therefore, PHAs and owners have the discretion not to use this ''safe harbor,'' and if a PHA or owner does take advantage of this flexibility and documents that determination with the appropriate third-party verification in accordance with the requirements of § 5.609(c)(3)(ii), they are not subject to penalties for doing so.

In this final rule, HUD is clarifying that PHAs and owners will be able to use income determinations received through established data sharing agreements, or PHAs or owners can obtain income determinations directly from administrators for means-tested public assistance specified on the approved list in the regulation at § 5.609(c)(3). A PHA or owner may also rely on third-party documentation provided to the PHA or owner by the tenant of a determination made by a form of assistance on the list in the regulatory text.

B. Additional Guidance

Commenters asked for additional information and guidance on how to use determinations of income made by other agencies. Some asked for general guidelines, while others specifically asked for additional information on what documentation would be acceptable evidence of the income determination, including whether it has to come from the other agency or if it can come from the tenants. A commenter stated that HUD should delay rulemaking on allowing outside determinations of income until HUD provides additional information on how verification would work and the forms and sources of appropriate proof of the determinations.

Commenters asked HUD to provide additional information on how other agencies determine income and how the other determination can be used by PHAs or owners as a safe harbor. A commenter stated that HUD should provide information on how similar other agencies' definition of income is to HUDs, as using a calculation not aligned with HUD requirements may jeopardize a PHA's ability to provide fair determinations of income, leaving the PHA with legal vulnerabilities. The commenter further stated that having the list of the approved agencies' income sources will provide a safe harbor for PHAs. Commenters stated that HUD should delay rulemaking until it has conducted further research across programs and States to inform the rulemaking.

Many commenters stated that HUD should provide requirements on which determination to use when there is more than one available, and one suggested that if a discrepancy between determinations exists, PHAs should use the higher income. A commenter stated that if discretion lies with PHAs or owners, inconsistencies will arise, complicating the coordination of care between Continuums of Care providing case management. Others stated that HUD should give PHAs the discretion to determine which program's income information to use when more than one is available. A commenter stated that HUD should provide guidance on the best practices for resolving differences in determinations.

A commenter also asked for guidance on what to do if a participant disputes an income determination from another agency.

A commenter stated that HUD and Congress should work to eliminate duplicative, burdensome recertification requirements.

HUD Response: HUD's revision of the regulatory text in this final rule, discussed more fully above, should address commenters' concerns about what documentation is required. In addition, any PHA or owner using income determinations from the list of assistance in the regulatory text will meet the requirements for the statutory safe harbor. If third-party verification of the income determination is unavailable, or if the family disputes the determination, the PHA or owner must determine the family's annual income in accordance with 24 CFR part 5, subpart F.

Because many of the other forms of public assistance have definitions of income that vary from State to State, it is not practical for HUD to provide detailed information to PHAs and owners on how the other forms of assistance define income. However, HUD intends to offer further guidance to PHAs and owners containing best practices for choosing between multiple available determinations and on how to resolve any discrepancies.

HUD also appreciates the suggestion to continue to streamline reexamination requirements across Federal agencies administering means-tested public assistance, and hopefully the efforts in using this interagency flexibility will highlight additional areas where the government can seek alignment.

C. Eligible Forms of Assistance

Commenters responded to HUD's request for input on which types of assistance should be included in the list of outside determinations a PHA or owner may use. A commenter stated that HUD should establish a list of eligible programs, while others stated that HUD should allow PHAs to submit other methods to be approved by HUD or that HUD should not limit the forms of Federal assistance on the list. A commenter stated that HUD should give PHAs the flexibility to choose programs from a list provided by HUD and set out the choice in the administrative plan. Commenters also stated that HUD should not limit the number of programs that a PHA may use for determinations.

A commenter stated that PHAs or owners should be allowed to use Federal tax return information, particularly if the family was eligible for an earned income tax credit (EITC) or child tax credit. Others stated that HUD should not use EITC determinations, because tax returns contain a lot of personal information or because the data will be at least a year out of date. Another commenter stated that the calculations to determine EITC eligibility exclude substantial sources of income that the 1937 Act includes, which would increase program costs and would have varying effects on different groups of participants in HUD programs.

Commenters stated that HUD should allow determinations for Social Security or Supplemental Security Income. Others suggested including VA benefits or Social Security Disability Insurance (SSDI). A commenter stated that the income definition for SNAP is similar to the 1937 Act and is national, so it would be appropriate to use. Commenters stated that the programs in the 1937 Act should be allowed to use income determinations made for the HOME program, or determinations used for LIHTC. Commenters also suggested using determinations for the Head Start program or determinations made by child support enforcement agencies.

Other commenters stated that HUD should not allow PHAs and owners to use determinations for TANF, as States have wide leeway in setting the formula to determine income, and therefore there would be a wide range of different income determinations making it harder for HUD to provide effective oversight.

HUD Response: HOTMA mandates that HUD allow PHAs and owners to use income determinations from TANF block grants, Medicaid, and SNAP assistance. In addition, HUD believes that the definition of adjusted gross income used for the EITC is similar enough to the definition of income used by HUD to justify the inclusion of the EITC on the list.

In this final rule, HUD is adding several forms of assistance to the list of means-tested public assistance that a PHA or owner may rely upon for an alternative income determination under § 5.609(c)(3): LIHTC; WIC; the SSI program; and other HUD programs, such as the HOME program. In addition, PHAs or owners may use income determinations from other forms of means-tested Federal public assistance if HUD has established a memorandum of understanding with the agency administering the assistance.

Because the use of outside income determinations is permissive for PHAs or owners, PHAs or owners must specify in their written admission and continued occupancy policies, HCV administrative plan, or House Rules, as applicable, the policies that they are adopting, including which programs from the HUD-approved list, if any, they will accept and their method for choosing between potentially competing determinations from different programs.

D. Data Sharing

Commenters stated that using determinations by other agencies would be useful if the PHA could obtain the information the other agency used for verification. A commenter stated that the level of administrative relief from this policy will depend on the PHA's ability to develop and implement data-sharing agreements. Commenters wrote that HUD should facilitate data sharing to allow PHAs and owners to obtain information from other programs, because without such data sharing, the ability of PHAs and owners to use outside determinations would be limited. Some stated that HUD should provide capacity development and technical assistance to PHAs and owners for data sharing.

Commenters stated that PHAs should have the freedom to create their own data-sharing partnerships, and PHAs should have the freedom to create such partnerships with as many programs as possible. A commenter stated that local PHAs will have a better understanding of the accuracy of different program administrators and may have better relationships for sharing information.

Commenters stated that HUD should prioritize agreements with the Social Security Administration, given the number of families receiving Social Security, or the Department of Agriculture, due to the number of families receiving SNAP benefits.

Commenters stated that HUD should determine a way to share information electronically and asked for details about whether administrators of other programs would be willing to supply the information. A commenter stated that getting information from other agencies means that additional privacy protections will be needed.

HUD Response: HUD agrees that the ability of PHAs and owners to have data sharing agreements will be crucial for this safe harbor provision to relieve administrative burden. As stated above, in this final rule, HUD amends the regulatory text in § 5.609(c)(3) to provide that a PHA or owner is allowed to use the safe harbor flexibility only if HUD has included it on the approved list of means-tested Federal public assistance or established a memorandum of understanding. If assistance has been listed in § 5.609(c)(3) and the PHA wishes to obtain a data sharing agreement with an agency administering that assistance, this is allowable so long as the data sharing agreement allows the PHA access to the necessary third-party documentation required under § 5.609(c)(3)(ii).

HUD is prioritizing MOUs with the Social Security Administration and the Veterans' Administration, given existing agreements in other contexts, but HUD cannot guarantee which agreements will be in place first.

E. Timely Income Determinations

Many commenters stated that HUD should define ''timely'' with respect to a determination of income made by another agency; a commenter said that a time limit will prevent improper payments that might otherwise occur if a tenant does not honor reporting obligations to an outside agency. Some stated that the outside determination should be no older than 120 days, while

others stated that the determination by the other agency should be made within the previous 12 months. A commenter stated that the determination should be made no more than 180 days prior to the effective date of the rents set using the outside determinations of income.

Another commenter stated that HUD should not establish a firm definition of timeliness, but HUD should publicize best practices, as PHAs and owners often consider determinations more than 90 days old to be stale.

HUD Response: HUD is revising the text of this final rule in § 5.609(c)(3) to remove the inclusion of the word ''timely.'' The final rule provides that the verification must meet all HUD requirements related to the length of time that is permitted before the third-party verification is considered out-of-date and is no longer an eligible source of income verification.

Annualization of Income

Commenters stated that HOTMA does not eliminate the current practice of some PHAs of conducting more frequent income reviews of sporadic income sources and annualizing income. These commenters asked that HUD ensure the revised regulations do not preclude these practices and asked for HUD to provide explicit guidance permitting such actions.

Commenters also asked for additional clarity from HUD on what the revisions to annualizing income mean for PHAs and owners practically, so it will be clear what will happen when a PHA or owner cannot project long-term income.

HUD Response: The HOTMA statutory revisions require that for annual income reviews, PHAs and owners must use a family's income from the preceding year, taking into account any adjustments the PHA or owner has made due to an interim reexamination. Therefore, PHAs and owners are no longer projecting long-term income for annual reviews, and more frequent income reviews will not be necessary.

This final rule retains changes from the proposed rule that eliminate the provision on annualizing income. PHAs and owners will look at the income for the previous 12 months for annual reexaminations.

Prior-Year Income

Some commenters stated that shifting from anticipated income to actual income from the prior year was an important and positive change.

Other commenters stated that HUD's interpretation of the HOTMA language about prior-year income was not correct. Instead of referring to the prior 12 months of income, the commenters wrote, the intent was to use the family's income from the prior calendar year, which would allow the use of year-end documents and would create an incentive to increase earnings by delaying the impact of increased earnings on rent obligations.

Commenters also asked for additional guidance on how to use past income, particularly when a family's income may have started and stopped during the year or when there were multiple income changes during the prior year, since either may present significant difficulty for PHAs or owners. A commenter suggested allowing PHAs to use documentation from the immediately preceding 60 to 90 days.

Commenters stated that PHAs and owners must be given instructions to retain information submitted in the prior 12 months to determine if the annual review finds a change in income not accounted for previously. Others stated that HUD should provide PHAs with clear guidance on what would be acceptable forms of income verification.

Commenters opposed the idea of using past income, stating that using the income in the preceding year would not provide the most accurate and current family income. Instead, the commenters stated that PHAs should be given the most flexibility to determine accurate income, including just taking the prior-year determinations into consideration. A commenter stated that the regulation did not seem to reflect the HOTMA statutory language that allows PHAs and owners to make other adjustments to prior-year income that the PHA or owner considers appropriate to reflect current income.

HUD Response: HUD appreciates the comments on how to implement the statutory requirement that PHAs and owners use the prior year's income at annual certifications. HUD is maintaining the language that PHAs and owners must use the income the family received over the preceding 12 months, because this is the most reasonable reading of section 3(a)(6)(A)(ii) of the 1937 Act, as amended by HOTMA. The statute states that PHAs and owners must ''use the income of the family as determined by the agency or owner for the preceding year, taking into consideration any redetermination of income during such prior year . . .'' (42 U.S.C. 1437a(a)(6)(A)(ii)). HUD believes that a plain language reading of ''preceding year'' is the 12 months prior to the income calculation. If ''preceding year'' were to mean ''preceding calendar year,'' this would deviate from the plain language reading of the statute. Using a calendar-year cycle would provide recent information for families with annual examinations earlier in the year, and a much larger gap of time for families with annual examinations later in the year. This would result in families being treated differently from one another merely due to when the family's income certification cycle began, which HUD does not believe Congress intended by the statutory language.

Moreover, reading ''preceding year'' to mean the ''preceding calendar year'' creates contradictions in the statute and the rule. Consider the scenario where a family had an interim reexamination of income that took place in the current calendar year but preceding income calculation cycle: Under the statute, the PHA or owner must take ''into consideration any redetermination of income during such prior year'' when performing an annual income reexamination. If HUD interpreted ''such prior year'' to mean the ''preceding calendar year,'' the PHA or owner would ignore any interim reexaminations of income performed in the current calendar year and only consider interim reexaminations that took place in the preceding calendar year. This result runs counter to clear Congressional intent that PHAs and owners take the most recent calculation of income into consideration when performing an annual income reexamination. As a result, HUD concludes that the most reasonable reading of the statute is that ''preceding year'' means the 12 months preceding the calculation of income.

If a PHA or owner determines that the family's prior-year income does not reflect the family's current income, the PHA or owner is required to adjust the income determination under § 5.609(c)(2)(ii) and (iii).

While the existing procedures related to the order of hierarchy or acceptability for verification for income, assets, and expenses [11] is not changed as part of this rulemaking, HUD may make adjustments to those procedures in the future as warranted. HUD does not believe it is necessary for the final rule to specifically require PHAs and owners to retain information submitted by the family in the prior 12 months in order to complete the annual reexamination. The family is required to provide information to the PHA or owner in order for the PHA or owner to complete the annual reexamination, regardless of whether the family submitted information related to an increase or

[11] See PIH Notice 2018–18 and chapter 5 of Handbook 4350.3.

decrease in income prior to the annual reexamination.

Income Inclusions

A. General

Commenters stated that HUD should not rely on broad language to define what is included as income but should continue to have a list of what is specifically included, as the broader language may create confusion and increase the risk of litigation, while the specific list provides answers to questions from the public and individuals.

Some commenters asked that HUD specifically include certain payments as income, such as per capita payments to Native Americans from gaming operations and tribal kinship or guardianship payments or net income from businesses.

A commenter also stated that HUD should specify that funds only count as income if the family actually receives the income, not just because the family is entitled to it, such as child support payments.

HUD Response: Given the wide range of receipts that would count as income and the broad language included in HOTMA, HUD continues to believe that it is more appropriate to define income very broadly and only specify what is *not* included as income. Generally, per capita payments to Native Americans that are not derived from interests held in trust or restricted lands are considered income unless such payments satisfy the requirements of another exclusion in this regulation or are specifically excluded from being considered income under Federal statutes. However, HUD is revising § 5.609(b)(4), which, as proposed, would exclude from income payments to care for foster children or adults, to also exclude Tribal kinship payments from being considered income under the rule. This change aligns the regulation's treatment of Tribal kinship payments with that of State kinship payments, which were already excluded from income in the proposed rule.

HUD declines to specify in this final rule that income excludes payments not actually received by a family, such as child support payments that the family is entitled to but does not receive. It is HUD's position that such an exclusion is not necessary because § 5.609(a) states that all amounts ''received from all sources'' that are not excluded in paragraph (b) are income.

B. Gifts

Commenters asked for HUD to define what a ''gift'' is for purposes of including it in income. Commenters also requested information on how HUD defines sporadic income for inclusion, and what types of funds would fall into this category.

HUD Response: HOTMA specifically provides that income includes recurring gifts. As discussed more fully below, in response to public comments, HUD is retaining the current exclusion for nonrecurring income, with some modifications for clarification in § 5.609(b). This revised exclusion specifies that gifts for holidays, birthdays, or other significant life events or milestones are excluded from income. However, other gifts that are simply provided to the family on a regular and routine basis (*e.g.,* a relative or friend provides a member of the family with cash gifts on a weekly or monthly basis) would be included in income.

Interim Reexaminations of Income

A. General Policies

Commenters stated that PHAs should not have to perform interim reexaminations for decreases in income if the family never had to report the change and the PHA used the family's prior 12 months of income to determine rent. While some commenters supported the elimination of interim reexaminations in the final 3 months of a certification period, others stated that PHAs and owners should still be required to conduct interim reexaminations for decreases in income.

A commenter suggested creating an expedited process, with a lower level of verification and a strict deadline, for downward adjustments in tenant rents. Another commenter stated that HUD should require providers to prioritize interim reexaminations for decreases over interim reexaminations for increases in income. A commenter stated that it would be appropriate for a PHA to inform an HCV owner that there is a potential adjustment being discussed, along with a timeline, to allow the owner to make an informed decision on whether to hold off on a lease enforcement action or whether a solution from the PHA is likely.

A commenter pointed out that there is inconsistency in certain language in the proposed §§ 5.657, 960.257, and 982.516. The commenter stated that the use of both ''must'' and ''may'' as well as both ''make [the interim reexamination]'' and ''conduct [an interim reexamination]'' within the proposed regulations regarding interim recertifications may be confusing and misinterpreted.

HUD Response: HUD reiterates that, under this final rule, interim reexaminations for income decreases would only be conducted at the request of the family so PHAs will not have to conduct interim reexaminations for a decrease if the family does not report the change. HOTMA requires interim reexaminations be conducted whenever the PHA, grantee, or owner has estimated that the family's income has increased by ten percent or more. When conducting its estimate, the PHA, owner, or grantee must also consider whether the increase is due to earned income, and whether a previous interim reexamination already occurred due to a decrease in income. Only where the PHA, owner, or grantee estimates that such increase is not attributable to earned income does HUD require that a PHA, owner, or grantee perform an interim reexamination of income for a family. If the family has undergone an interim reexamination for a decrease in income, the PHA owner, or grantee has discretion regarding whether or not to count increases in earned income when estimating or calculating whether the family's adjusted income has increased. Further, the HOTMA statutory language allows PHAs and owners to decline to conduct interim reexaminations due to increased income only in the final 3 months of an annual certification cycle; PHAs and owners are still required to conduct interim reexaminations for income decreases. In the case of zero-income families, PHAs and owners will estimate whether they must conduct interim reexaminations whenever there is an increase in income because the family's change in income is greater than ten percent. If the increase in a zero-income family's income is entirely from unearned income then the PHA or owner must conduct an interim reexamination of family income. However, just as in all other cases, the PHA or owner may choose not to conduct an interim reexamination of a family's income in the last 3 months of a family's income certification period.

HUD is already creating in this final rule, at § 5.233(a)(2)(i), a simplified process for interim reexaminations by removing the requirement to use EIV, and HUD does not feel additional flexibilities are needed. In addition, because the changes made by HOTMA are intended to relieve burdens on PHAs and owners, HUD is declining to impose additional restrictions on PHAs and owners. A PHA and owner already prioritize interim reexaminations based on the order in which families request them, and HUD further declines to add notification requirements to HCV

owners to what is already a short timeline for conducting interim reexaminations.

HUD thanks commenters for pointing out where the regulatory language could be clearer. In some cases, different language is required. For example, families have the option (''may'') to request an interim, while PHAs and owners must perform the interim reexamination when requested if the changes in income or deductions meet the interim threshold percentage. However, HUD has revised the language referring to interim reexaminations in this final rule (in §§ 5.657(c), 574.310(e), 960.257(b), and 982.516(c)) to be consistent about the obligations of PHAs, owners, and grantees to ''conduct'' interim reexaminations.

B. Errors

Commenters stated that if there is an error in a downward adjustment, repayment can be arranged as with EIV.

HUD Response: HUD agrees with the commenters, and therefore has added language to this final rule to clarify the issue, in §§ 5.609(c)(4), 5.657(f), 574.310(h), 960.257(f), and 982.516(f). When mistakes result in rent being erroneously decreased, the error must be corrected but the family is not responsible for repayment if the PHA or owner made the error. If the tenant provided inaccurate information, the family must repay the PHA or owner per the established repayment agreement.

C. Treatment of Earned Income

A commenter opposed the prohibition on considering increased earned income when estimating if a family's income has increased; the commenter stated that this was equivalent to keeping the earned income disregard and would complicate administrative workflows by creating a different definition of income for interim and annual reexaminations. Another commenter stated that HUD should clarify that the reason a PHA would be required to take into account the family's actual decreased adjusted income over the previous 12 months on a prospective basis would be because the PHA would be determining the family's actual adjusted income over the previous 12 months.

HUD Response: HOTMA amends the 1937 Act so that PHAs and owners may not consider a family's increases in earned income for the purposes of an interim reexamination unless the family had previously undergone an interim reexamination during the year for any decrease in income. If the family has undergone an interim reexamination for a decrease in income after the completion of the last annual reexamination, the PHA or owner has discretion regarding whether or not to count increases in earned income when estimating or calculating whether the family's adjusted income has increased. Under this final rule, annual reexaminations will be based on income from the preceding 12 months. If, during an annual certification period, the family's income decreases from the prior year, the family may be due an adjustment, per § 5.609(c)(2).

D. Payment Standards

Commenters stated that HUD should require PHAs to apply mid-year payment standard increases as promptly as possible. A commenter stated that if the payment standard is increased and the landlord increases rent before the next regular certification, the revised Section 8(o)(2)(A) of the 1937 Act requires the PHA to provide tenants with the benefit of the new payment standard immediately instead of waiting for the next regular examination. Commenters stated that HUD should revise the payment standard regulations to clarify that tenants who request a reasonable accommodation for an increase in payment standards are not required to pay 40 percent of their income in rent to see the benefits of the accommodation.

Commenters also stated that HUD should be explicit that PHAs and owners have the authority to adjust the total tenant payment (TTP) to account for the amount and timing of changes in income.

HUD Response: HUD appreciates the comments, but changes to payment standards requirements were not contemplated by the proposed rule and are consequently beyond the scope of this rulemaking. HUD did propose changes to the payment standard requirements in the HCV regulations in another proposed rule (Housing Opportunity Through Modernization Act of 2016—Housing Choice Voucher (HCV) and Project-Based Voucher Implementation; Additional Streamlining Changes; (85 FR 63664, October 8, 2020)) and received similar comments in response to that proposed rule, which will be taken into consideration as part of the development of that final rule.

E. Effective Date of Rent Changes

Commenters made suggestions regarding when rent calculations from interim reexaminations should take effect. A commenter stated that the effective date should be aligned with the next month. Another stated that HUD should clarify that the effective date of any change in rent would be based on the actual change in income and would be dependent on appropriate notice to the PHA of that change in income. A commenter suggested HUD adopt the provisions in the HUD Handbook 4350.3 ''Occupancy Requirements of Subsidized Multifamily Housing Programs'' that makes changes from increases effective on the first of the month after the end of a 30-day notice period, while changes from decreases in income are effective on the first day of the month after the date of the action that led to the interim reexamination.

Commenters also stated that HUD should prohibit housing providers from requiring retroactive increases in rent where a tenant has timely reported an increase in income.

HUD Response: With this final rule, HUD is adopting regulatory text similar to the guidance previously included for Multifamily programs regarding the effective date of interim reexaminations, in §§ 5.657(c)(5), 574.310(e)(4)(v), 960.257(b)(6), and 982.516(c)(4). If the tenant complies with the reporting requirements by timely reporting changes based on PHA or owner policy and the interim reexamination results in a rent increase, the PHA or owner must give the family 30 days advance notice of the increase, and the increase will be effective on the first of the month starting after that 30-day period. If the tenant's rent will decrease, the change in rent is effective on the first day of the month after the date of the action that caused the interim certification (*e.g.,* the first day of the month after the date of the loss of employment).

If the tenant does not timely report a change in income as required by the PHA or owner's policy, any resulting rent increases from an interim reexamination will be retroactive to the first of the month following the date of the action resulting in an increased income and rent decreases will be effective no later than the first of the month following the completion of the interim reexamination.

F. Interim Reexamination Process

Commenters stated that HUD should adopt the process from the HUD Handbook 4350.3: *Occupancy Requirements of Subsidized Multifamily Housing Programs* on interim reexaminations. Specifically, commenters called out the handbook prohibitions on eviction or other adverse impacts while a request for a rent adjustment due to a loss of income is being processed, along with a 30-day cure period and the requirement of written advance notice of rent increases.

HUD Response: As stated above, HUD is adopting, with this final rule,

language similar to the guidance previously included for Multifamily programs regarding the effective date of interim reexaminations in §§ 5.657(c)(5), 574.310(e)(4)(v), 882.515(b)(4), 960.257(b)(6), and 982.516(c)(4). HUD agrees that tenants should experience no adverse impact for failure to pay rent when there is a pending interim adjustment if the family reports the income change in a timely manner according to PHA, owner, or grantee policies.

G. Threshold for Conducting Interim Reexaminations

Some commenters expressed support of the proposal that interim reexaminations would be triggered only by a ten percent change in income. Some stated that it is appropriate to move to percentages from a set dollar amount. Others stated that allowing a request for decreased rent when income falls ten percent is fair or will benefit families who need rental assistance. A commenter explicitly supported the grace period that allows families to benefit from earned income increases unless the family previously requested a decreased rent due to an income decrease.

Commenters stated that a PHA or owner should not be allowed to decline interim reexamination requests because the family's income change is below ten percent, especially if the change is for a decrease in income, to avoid creating a rent burden. Others stated that it should be up to the PHA's discretion to conduct interim reexaminations for income increases; commenters stated that some PHAs do not currently do interim reexaminations for income increases and requiring it now would increase their burden. Another commenter stated that instead of requiring reexaminations for families when the PHA or owner suspects an increased income, the need for interim reexaminations should be based on a family's self-reported monthly income at the request of families.

Some commenters opposed requiring PHAs to do interim reexaminations when a threshold change is met, because there is already a 90-day lag in EIV information and annualized income requires an even longer period of time; the commenters stated that it would not make sense to conduct interim reexaminations every time there is a fairly small change in income. A commenter stated that HUD should not implement requirements for interim reexaminations beyond what is statutorily required by HOTMA. Another commenter stated that HUD should be clear that PHAs and owners have a wide range of discretion, but MTW agencies still cannot exceed the ten percent threshold.

Other commenters stated that estimating when income has changed by ten percent would be difficult and it would basically require the PHA or owner to do all the income determination work anyway. Commenters stated that households will report many more minor changes to confirm they have not reached the threshold.

Some commenters opined on what type of income should be used to determine whether an interim reexamination is justified. Commenters stated that HUD should base the threshold on gross income, even self-declared, rather than adjusted income. A commenter stated that tenants earning hourly wages should be subject to a full calculation of income and assets, while fixed-income participants should be able to submit just gross expected income.

Commenters stated that the percentage triggering reexaminations should be higher than ten percent, because at lower income levels, small dollar changes in income will meet the ten percent threshold. A commenter stated that HUD should set a higher threshold for increases in income to set an incentive for increased earned income.

A commenter stated that HUD should set a threshold lower than ten percent to be fair to the poorest recipients of HUD assistance and stated that setting a national threshold instead of allowing PHA or owner discretion would obviate different rules and levels of hardship.

Other commenters suggested setting the threshold at fixed dollar amounts. Commenters suggested that using dollar amounts would increase clarity and ease of administration for PHAs and owners, because using a percentage would require a PHA or owner to go through a full calculation to determine if the threshold has been met. Another commenter stated that percentage changes would result in a disparate impact on lower-income households versus higher-income families—the same dollar amount change could trigger an interim reexamination for a lower-income family but not for a family with a higher income. Commenters suggested a change of $200 a month and suggested adjusting it for inflation. Others proposed a threshold of $400–$500 a month. A commenter pointed out that given that the Multifamily guidance currently suggests a threshold change of $200, whether or not a PHA or owner experiences a decrease in burden depends on the number of families served with income below $20,000.

Some commenters stated that PHAs and owners should have the discretion to use a percentage change or fixed dollar amount to set the threshold. Commenters stated that HUD should spell out the exemption for interim reexaminations for increases in income more clearly. A commenter suggested how HUD could clarify how PHAs and owners could determine whether a family has met the threshold for an interim reexamination and stated that HUD could provide tools to help families to determine if their income changes meet the interim reexamination threshold. A commenter stated that HUD should clarify that participants are not held responsible for unreported increased income below the ten percent threshold or if the PHA has a policy that does not require reporting increased income between annual reexaminations.

Commenters stated that HUD should set a different threshold for increases in income than for decreases and suggested the Multifamily standard of $200; a commenter stated that doing so would decrease interim reexaminations for very small increases in income, decreasing the burden on PHAs and owners. Another commenter suggested a threshold of $500 for increases in income.

Commenters stated that HUD should lower the threshold for decreases in income. A commenter stated that the downward threshold should be the lower of $100 per month or 5 percent of income to protect families and allow for easy determination that the family qualifies for an interim. Another commenter stated that the threshold should be 5 percent for income decreases for households with income less than 20 percent of AMI. Commenters stated that HUD should set a lower threshold because not decreasing rent when there is a significant income loss, which may be less than a ten percent change, could make a difference in being able to pay rent. A commenter suggested a threshold of $25 for extremely low-income families with decreased income.

HUD Response: The language of HOTMA requires that interim reexaminations for decreases in income must be conducted by a PHA or owner at the request of the family when there is an estimated change of ten percent or more in a family's annual adjusted income, or such lower amount as the Secretary may establish. HUD has determined that adding a dollar threshold may add more administrative burden than it relieves, because the amendments made by HOTMA set the

threshold statutorily at ten percent; therefore, HUD would have to incorporate the percentage threshold into any dollar limitation provided. However, the final rule allows HUD to establish a lower amount by notice in accordance with HOTMA, which could include establishing a lower threshold percentage in general or in certain circumstances (*e.g.,* in cases where a family has requested a hardship exception for unreimbursed health and medical care and reasonable attendant care and auxiliary apparatus expenses or child care expenses in accordance with §§ 5.611(c) and 5.611(d).

However, there are some flexibilities built in for PHAs and owners. PHAs and owners may establish a lower threshold for changes in income or deductions resulting in a decrease of family income if they wish to do so and are willing to take on the additional administrative burden. In addition, with respect to income reviews for increases in income, PHAs or owners may elect not to conduct income reviews in the final 3 months of a certification period.

Unless the family has undergone an interim reexamination for a decrease in income after the completion of the last annual reexamination (or the family's initial income examination in the case where the family has not yet had its first annual reexamination), an interim reexamination is not triggered by an increase in the family's earned income, even if the increase is above the ten percent threshold. The PHA or owner has discretion regarding whether or not to conduct an interim reexamination based on any increases in earned income only if the family has undergone an interim certification for a decrease in income after the completion of the last annual reexamination (or initial examination, if the first annual reexamination has not yet occurred). The existence of the threshold also means that if there is an income change below the threshold, the tenant is not required to report the income change. Otherwise, only changes of more than ten percent of unearned income trigger an interim reexamination under the revised rule.

HUD notes that although there are flexibilities for PHAs and owners, entities must apply their policies uniformly and in compliance with all Federal nondiscrimination and fair housing requirements, including, but not limited to, the Fair Housing Act, Title VI of the Civil Rights Act, Section 504, and Title II of the Americans with Disabilities Act, as applicable. This also includes, among other requirements, providing for reasonable accommodations that may be necessary for individuals with disabilities.

Finally, HUD intends to publish additional guidance for PHAs and owners on how they may use self-certifications from tenants and how PHAs and owners may help their tenants determine if any income change meets the threshold. One objective of using self-certifications and other helpful guidance on estimating income changes that may meet the interim reexamination threshold is to alleviate the administrative burden on the PHA and owner of performing interim reexaminations where an interim reexamination will not lead to changes in income or amount the family must pay. HUD does acknowledge, however, that depending on the PHA's or owner's policies, the PHA or owner may be required to do extensive reviews of income to determine if the change in income meets the relevant threshold to trigger an interim.

H. Reasonable Period of Time

HUD received many comments on how long a PHA or owner should have to conduct an interim reexamination. Some commenters stated that HUD should provide a definition of ''a reasonable period of time'' to conduct an interim reexamination. A commenter suggested providing a time frame to start the interim reexamination but should leave out a timeline for completing the review. Other commenters opposed HUD providing a definition of ''reasonable time'' in favor of allowing PHAs and owners to define it. These commenters stated that getting information may be outside the control of a PHA or owner, and size or financial differences between PHAs and owners mean a one-size-fits-all solution would not work.

Commenters stated that HUD should provide clarity on what exactly is covered by any specified deadline. Commenters stated that timeliness has two components, including how soon a family must report a change and how soon the PHA or owner must act upon that knowledge. Commenters asked whether the deadline should cover the time between the request and when the review is completed or the request and when the change is effective or whether the deadline would cover only the time between the request and when the review is started. Some stated that the clock should start from the date the PHA or owner receives all the information, while another commenter stated that the clock should start from the date the family reports a change.

Some commenters stated that it is reasonable to require an interim reexamination to be started within 2 weeks, but it is not enough time to complete the review.

Commenters supported following the Multifamily handbook, which states that, in general, interim reexaminations should not take longer than 4 weeks. However, these commenters stated that HUD should make this a more concrete deadline to avoid questions about whether the PHA or owner is compliant with the required time frame. Other commenters stated that it would take 30 days just to obtain all the needed information. Some pointed out that interim reexaminations are unexpected work that staff has to fit in around the regularly planned workload. A commenter stated that a PHA or owner may complete the review in less time if they prefer.

A commenter stated that the interim reexamination should be conducted in the same month that the information is received by the PHA, as long as it is not in the last 5 business days of the month.

Other commenters recommended a 60-day period, stating that such a time frame would give adequate time to receive required paperwork from tenants, review it, and calculate the revised income. A commenter stated that HUD should allow at least 60 days for PHAs with 30,000 or more vouchers, in line with the current time frame for annual reexaminations.

Other commenters stated that HUD should not set a time less than 90 days, as that would allow time to receive required documentation and to account for error corrections. A commenter also stated that this will lead to fewer interim reexaminations that only deal with small job changes. A commenter wrote that HOPWA should allow for 90 days to align with HOPWA assessment and service plan cycles and to minimize staff burden in reexaminations.

A commenter stated that 120 days was a reasonable time. Another suggested a time frame of 90–120 days to allow for the collection of 4 paystubs to demonstrate a long-term change, rather than just a short-term shift.

Some commenters distinguished between requests for changes due to increases in income and decreases in income. A commenter stated that HUD should specify a period to complete interim reexaminations for decreases in family income, as a failure to provide downward adjustments promptly could expose families to hardships and potential displacement and homelessness. The commenter stated that reexaminations for decreases in income should be completed in time to be effective before the family's next rent payment or one week, whichever is

later, and that a family should not be evicted or sanctioned if they have reported a decrease in income, but the review is pending. Another commenter stated that interim reexaminations for decreases should be effective the first of the following month, unless it is after the 20th of the month, in which case the PHA or owner would have the option to delay another month.

HUD Response: HUD does not feel that a set time frame is appropriate. Some of the proposed time frames from commenters are also too long for families experiencing a decrease in income and facing a potential inability to pay their rent. Therefore, in §§ 5.657(c)(1), 574.310(e)(4), 882.515(b)(1), 960.257(b)(1), and 982.516(c)(1) of this final rule HUD is adopting a policy similar to the existing Multifamily guidance. While the PHA or owner may determine a reasonable time frame based on the amount of time it takes to verify information, it generally should not be longer than 30 days after a change in income is reported. HUD also notes that PHAs and owners must ensure that the time frames established are consistent with requirements under Federal nondiscrimination requirements, including, but not limited to, the obligation to provide reasonable accommodations. Therefore, if families have a disability-related need for a different time frame, PHAs and owners may be required to accommodate that need by extending a time frame.

Earned Income Disregard

A. General

Some commenters explicitly supported the elimination of the EID, stating that it will reduce the burden on PHAs and reduce income calculation errors.

Others objected to the elimination. They cited the benefits of EID in helping families become self-sufficient. Others stated that it allows families to secure their homes while maintaining employment. One commenter stated that Congress did not properly remove the EID from the statute with the language in HOTMA. Another commenter recognized the statutory change, even as they oppose eliminating the EID.

A commenter stated that HUD should provide PHAs with viable alternatives to EID, such as a once-in-a-lifetime deduction for residents that experience an EID qualifying event, such as excluding a percentage of the increase due to new earned income over the baseline income prior to the event.

Some commenters stated that current recipients should not be allowed to continue using the benefit until the end of their current period. However, many others stated that current participants should be allowed to continue to receive the EID benefit until their time ends. They stated that this would be fair to the current recipients, and some suggested that this would prevent the PHA from having to contact all affected families. A commenter even suggested that families in this group could have a limited form of the benefit, excluding the increased income of EID recipients during the 12-month period from when employment started, and then fully including all income after that period.

Commenters stated that HUD should continue to include families in EID if they had a qualifying event before the phase-out date of the EID, including if the family was not determined to be eligible until after the date the EID is fully phased out. Commenters stated that not allowing families that experience a qualifying event before the benefit is ended would upend the financial planning of those families.

HUD Response: HOTMA properly and correctly removed the statutory authority for EID, so HUD cannot retain the disallowance once the statutory change is in effect, which it will be upon the effective date of this final rule. However, HUD agrees that if a family is receiving a disallowance of increase in annual income in accordance with §§ 5.617(c) and 960.255(b) on this final rule's effective date, participants should be able to benefit from EID for the full 24 months. Therefore, this final rule retains the regulations for EID for this time period. However, the EID will be available only to families that are eligible for and participating in the program on the effective date of the final rule; no new families may be added. Additionally, in this final rule, HUD clarifies in § 960.255(e) that families eligible to receive the Jobs Plus program rent incentive, Jobs Plus Earned Income Disregard (JPEID) pursuant to the FY2023 notice of funding opportunity (NOFO) or earlier appropriation distributed through prior Jobs Plus NOFOs may continue to receive JPEID under the terms of the NOFO. This clarification is necessary to ensure that FY22 Jobs Plus grantees, as well as all prior Jobs Plus grantees, can offer JPEID as a rent incentive to individuals living at Jobs Plus target sites. The JPEID was established by HUD as an alternative requirement to EID for Jobs Plus grantees by waiving section 3(d) of the U.S. Housing Act of 1937 and § 960.255(b) and (d). For more information about JPEID waivers and alternative requirements, please review the March 13, 2015 (80 FR 13415) and March 28, 2018 (83 FR 13506) **Federal Register** notices.

B. HOPWA and HOME EID

Some commenters supported ending EID for HOPWA. Many commenters, however, opposed ending the benefit. These commenters stated that removing the policy would create a disincentive to work for people who already face significant economic and affordable housing barriers. Commenters stated that EID affords recipients the ability and time to adequately transition and to adjust to higher cost burdens. Commenters stated that the loss of the EID will threaten participants' housing stability, thereby threatening their health.

Commenters also stated that if HUD ends EID for the HOPWA program, current recipients should continue to receive the benefit, as abrupt removal of the benefit could destabilize tenants, causing them to possibly lose their homes.

Some commenters stated that they disagreed with HUD's conclusion that EID must be eliminated for the HOPWA program. Commenters stated that the language of HOTMA does not eliminate HUD's regulatory authority to continue EID with HOPWA, stating that HUD, in applying EID to the HOPWA program initially, relied on its authority under the HOPWA statute, not the 1937 Act.

HUD Response: In general, HUD would agree that EID has helped improve employment, health, and housing stability among HOPWA program beneficiaries. HUD also agrees that abrupt termination of EID could adversely affect the housing stability and health of HOPWA beneficiaries who are currently benefiting from EID. Accordingly, HUD has revised the rule to extend EID in HOPWA to the same extent that HUD is extending EID in HUD's other programs.

However, the current statutory conditions for the HOPWA program (*i.e.,* Section 859 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12908(a)(1))) restrict HUD from continuing EID in HOPWA after ending EID in the 1937 Act programs, unless HUD can determine that it is not practicable to administer the HOPWA assistance without EID. HUD cannot make this determination because HOPWA was administered practicably without EID from the program's inception in 1992 until the program's adoption of EID in 2001. Therefore, HUD has determined that only a statutory change can enable the extension of EID in HOPWA beyond the elimination of EID in the 1937 Act programs.

For HOME, HUD is maintaining that there is no independent statutory basis for applying the EID in § 5.617 to persons with disabilities who are tenants in HOME-assisted rental housing or who are receiving HOME tenant-based rental assistance. HUD will continue to allow HOME tenants that have already taken advantage of the EID benefit upon the effective date of the final rule to continue to use EID for the full 24 months defined in § 5.617(c) but will not permit additional tenants to use EID in HOME after the effective date of the rule. HUD believes this is consistent with the statutory intent of removing EID from the 1937 Act and that this will maintain alignment between HOME and the Section 8 program.

Income Exclusions

A. General

Commenters wrote in favor of providing a comprehensive list of income that is excluded, stating that anything not on that list is considered income. Some commenters specified that HUD should consider using the IRS exclusion list. Similarly, commenters stated that HUD should include in the regulation the current list of forms of income other statutes require to be excluded, and HUD should update the list through a **Federal Register** notice, rather than using a **Federal Register** notice to contain the list.

There were many comments submitted offering suggestions on how HUD should exercise its flexibility in excluding certain funds from tenants' income. Some suggested that HUD exclude refunds from the EITC or even all tax refunds that are intended to alleviate poverty. A commenter suggested that HUD should exclude income taxes withheld by employers, child tax credits, adoption expense tax credits, or higher education tax credits.

Commenters stated that HUD should exclude all sporadic, nonrecurring gifts, with some writing that the statutory definition of income specifies ''recurring gifts.'' Commenters also stated that requiring tenants to report such amounts would create confusion and would put tenants at risk for not reporting a one-time amount. Others stated that tracking these amounts would be administratively difficult, and that including them would also make SSI and SSDI calculations, which are usually simple, more complex. A commenter stated that including sporadic funds would trigger many more interim reexaminations, and PHAs and owners cannot annualize such one-time funds. Other commenters stated that it is unfair to include nonrecurring amounts, because they are not consistent forms of income for which a family can budget, and tenants would be exposed to terminations for windfalls that may be depleted in months. A commenter stated that ending the exclusion of an inheritance could result in a family being OI and could affect asset calculations for subsequent years. A commenter stated, however, that it is administratively burdensome to determine if an amount is a sporadic gift, and therefore such amounts should be included in income.

A commenter suggested that as an alternative to fully including nonrecurring income, HUD should leave the sporadic income exclusion in place, allow rent to increase for a year (but prohibit terminations due to this type of income), and specify that previously terminated families will, after 30 days, be allowed back with a new income calculation; this would allow families with small inheritances to maintain support after 30, 60, or 90 days.

Commenters also wrote on the proposed exclusion for certain State Medicaid-managed care system payments to allow families to keep individuals with disabilities living at home. Some stated that HUD should explicitly exclude income from such payments, going beyond the proposed language that merely excludes ''payments.'' Others stated that HUD should not limit the exclusion to Medicaid-managed care payments but should extend the exclusion to all payments to a family from a State agency. Commenters supported the exclusion of ABLE accounts and stated that HUD should exclude State-run savings programs for eligible persons with disabilities.

Commenters suggested that HUD should exclude payments into long-term care insurance. Others stated that HUD should exclude not only medical reimbursements, but also reimbursements for disability-related expenses. Commenters suggested that HUD should exclude: payments for participation in a research study; amounts the household pays in formal child support; earnings for full-time students 18 years of age or older other than heads of households, co-heads of household, or spouses; income of foster adults; and annual income replacement housing ''gap'' payments or loan proceeds. Commenters suggested excluding income derived from Census employment. Commenters stated that HUD should exclude child support income, as such payments are often sporadic and are meant to cover the needs of the child.

Some commenters stated that HUD should exclude all veterans' disability benefits. However, another commenter stated that this would be too big an exclusion, and HUD should exclude only a percentage of such payments.

A commenter stated that HUD should adjust income exclusions for inflation.

HUD Response: HUD agrees with commenters that it is cleaner and clearer to define what is *not* income, rather than list the almost infinite other types of money that should be considered income. HUD will continue to evaluate the list of exclusions in the IRS definition of income to determine if further regulatory changes are appropriate, but due to statutory restrictions on each definition, the lists of exclusions will necessarily be at least somewhat different. While certain programs, such as HOME and HTF, have statutory authority to allow grantees a choice about which definition may be used, *i.e.,* the definition of Adjusted Gross Income under the IRS Form 1040 or the definition of annual income under § 5.609, the 1937 Act programs do not have that same statutory provision. HUD also believes that the current practice of using publications in the **Federal Register** to list the types of funds that are excluded from HUD income calculations by other statutes is the appropriate way to handle a lengthy list that may need fairly regular updating. The most recent **Federal Register** notice can be found at 79 FR 28938, from May 20, 2014.

Under current policies, certain tax refund payments, such as the EITC, are already excluded from income, and this final rule does not change that. In addition, PHAs and owners will continue to base income determinations on gross income, which includes income before Federal and State taxes are paid. Any Federal refund (or advance payment, with respect to a refundable credit) is excluded from income by statute (26 U.S.C. 6409). As far as excluding specific other refundable tax credits from States, HUD is including in this final rule language to exclude from income amounts directly received by the family as a result of State refundable tax credits or State tax refunds at the time they are received (§ 5.609(b)(24)(iii)).

In response to the public comments received, this final rule will no longer eliminate the exclusion from income of ''temporary, nonrecurring, or sporadic'' income. Rather, to address the concerns that the language in the existing regulation is unclear, HUD is modifying the language to exclude ''nonrecurring'' income received in the previous year that will not be repeated in

§ 5.609(b)(24). However, earnings as an independent contractor, day laborer, or seasonal worker are explicitly not within the category of excluded income. HUD is defining the terms day laborer, independent contractor, and seasonal worker in § 5.603 of this final rule. Some examples of a seasonal worker include a holiday gift wrapper, lifeguard, ballpark vendors, or snowplow driver.

Additionally, to address other forms of short-term payments that would have been excluded under the previous blanket exemption, HUD is specifying certain forms of income that are included in the category of ''nonrecurring'' income that would be excluded from the calculation of income: work on the decennial Census (less than 180 days and not resulting in a permanent position) (§ 5.609(b)(24)(i)); direct Federal or State payments or tax credits intended for economic stimulus or recovery (§ 5.609(b)(24)(ii)); amounts received directly by the family as a result of State or Federal refundable tax credits or refunds at the time they are received (§ 5.609(b)(24)(iii) and (iv)); gifts for holidays, birthdays, or special occasions (§ 5.609(b)(24)(v)); in-kind donations from food banks or other organizations (§ 5.609(b)(24)(vi)); and lump-sum additions to assets such as lottery or other contest winnings (§ 5.609(b)(24)(vii)). As discussed above, because there has been some confusion, HUD is adding an exclusion in § 5.609(b)(25) to make clear HUD's existing practice of excluding civil rights settlements or judgments, including settlements or judgments for back pay. The wording of this exclusion reflects the fact that resolutions of civil rights matters may be structured settlements instead of lump-sum payments. With these revisions and additions, HUD intends to exclude from income sources of funds that cannot be relied upon to pay for a family's housing needs, while providing additional clarity to PHAs and owners about what funds should still be considered income, given the broad definition contained in HOTMA.

However, other types of funds that commenters asked to be excluded from income will be included in income under these revisions. Income from research studies or money received for child support, for example, would not fall into any of the exclusions and would be considered income under the final rule, unless the family can demonstrate that the funds will not be received in the coming year. HUD believes that these funds are potentially reliable enough to not automatically assume they will not be repeated, and they are funds that can be used to pay for a family's housing needs. Therefore, under the broad definition of income in HOTMA, these sorts of funds should be included in the calculation of income. However, PHAs have the discretion to use permissive deductions for these payments based on their policies.

HUD intends these changes to reduce burden, both on tenant families and on PHAs and owners. Determining if a payment is nonrecurring is difficult and can be unclear. Using past income consistently will ensure that families that do not receive the income regularly will see the adjustment in their calculated income at the next interim or annual reexamination. For the voucher program, families are not immediately terminated if their income increases and they reach zero for the housing assistance payment (HAP). Under § 982.455 (which HUD is not amending in this final rule), the family's HAP contract does not terminate until 180 days after the last payment has been made to the owner. Families are not likely to stop receiving assistance due to the inclusion of nonrecurring payments. Congress intended to streamline these requirements to reduce burden on PHAs and owners. Accepting proposed alternatives such as more frequent evaluations or temporary exclusions of certain types of income would limit the effect of that burden reduction.

HUD also appreciates comments about certain payments from States to allow families to keep individuals with disabilities living at home. If a family receives such a payment and it was already excluded from the family's income under the current regulation at 24 CFR 5.609(c)(16), this final rule does not change that. The proposed rule eliminated the requirement that such payments offset the cost of services or equipment, and this final rule retains that change. However, HUD is expanding § 5.609(b)(19) to cover all payments to a family from a State agency, regardless of whether such a payment is through Medicaid, in response to public comments that pointed out the wording under the proposed rule was too limiting because some States use a source of funding other than Medicaid managed care to provide for in-home support. In response to these comments, the final rule includes funding through any Medicaid structure, not just managed care. Furthermore, it also excludes payments from, or authorized by, State agencies in states which use a source of funding other than Medicaid to provide for in-home support. In addition, as discussed previously in this preamble, HUD is also clarifying in the final rule that payments may be made directly by a State Medicaid agency (including through a managed care entity) or other State agency or federal agency, or made by another entity authorized by the State Medicaid agency, or other State or Federal agency to do so on its behalf to enable a family member with a disability to remain living at home. HUD is also adding language in the final rule that payments to a member of the assisted family by the State Medicaid agency-managed care system or other State or Federal agency (or other entities authorized by those agencies to make such payments) for caregiving services to enable a family member who has a disability to live in the assisted unit are covered payments and would be excluded from the family's income.

HUD will continue to count payments for long-term care insurance as an unreimbursed health and medical care expense for purposes of § 5.611(a)(3)(i), but HUD declines to exclude such payments from the family's income. However, § 5.609(b)(6), which is not substantively changed by this final rule from the current regulatory text, excludes amounts received by the family that are specifically for, or in reimbursement of, the cost of health and medical care expenses for any family member.

Many other suggestions from commenters continue to be excluded from income under this final rule, such as the earned income of dependent full-time students and any income from foster adults and foster children. In addition, this final rule retains the language from the proposed rule excluding from income replacement housing ''gap'' payments in § 5.609(b)(23) and loan proceeds in § 5.609(b)(20). However, HUD declines to exclude payments either paid or received as child support from the family's income or additional veterans' disability payments not already excluded by another provision of § 5.609(b). PHAs still retain the ability to create permissive deductions from income.

The majority of income exclusions are categorical—funds that fit into one of the exclusions, regardless of amount, are excluded from income. However, to the extent that an exclusion is for a set dollar amount, almost all such amounts are to be adjusted annually according to the CPI–W.

B. Returns on Assets

A commenter stated that HUD should exclude income from assets from income, which would decrease labor costs for staff with a minimal impact on tenant rent payments. A commenter

stated that there may be assets an individual cannot access or benefit directly from, and therefore those assets should not count as income.

A commenter stated that the proposed regulation in § 5.609(b)(1) excluded only imputed returns on assets and asks how actual income on assets under $50,000 should be treated.

HUD Response: The 1937 Act, as amended by HOTMA, specifically includes actual income from assets in the definition of income. Therefore, any actual income received must be counted as family income. However, if the family does not have access to a specific asset, as determined by the applicable State law, it should not be counted as belonging to the family, because the family would not own the asset as required under the definition of ''net family assets'' in § 5.603. This includes any funds held in escrow as a result of a family's participation in the FSS program, as the family does not have access to those funds during their participation in the program.

In § 5.609(a)(2) of this final rule, HUD is clarifying the regulatory language regarding income from assets to help PHAs and owners determine what income from assets should be included in the family's annual income while also minimizing the burden on PHAs, owners, and families. Under § 5.618(b)(1), when all net family assets have a combined value of $50,000 or less, the family is to include on its self-certification that the combined value of net family assets do not exceed $50,000, and the amount of actual income the family expects to receive from the family's assets. This amount is to be included in the family's income. The PHA or owner may rely on this self-certification to serve as verification for both assets and the amount of actual income the family expects to receive from such assets.

When all net family assets have a combined value over $50,000, if the PHA or owner can compute the actual income for some assets, but not all assets, the PHA or owner must compute the actual income for those assets, calculate the imputed income for all remaining assets where the actual income cannot be computed, and combine both amounts to determine the income for all assets. The PHA or owner must calculate the imputed return on the combined value of all net family assets when the net family assets are more than $50,000 if *no* actual income can be computed from any of the net family assets.

C. Student Financial Assistance

Commenters suggested that HUD should exclude the full amount of student financial assistance a tenant receives. Others stated that HUD should exclude only amounts paid to the educational institution while counting everything else as part of annual income.

Commenters asked for additional information and updated handbook guidance on the application of the student rule. Others asked for additional clarification on the definition of ''grant-in-aid'' and whether recurring gifts from family members to pay tuition and expenses would be included or excluded.

Commenters also stated that HUD should provide clarification on whether the financial aid exclusion applies to public housing as well as the HCV and PBRA programs.

A commenter also stated that HUD should ensure its policies do not create barriers to education or create undue hardships for part-time students.

HUD Response: In this final rule, HUD codifies a Federally mandated income exclusion under section 479B of the Higher Education Act of 1965 (HEA) (20 U.S.C. 1087uu). Section 5.609(b)(9)(i) of the final rule excludes assistance that section 479B of the HEA requires to be excluded from a family's income. This provision excludes from income assistance to students under Title IV of the HEA and under Bureau of Indian Affairs student assistance programs, even assistance in excess of tuition and required fees and charges.

Additionally, in response to the comments on the proposed rule, HUD has provided, in § 5.609(b)(9)(ii), additional language to define ''student financial assistance'' that is not otherwise excluded by the Federally mandated income exclusion in § 5.609(b)(9)(i). HUD defines ''student financial assistance'' in order to provide greater consistency of application. As discussed earlier in this preamble, the final rule provides that student financial assistance excluded by § 5.609(b)(9)(ii) is limited to financial assistance provided for the actual covered costs of the student, which are the actual costs of tuition, books and supplies (including supplies and equipment to support students with learning disabilities or other disabilities), room and board, and other fees required and charged to a student by an institution of higher education, and for a student who is not the head of household or spouse, the reasonable and actual costs of housing while attending the institution of higher education and not residing in an assisted unit. Student financial assistance must be a grant or scholarship received from the Federal government; a State, Tribal, or local government; a private foundation registered as a nonprofit; a business entity; or an institution of higher education. Furthermore, the grant or scholarship must be either expressly for tuition, book, supplies, room and board, or other fees required and charged to the student by the education institution; expressly to assist a student with the costs of higher education; or expressly to assist a student who is not the head of household or spouse with the reasonable and actual costs of housing while attending the education institution and not residing in an assisted unit.

The final rule states that student financial assistance does not include gifts from family or friends. In other words, gifts that are recurring and otherwise do not meet the criteria for the income exclusion for gifts would be counted as income under the final rule, regardless of whether the recipient of the gift is a student. This ensures that the application of the student financial assistance exclusion is equitable as it does not advantage students with wealthy family members or friends over other students.

The income exclusions in § 5.609(b)(9) apply to all families in assisted housing, regardless of whether the family participates in public housing or Section 8 programs. However, as discussed in an earlier part of this preamble, the application of the income exclusion in § 5.609(b)(9)(i) to families in the Section 8 programs may be limited when using funding from years when HUD appropriations language contains overriding language that requires HUD to include student assistance listed in Title IV of the HEA in the calculation of student financial assistance in excess of tuition and required costs and fees for purposes of determining the income for Section 8 heads of household or spouses who are either age 23 and under or without dependent children.

In response to the comment that HUD avoid creating barriers or hardships for part-time students, HUD notes that the exclusion in § 5.609(b)(9)(i) applies to part-time and full-time students equally. Additionally, HUD is expanding the student financial assistance exclusion in § 5.609(b)(9)(ii) to include part-time as well as full-time students. HUD believes that that it is appropriate to exclude student financial assistance, as defined in § 5.609(b)(9)(ii), from income regardless of whether the student is full or part-time. The reason the family is

receiving the student financial assistance is to assist the family with actual educational expenses, and under § 5.609(b)(9)(ii) the student financial assistance is limited to costs required and charged to the student by the institution of higher education. Consequently, the student financial assistance should be excluded from income, regardless of whether the student is a full or part-time student. While HOTMA specifies that the student financial assistance exclusion is for full-time students, HUD is using its authority when defining income to provide the same student financial assistance exclusion for part-time students.

A noted elsewhere in this preamble, HUD intends to offer further guidance on the student financial aid exclusion under this final rule.

D. Lump-Sum Payments

Commenters weighed in on whether lump-sum payments should be counted as income. A commenter stated that HUD should maintain the current exclusion of lump-sum receipts from income because those lump sums cannot be annualized for income calculations.

Commenters stated that lump-sum insurance payments or settlements, which are meant to help recipients recover from significant financial losses, should not be included as income. Commenters stated that HUD should exclude damage awards from civil actions that do not result in disability other than such awards that represent lost wages, settlements for injuries resulting in disability but for which there is no declaration of culpability, or compensation for physical injuries recovered in various claims by injured people and their families, similar to IRS exemptions. Others stated that HUD should exclude only deferred disability lump-sum payments and current exclusions but should not add more blanket exemptions.

Others stated that it is fair to count as income settlements and subsequent drawdowns of funds meant to replace income or lump sums deposited into a bank account. A commenter said that lump sums deposited into trusts should not be counted as income unless it is drawn upon.

A commenter stated that the proposed exemption language would require a PHA to determine the specific legal claim under which the funds were awarded and would exclude settlements where the defendant avoids admitting to causing harm.

HUD Response: This final rule is including as an exclusion from income lump-sum additions to family assets, including lottery or other contest winnings, in § 5.609(b)(24)(vii), as a type of nonrecurring income. PHAs and owners would consider any actual or imputed returns from assets as income at the next applicable income examination, as may be required by § 5.609(a)(2). In the case where the lump sum addition to assets would lead to imputed income, which is unearned income, that increases the family's annual adjusted income by ten percent or more, then the addition of the lump sum to the family's assets will trigger an immediate interim reexamination of income. This reexamination of income must take place as soon as the lump sum is added to the family's net family assets unless the addition takes place in the last 3 months of family's income certification period and the PHA or owner chooses not to conduct the examination.

In addition, this final rule in § 5.609(b)(5) and (7) retains language from the proposed rule that excludes from income insurance payments, settlements for personal or property losses, and recoveries from civil actions or settlements based on claims of malpractice, negligence, or other breach of duty owed to a family member arising out of law that resulted in a member of the family becoming a family member with a disability. This final rule is silent on requirements regarding culpability of the parties, so that is not a factor in whether or not the recoveries or settlements are excluded from income. HUD is also adding a clarification that the exclusion of settlements for personal or property losses covers insurance payments and settlements for personal or property losses. Finally, HUD is further clarifying that payments made pursuant to the resolution of civil rights matters, which have always been excluded from income, are now explicitly listed in new § 5.609(b)(25), as explained above.

E. Trust Distributions

Commenters stated that the proposed regulation exempting certain payments from special needs trusts (SNTs) is too narrow. Some stated that the regulation unfairly counts as income funds distributed for non-medical, quality-of-life expenses, and many tenants with disabilities may create SNTs to pay for a variety of future needs, not just medical expenses. Commenters stated that the proposed rule could result in people with disabilities being forced to choose between housing and other necessities, and including all distributions would harm the relationships sanctioned by other means-tested programs between SNTs and other vendors.

Another commenter stated that limiting the exemption to only irrevocable trusts exclude payments that would qualify for the exemption other than the fact that they are in a different type of trust or account.

Commenters stated that requiring PHAs to verify the existence of the trusts and to project annual amounts received would be administratively burdensome.

Commenters stated that the plain meaning of the HOTMA amendments is that the distributions of the principal of trusts should not be income. Others stated that excluding only withdrawals for specific purposes would create operational and administrative challenges.

HUD Response: HOTMA amended the 1937 Act to codify in statute a very broad definition of ''income,'' with limited exceptions to what is to be considered income. Section 104 of HOTMA, which amended Section 16 of the 1937 Act, excluded irrevocable trusts and trust funds that are not under the control of the family or household from being considered part of a family's net family assets. Section 104 of HOTMA amended the 1937 Act to explicitly require PHAs or owners to consider any income distributed from an irrevocable trust fund or a trust fund that is not under the control of a family or household member as annual income to the family unless the income distributed was used to pay for the health and medical care expenses of a minor. In considering the effect of the language, HUD recognizes that the corpus (or principal) of a trust is not new money coming in for the family. Therefore, HUD is clarifying § 5.609(b)(2) to exclude from a family's income any distributions of a trust's principal, regardless of the form of the trust, because this is not income for the family.

As a general rule, PHAs and owners must count any distributions of income from an irrevocable trust or a trust not under the control of the family (*e.g.,* distributions of earned interest) as income to the family. However, this general rule does not apply to distributions used to pay the health and medical care expenses of a minor. Distributions, even of trust income, are not considered part of family income if used for this purpose.

HUD notes that these rules apply equally to irrevocable SNTs or revocable SNTs not under the control of the family or household. HUD recognizes that individuals with disabilities rely on SNT distributions to pay for a variety of

needs. However, HUD has no discretion in applying the statutory requirements surrounding income distributions from irrevocable trusts and trusts held outside of the control of the family or household.

Finally, per the amendments made by Section 104 of HOTMA, revocable trusts under control of the family count as an asset under the definition of ''net family assets'' in § 5.603. Only trusts that are irrevocable or not under the control of a family or household member are excluded from a family's net family assets. Since revocable trusts under the control of the family or household are considered part of the net family assets, the final rule clarifies at § 5.609(b)(2)(ii) that distributions from these trusts are not used to calculate annual income. Instead, the PHA or owner must count all actual returns (*e.g.,* interest earned) from the trust as income or, if the trust has no actual returns and the total value of the combined net family assets exceeds $50,000 (as that amount is updated for inflation), as imputed returns, as applicable, under § 5.609(a)(2).

F. Withdrawals From Assets

Some commenters stated that HUD should count as income any amount drawn against a payment from a bank or trust fund, including insurance payments or settlements. A commenter stated that the proposed regulations regarding distributions from trusts are complex, prone to error, and subject to subjective interpretations, and would privilege or penalize certain forms of income over other comparable incomes, often hinging on details such as whether or not there was a lawsuit, the type of account into which the funds were deposited, and whether the expenses are for a minor, none of which seem relevant to the availability of the funds to the family.

Others stated that HUD should exclude from income all withdrawals from insurance payments or settlements. A commenter stated that withdrawals from existing assets included in asset determinations should not be considered income; only ''new money'' to the family is income. A commenter stated that limiting the exclusion to disability-related withdrawals specifically related to the settlement would lead to confusion about what counts and what documentation is required, making things more complex and time-consuming, in direct opposition to the purpose of HOTMA. Others stated that insurance settlements are meant to compensate the family for a loss and verifying the circumstances around the payment or settlement would greatly add administrative burden to PHAs and owners. A commenter stated that the exclusion should apply regardless of whether the payment or settlement is related to a minor.

A commenter stated that both the lump sum and any interest earned from the lump sum should be counted as income if the sum is placed in a bank account.

Commenters stated that withdrawals of principal from accounts should not be counted as income if the original source is excluded from income. However, other commenters stated that including withdrawals as income in specific circumstances would increase the administrative burden on staff and residents to allow PHAs and owners to determine whether a withdrawal is included in the exclusion or not.

With respect to SNTs, commenters stated that all withdrawals from such trusts established for tenants with disabilities should be excluded from income. A commenter stated that all funds pulled from irrevocable trusts should be counted as income, as the trusts provide documentation on amounts distributed, but it would be difficult or impossible to track or prove the purpose of the distribution.

HUD Response: Withdrawals of a family's assets (*e.g.,* money deposited in a bank account under the name of a family member) are not considered new income to the family or part of a family's annual income unless the family's assets are held in a trust that is not revocable by or under the control of a member of the family or household. In those rare instances, PHAs or owners must consider income that is distributed to a family member as part of a family's annual income unless the withdrawal is for the health and medical care expenses of a minor (as discussed above).

However, unless the amount meets one of the exceptions in § 5.603, *i.e.,* is a specific type of recovery or placed in a specific type of trust, the money in the bank account would still count as a family asset. Therefore, any actual returns (such as interest) on those funds will be considered family income, or barring any actual returns, if the net family assets exceed $50,000 (as adjusted annually by CPI–W), any imputed income will be considered family income.

Please see the discussion under ''Trust Distributions,'' above, for a discussion of the treatment of distributions of income or principal from trusts.

Deductions From Income

A. Attendants Deduction

Commenters stated that HUD should restore the deduction of attendant care and auxiliary apparatus expenses in excess of the earnings of the family member who can work because of such expenses, as the amendments in HOTMA do not require removing the deduction, and the deductions may pay for themselves over time by allowing higher earnings.

HUD Response: These deductions are currently located in § 5.611. There is no change from the current regulations in this final rule other than the statutory change from 3 to 10 percent of annual income for the threshold that applies to unreimbursed health and medical care expenses and reasonable attendant care and auxiliary apparatus deductions.

B. Child Care Deduction

Commenters expressed concern that increasing the threshold for deductions will make it more difficult for families. Commenters suggested that expenses should qualify as a deduction at 4 percent of a family's income. Another commenter stated that child care deductions should be treated the same way as medical deductions, with a reasonable threshold before the allowance applies.

Commenters asked HUD to clarify that child care deductions are available year-round to a household with seasonal employment or education, otherwise PHAs or owners may limit the deduction only to months when the family member is working or taking classes.

HUD Response: While the 1937 Act, as amended by HOTMA, sets a threshold for health and medical care and reasonable attendant care and auxiliary apparatus expenses deductions, it does not do so for child care deductions. Rather, the statute requires only that the expenses be reasonable and necessary to enable a member of the family to be employed or attend classes. Therefore, requiring a threshold of expenses is inconsistent with the statute.

HUD will consider providing additional guidance clarifying how to determine what expenses are deductible and how to determine such amounts.

C. Deductions for Elderly Families or Families With a Person With Disabilities

Commenters supported increasing the deduction for elderly families or families with persons with disabilities. Some asked HUD to consider a more realistic increase, such as up to $750.

However, some commenters stated that HUD has not done the study required by Section 102(i) of HOTMA, and HUD should defer any rulemaking until the report is completed and submitted to Congress.

HUD Response: Because the HOTMA statute mandates the deduction of $525, HUD cannot change it. HUD will conduct the study required by Section 102(i) of HOTMA 12 months after this final rule is effective, which will allow HUD to determine the effects of the new deductions as mandated by the statute.

D. Inflation

Commenters stated that adjusting the annual dependent deduction by inflation would create a hardship on PHAs, because HUD does not specify the inflation factor.

HUD Response: HUD has specified that the CPI–W will be the inflation factor used to adjust the deduction amounts for elderly and disabled families and for minors, students, and persons with disabilities. In accordance with HOTMA, HUD will annually recalculate these deductions and make the revised amounts available to PHAs. HOTMA requires that HUD recalculate the deductions by rounding the inflated amount to the next lowest multiple of $25.

E. Health and Medical Care and Reasonable Attendant Care and Auxiliary Apparatus Expense Deductions

Some commenters supported raising the threshold for medical deductions, as it would reduce burdens on PHA and owner staff. Others opposed the increase. Some stated that it would eliminate the deduction for many households or would create an untenable situation for families already facing financial challenges due to health or disability. A commenter stated that the higher threshold would result in PHAs having to process many hardship exemptions.

Commenters expressed concern that increasing the threshold for deductions will make it more difficult for families. Commenters suggested that expenses should qualify as a deduction at 4 percent of a family's income. Others stated that increasing the threshold from 3 percent to 10 percent at one time is not fair to those who need the medical deduction; instead, the commenters suggested that HUD stagger the increase, either by relating increases only to inflation or doing a set amount each year for 3 to 7 years. Others suggested creating a maximum rent increase every year.

Some commenters had specific suggestions on how to ease the difficulties on families. One suggested a threshold of 6.5 percent. Another stated that HUD should make the current medical allowance available to all households, regardless of age or disability status.

HUD Response: HUD agrees that raising the threshold will reduce burdens on staff of PHAs and owners. In addition, HUD believes that the increased deductions for elderly families or families with a person with disabilities may help to offset the increased threshold for deductions due to health and medical care and reasonable attendant care and auxiliary apparatus expenses. Families still experiencing a hardship may be eligible for hardship exemptions.

Deductions for health and medical care expenses for elderly or disabled families are statutorily mandated, including the threshold that must generally be met for a family to receive the deductions. Therefore, HUD may not change the deduction to a different percent, as some commenters have requested. However, PHAs may adopt additional deductions from annual income for all families as a permissive deduction, though they will not be eligible for an increase in subsidy amounts to cover the costs of such permissive deductions, as discussed further later in this preamble. HUD has also provided hardship exemptions in accordance with HOTMA's requirements, thereby providing relief to affected families.

F. Permissive Deductions

Some commenters were opposed to the use of permissive deductions. Some stated that they could result in disparate impacts, such as if a PHA creates a permissive deduction only for earned income, which would result in a discriminatory effect on certain protected classes with unearned income, such as persons with disabilities. Some stated that additional deductions, and proving such deductions did not materially increase subsidy, would be burdensome to the PHAs. One commenter requested that subsidy be increased if additional deductions are required.

Commenters stated that HUD should allow PHAs to adopt additional deductions based on the needs of their communities. One commenter stated that the standard for what is permitted should be broad enough not to discourage PHAs from exploring innovative solutions to the goals of HUD, PHA, and the community. A commenter stated that extending permissive deductions to Section 8 programs would add equity between programs and would reduce the complexity of administering different programs.

Commenters wrote that HUD should find ways to encourage the use of permissive deductions to encourage work. One stated that the statutory limitation on material increases in subsidy was a missed opportunity to provide such a work incentive. Others supported the idea of using permissive deductions to encourage tenants to work but stated that funding support from HUD is needed to make it work. A commenter also stated that even if HUD permits some subsidies for work incentives, it should still be left to PHAs to decide whether to implement them.

Commenters also wrote about allowing additional subsidy. Some stated that HUD should not allow additional subsidy to cover permissive deductions. Other commenters stated that requiring PHAs to bear all costs will result in very few permissive deductions being used and may even disincentivize PHAs from providing necessary deductions for residents. A commenter stated that allowing permissive deductions as described in the proposed rule could result in reduced funding resources for all agencies in the medium term. A commenter stated that the statute does allow some added subsidy costs because it only prohibits ''material'' increases.

Commenters spoke to how HUD proposed to define whether an increase in subsidy is ''material.'' A commenter stated that HUD should define ''materially increase Federal expenditures'' in such a way as to allow PHAs to create an earned income deduction, excluding 15 percent of earned income to remove disincentives for work and creating parity between families with earned income and families with fixed-income sources. Another suggested defining materially at 5 percent, as it is a figure HUD uses elsewhere. A commenter stated that HUD should clearly communicate the standard, and that it should be measured at a PHA's portfolio level, rather than at the family level. A commenter suggested that it may be more administratively burdensome for PHAs to demonstrate that there is no increased subsidy cost than it is worth it to the PHA to provide the additional deduction.

HUD Response: Amendments made by HOTMA explicitly permit PHAs to adopt permissive deductions, so PHAs may do so for public housing and for the HCV program and moderate rehabilitation programs (including the

moderate rehabilitation Single-Room Occupancy (SRO) program). Permissive deductions were already allowed in the regulations for public housing, so it is not new for that program. This discretion is only available for PHAs, not for non-PHA owners. When establishing permissive deductions, PHAs are still subject to Federal nondiscrimination requirements, including the obligation to provide reasonable accommodations that may be necessary for households with family members with disabilities.

PHAs can respond to community needs by using a wide range of permissive deductions, including permissive deductions to provide incentives to work. However, given the statutory requirement that permissive deductions may not materially increase Federal expenditures, HUD does not want to reduce funding for all PHAs by factoring in permissive deductions prior to allocating PHA Operating Funds. Consequently, the final rule provides that a PHA that adopts such deductions for public housing will not be eligible for an increase in Capital Fund and Operating Fund formula grants and the costs of permissive deductions must be covered by each individual PHA rather than by HUD. Likewise, for the HCV, moderate rehabilitation, and moderate rehabilitation SRO programs, the final rule provides that the subsidy costs attributable to permissive deductions will not be taken into consideration in determining the PHA's HCV renewal funding or moderate rehabilitation funding.

Assets

A. Cap

Commenters expressed support for there being a cap on assets held by families receiving assistance under the 1937 Act. Some asked that the cap be raised to $250,000, because the cap of $100,000 may make elderly families with retirement savings ineligible for assistance. Commenters also requested that HUD permit PHAs to defer termination of families that are over the asset cap until the next annual reexamination to allow the family to demonstrate that the owner of the asset is selling the asset or is moving out of the household.

HUD Response: HUD appreciates the public comments. Under the new definition of *Net family assets* in both the proposed rule and this final rule, in § 5.603(b), the value of any retirement accounts recognized as such by the IRS are not included in net family assets. In addition, pursuant to § 5.618(c), PHAs and owners are given discretion in enforcing the asset limitation on eligibility for assistance at reexamination in § 5.618(a). HUD will issue additional guidance on the use of this discretionary authority. PHAs and owners are reminded that they may not create polices, criteria, or methods of administration that result in discrimination against individuals with protected characteristics under fair housing and civil rights laws and regulations. As such, PHAs and owners may need to provide reasonable accommodations to policies established under this provision to ensure equal access to their programs and activities by individuals with disabilities.

B. Exclusions

While some commenters agreed with the exclusion of IRAs from family assets, commenters also requested additional exclusions. Some suggested that HUD exclude disability-related durable medical equipment (such as electronic wheelchairs, lifts, or disability-adapted vehicles). Commenters stated that HUD should exclude any assets that are inaccessible to the tenants and provide no income. Commenters suggested that HUD exclude inheritances, or insurance payments, or amounts recovered for personal or property losses.

Commenters also stated that HUD is required to exclude equity in units bought under public housing homeownership programs when determining a family's eligibility for assistance. Others stated that HUD should exclude homes with negative equity.

HUD Response: Medical equipment such as described by commenters would count as necessary personal property, and therefore would be excluded from assets under § 5.603(b). If the household does not have control of a trust fund asset or the effective legal authority to sell real property, both as defined by the applicable State or local law, neither the fund nor the real property will be counted as part of the net family assets. Irrespective of whether an asset generates income, if the asset is not excluded, then the asset must be included in net family asset calculations.

HUD believes that insurance payments should continue to be counted as an asset. The 1937 Act, as amended by HOTMA, has a provision that a civil recovery or settlement for claims of malpractice, negligence, or other breach of duty owed to a family member arising out of law that resulted in a family member becoming disabled is excluded from net family assets. Given the specificity of the statutory language, HUD believes the intent of the statute is that other payments or settlements are to be counted as assets.

Under the amended 1937 Act, families that have a present ownership interest in, a legal right to reside in, and the legal authority to sell real property that is suitable for occupancy for the family (unless the person is a victim of domestic violence or if the family is offering the property for sale) are not eligible to receive rental assistance. A present ownership interest would include any title to a home, any ownership of membership shares in a cooperative, and any lease or other right to occupy a home or cooperative, all as defined by the State or local laws of the jurisdiction where the property is located. It would not include the right to purchase title to a residence under a lease-purchase agreement. In addition, the statutory language excludes from net family assets (1) real property for which the family does not have the effective legal authority to sell in the jurisdiction in which the property is located and (2) equity in property for which the family is currently receiving homeownership assistance through the HCV program from a PHA. These exclusions are contained in the definition of *Net family assets* in § 5.603(b). HUD will provide PHAs and owners additional guidance on how to calculate the value of real property with negative equity for those families who meet one of the exemption categories.

C. Inclusions in Assets

Commenters asked HUD for clear and comprehensive guidelines on what constitutes ''net family assets.'' Commenters suggested that HUD specify in the definition of assets that it includes lump-sum items like insurance payments, settlements, and inheritances to prevent PHAs and owners from counting such funds as income.

Commenters requested clear guidance on the difference in treatment between whole life insurance and term life insurance, as community-based service providers experience barriers in getting vulnerable individuals housed due to life insurance issues.

HUD Response: Given that there are many categories of funds that would be considered assets and should be included in asset calculations, HUD does not believe that the regulation should specify every form of asset. Instead, any type of asset not specifically excluded should be included in the calculation of net family assets. However, HUD believes that guidance may be an appropriate vehicle for providing additional information on

what can constitute an asset and how to calculate its value.

This final rule does not change current practice regarding the treatment of different forms of life insurance. The cash value of an insurance policy is considered an asset, but the face value of any policy is not. Similarly, the final rule does not change current practices regarding the valuation of any form of real property owned by a family (*e.g.,* commercial real property) for purposes of calculating net family assets. The value of real property included in net family assets is the net cash value after deducting reasonable cost that would be incurred in disposing of the family's real property, which would include repayment of any mortgage debt or other monetary liens on the real property.

D. Personal Property

Some commenters supported the proposed exclusion of personal property valued at $50,000 or less from assets. A commenter stated that allowing PHAs to determine whether specific items are assets allows too much ''fluidity'' in making income determinations. In addition, commenters stated that the proposal aligns with the asset self-certification threshold, reducing the verification burden on staff.

Other commenters objected to the proposed exclusion of personal property from the determination of assets.

Commenters stated that HUD should define ''necessary items'' to prevent confusion of what they are, as PHAs and owners determine whether families are over the income and asset caps. Some commenters suggested that HUD include a non-exclusive list of necessary items in guidance.

Commenters suggested items to include in the list of ''necessary items.'' Some stated that the term should include items like home furniture or cars that are necessary for work or getting children to school. Commenters asked whether all cars would be considered ''necessary'' and whether the term ''necessary'' meant that there were, by implication, items that would be considered ''non-necessary'' (such as jewelry) that would then have to be included as assets. Some commenters suggested that HUD define ''necessary'' to include cars (or other forms of personal transportation), medical equipment, and other items essential for daily living (including furniture), education, and employment.

Some commenters also stated that HUD should not limit the exception to ''necessary items.'' Commenters stated that requiring PHAs or owners to determine the value of items like collectibles or jewelry, which may not be considered ''necessary,'' would be burdensome because values may differ based on local market conditions. Other commenters stated that it would be administratively burdensome to determine what items were ''necessary'' and what items would be included as an asset.

Commenters also stated that HUD should make it explicit that the PHA has the right to establish different levels of personal property to exclude from assets, in line with PHAs' ability to exercise flexibility in enforcement on asset restrictions or to establish other exceptions. Other commenters asked for clarity on whether the $50,000 cap is per item or total value of necessary items.

Commenters suggested that HUD should allow families to self-certify that their personal property is valued under $50,000, eliminating the burdensome requirement that PHAs itemize such property. Commenters stated that HUD should not require PHAs to document the value of personal property that is excluded from the calculation of net family assets.

HUD Response: Determining what is a ''necessary item'' for personal property is a highly fact-specific determination, and therefore creating a list in the regulation would be inappropriate. However, HUD will issue additional guidance for PHAs, owners, and grantees to determine whether an item is a ''necessary item of personal property'' or whether the value of the item should be included in calculating the value of all non-necessary items of personal property for the $50,000 exclusion. In this final rule, in paragraphs (3)(i) and (ii) of the definition of *Net family assets* in § 5.603(b), HUD is clarifying that all necessary items are excluded from any calculations of personal property value; items of personal property not counted as ''necessary items'' must have a combined total value of $50,000 or less (as such amount is adjusted by CPI–W annually) for the PHA, owner, or grantee to exclude the property value from the family's assets.

In addition, the regulation, at § 5.618(b), allows PHAs, owners, grantees, and responsible entities to determine the worth of a family's personal property by accepting a family's self-certification that their property falls under the cap. This will reduce the burden on PHAs and owners to determine the value of any specific item.

E. Real Property

Many commenters reacted to HUD's proposed implementation of the new prohibition imposed by HOTMA on providing rental assistance to families with a present ownership interest in real property that is suitable for occupancy. Some commenters stated that HUD should not prohibit families that own real property from being assisted, as the family may not be able to afford upkeep, insurance, or taxes on the property. Others suggested that HUD could allow families to keep any properties worth less than $50,000 or stated that HUD could exclude equity in a property for which a family receives homeownership assistance or units that were purchased under public housing homeownership programs. Commenters also stated that HUD should ensure that PHAs have discretion in whether or not to enforce the prohibition on real property ownership. Commenters asked HUD to provide additional clarity on how PHAs and owners should approach properties that the family is renting out.

Commenters asked HUD to provide additional clarity on what documentation a family must provide in order to qualify for an exception to the prohibition. Commenters stated that leaving it up to a PHA to determine what is acceptable documentation would invite litigation and suggested that HUD use the existing Multifamily Occupancy Handbook (4350.3) to allow for owners and PHAs to collect information in a broad range of formats. Other commenters stated that HUD should provide guidance for PHAs and owners, but not prescribe standards for determining suitability of the property. Some commenters suggested that families should be allowed to self-certify that they qualify for an exception. Commenters suggested that HUD could establish a hierarchy of acceptable verification.

Commenters also asked how PHAs and owners are to determine whether a family owns real property. Commenters suggested that families should be allowed to self-certify that they do not own property, stating that it would be counterproductive to require more. Some commenters stated that requiring PHAs to establish ownership relationships would be extremely onerous, and HUD should defer rulemaking on this issue until HUD can issue clear and comprehensive guidelines. Some commenters suggested that local auditor websites could be a way to determine ownership interests in real property.

Commenters also responded to the proposed list of types of ownership interests a family may have without affecting the family's eligibility to receive assistance. Some commenters stated that there are multiple forms of

ownership that may be particular to a certain State and suggested that HUD expand the list of exceptions in the rule. Commenters stated that the burden of proof needed to demonstrate ownership will make this provision hard to implement; instead, the commenters stated that the question should be whether the family legally owns the home and has the ability to liquidate.

Commenters made suggestions regarding determining whether a property is suitable for the family's occupancy. Some commenters stated that allowing exceptions to the prohibition on owning real property would cause PHAs to be out of compliance with the intention of the proposed rule. Other commenters stated that suitability of the property should not be limited to circumstances around a physical disability, as there may be circumstances where disability-related needs for a family may not be related to a physical disability. Commenters also stated that it would be beyond the expertise of owners or PHAs to make determinations of whether a property owned today will meet the needs of an older adult as they seek to age in place in their community.

HUD Response: When it comes to real property, HUD is bound by the terms of the amendments made by HOTMA, which prohibit families from receiving rental assistance if they have a present ownership in real property in which they have the legal right to reside and the effective legal authority to sell, unless such property is not suitable for occupancy by the family as a residence, the family is receiving HCV homeownership assistance for the property, the owner of the property is a victim of domestic violence, or the family is selling the property. These are statutory restrictions. Based on certain factual circumstances, as described above, though, PHAs and owners have discretion when enforcing the restrictions.

However, the documentation to determine whether a family qualifies for one of the real property exemptions can vary widely according to the family's circumstances or what may be available. Therefore, specifying in the rule what documentation a PHA or owner may accept would be inappropriate. HUD will issue additional guidance with details on what forms of documentation may be appropriate under different circumstances, including how a PHA or owner may determine whether a family has a present ownership interest in or the effective legal authority to sell or whether the property is suitable for the family to occupy as a residence.

HUD also notes that the regulatory language regarding suitability due to disability *includes* unsuitability due to physical needs, but it does not exclude other, non-physical reasons why a property may not be suitable for a family member with a disability. HUD agrees that there may be various circumstances where a property may not be suitable for occupancy for a household with a member with disabilities. Examples include, but are not limited to, disability-related need for additional bedrooms, proximity to accessible transportation, etc.

Finally, § 5.618 provides that PHAs and owners can determine that a family does not have any present ownership interest in any real property based on a certification by the family. By statute, the family certification only addresses whether or not the family has any current ownership interest in any real property. Thus, PHAs and owners must be aware that this certification only addresses one aspect of the general real property ownership limitation. A PHA and owner must still inquire whether or not the family has a present ownership interest in, a legal right to reside in, and the effective legal authority to sell real property that is suitable for occupancy by the family as a residence. For instance, a PHA or owner could use a form that includes both the certification as well as questions for the family to answer regarding the other restrictions.

F. Residential Real Property (Domestic Violence)

Commenters supported the idea that HUD would also allow exceptions to the prohibition on owning real properties for survivors of domestic violence, dating violence, sexual assault, or stalking. Commenters stated that HUD should follow the procedures already established under the Violence Against Women Act (VAWA), including the documentation requirements and ability of survivors to self-certify their eligibility.

Some commenters stated that HUD should modify its existing forms (Forms 5380 and 5382) to allow families to identify the location of real property and to document their exemption from the real property prohibition due to being a survivor.

Other commenters stated that HUD should do a separate rulemaking for domestic violence survivors, perhaps waiting until after VAWA is reauthorized.

HUD Response: HUD appreciates the commenters indicating support for the exceptions to the prohibition on owning real properties for survivors of domestic violence, dating violence, sexual assault, or stalking. As indicated in the regulation, the real property restriction does not apply to any person who is a victim of domestic violence, dating violence, sexual assault, or stalking. For example, if such person has an ownership interest that otherwise would make the family ineligible, the prohibition will not apply. Additionally, HUD interprets this provision such that if a minor child within the family is a victim of domestic violence, dating violence, sexual assault, or stalking, an ownership interest held by that child's parent or guardian within the household will not trigger the prohibition. HUD agrees with commenters that the confidentiality requirements and restrictions on documentation requests associated with protections under VAWA should be extended to protect families seeking the domestic violence-related exception to the real property restriction in this rule. Therefore, this final rule adds language to § 5.618 to require the PHA or owner to comply with the confidentiality requirements and restrictions on requesting documentation under § 5.2007 whenever a family asks for or about an exception to the real property restriction because a family member is a victim of domestic violence, dating violence, sexual assault, or stalking.

HUD also appreciates the commenters' concerns with HUD's VAWA forms. In accordance with the Paperwork Reduction Act, HUD will at a later date update its VAWA forms and the relevant information collection requests. Rulemaking related to VAWA reauthorization is beyond the scope of this HOTMA final rule, and HUD has determined that this final rule is the appropriate vehicle to implement the exception to the prohibition on owning real properties for survivors of domestic violence, dating violence, sexual assault, or stalking.

G. Value of Assets

Many commenters spoke to how PHAs and owners should determine the value of assets of a family. Some stated that assets should be given the value assigned by the local tax assessor and applying inflation rates would be unfair and too burdensome to tenants. Other comments suggested that residents should be allowed to report the value of their assets, without requiring PHAs to do further research.

Commenters said that there should be a way to avoid itemization and valuation of assets and allowing self-certification that the family assets are below $50,000 would reduce the burden on staff and tenants. Commenters further stated that PHAs and owners

should be allowed to accept self-certification that net family assets are below the $100,000 limit for eligibility for assistance.

Commenters stated that allowing families to self-certify that their assets are under $50,000 is an ''extreme'' jump from the current self-certification amount of $5,000.

Commenters stated that HUD should not require PHAs to verify all assets triennially, since the income from assets is negligible in most cases and verifying and calculating assets requires a great deal of staff time.

Commenters also stated that HUD should round valuation figures down to the nearest $1,000 for assets so that staff have round numbers to use when applying inflation adjustments.

HUD Response: The amendments made by HOTMA allow families to self-certify when their combined net family assets are $50,000 or less, with that amount adjusted annually by an inflationary factor. In this final rule, HUD specifies, in § 5.618(b), that the inflation factor used to adjust the self-certification cap of $50,000 annually will be the CPI–W. HUD does not believe that it is permitted to round asset valuation amounts, given the definition of assets created by HOTMA as the net cash value of all assets after deducting reasonable costs for disposing of an asset.

However, it is statutory that PHAs and owners are required to redetermine a family's income on an annual or triennial basis, and those income reexaminations include valuation and returns of assets.

Hardships

While commenters submitted comments that covered a range of topics on hardships in general in HUD programs, most of the comments focused on the hardship provisions around the new deductions for healthcare and child care expenses.

A. General

Some commenters stated that it was premature for HUD to be issuing this rule. Commenters stated that HUD has not submitted the certification to Congress as required by Section 102(b) of HOTMA. Others stated that Congress contemplated more than normal notice-and-comment rulemaking regarding hardship exceptions. Commenters also stated that HUD should defer rulemaking on hardships for deductions until HUD can perform the study of the impact of HOTMA on tenants.

A commenter stated that there should not be hardship exemptions to rent requirements because the reduction in deductions for participants will be partially offset by the increase in the standard elderly/disabled deduction. A commenter also pointed out that having a different threshold for receiving deductions for some participants will be confusing for staff members and software providers, increasing the chance for error.

Commenters stated that placing the burden of determining whether a family should get a hardship on the PHA or owner would require residents to share personal information, and it would require owners to make determinations and subjective judgments based on deep levels of financial considerations, like credit card debt and budgeting priorities. Others stated that requiring families to demonstrate that the hardship is due to the decrease in deduction places too great a burden on the families, even potentially creating a litigation risk for PHAs because they are making subjective decisions. A commenter stated that allowing hardship exemptions when someone is attending school or is out of work would add burden and extra work to the PHA.

A commenter stated that HUD should adopt hardship exemptions for families consistently in all HUD-funded programs.

HUD Response: HUD does not believe that it is too early to issue this rule. In addition to receiving input from HHS during an interagency clearance process, HUD received input from a wide array of interested parties as part of the public comment process for the proposed rule, including: individuals; PHAs; public housing and tenant interest groups; health advocates; and legal services organizations. In addition, HUD cannot perform the study of the impact of the changes made by HOTMA on tenants until all the changes are in place.

The 1937 Act, as it existed both before and after HOTMA, requires that tenants who are facing financial difficulties receive hardship exemptions for the amount of rent that they owe. In 2019, HUD submitted the certification pursuant to Section 102(b) of HOTMA that hardship and tenant protections in the 1937 Act, as amended by HOTMA, are being fully provided to tenants.

Determining whether a family is facing a financial difficulty, and what is causing that financial difficulty, is a very fact-specific determination, and therefore it is a determination best left up to an individual PHA or owner. HUD reminds PHAs and owners, however, that in undertaking the fact-specific determination relating to a family's financial difficulty, they must comply with Federal fair housing and nondiscrimination requirements, including but not limited to Title VI of the Civil Rights Act, Section 504, the Fair Housing Act, and the Americans with Disabilities Act, as applicable, which may include providing reasonable accommodations. However, the HOTMA amendments do require that HUD, by regulation, specifically provide hardship exemptions when the financial difficulty faced by the family is due to specific circumstances around child care or health and medical care and reasonable attendant care and auxiliary apparatus expenses. For the child care deduction, it is necessary, in those circumstances, for PHAs and owners to perform detailed analyses of what is causing the family's inability to pay rent.

HUD does agree that it would be beneficial for hardships to apply across HUD programs as much as possible, so, as discussed below, HUD is revising § 5.601 to be sure that all of § 5.611, including the hardship provisions in paragraphs (c) through (e), apply to the other HUD programs listed in § 5.601 that use the determination of adjusted income in § 5.611.

B. 202/811

Commenters stated that it is unclear why there were no hardship provisions provided for residents in Section 202/811 properties.

HUD Response: HUD agrees with the commenters. Therefore, in this final rule, HUD has revised § 5.601 to be sure that § 5.611(a) and (c) through (e) apply to the Section 202 and Section 811 programs.

C. Child Care

Commenters stated that the hardship exemption as proposed for the child care deduction is appropriate. Others stated that HUD should allow PHAs to establish a time limit for families to receive child care exemptions in their hardship policy. A commenter also stated that it is unclear if the proposed rule would allow the child care hardship exemption to continue after the next regular reexamination if the PHA finds that the family's hardship still exists.

HUD Response: HUD agrees that the hardship exemption language for the child care deduction could be clarified and is revising the language regarding the duration of the hardship exemption. Therefore, in § 5.611(d) of this final rule, HUD is adding language to the child care hardship exemption to specify that the resulting alternative adjusted income calculation must remain in place for a period of up to 90 days. The final rule further provides that

responsible entities, at their discretion, may extend such hardship exemptions for additional 90-day periods based on family circumstances.

D. Hardship Criteria

Commenters stated that HUD should set the criteria for what constitutes a hardship and what the relief should be, rather than leaving it up to PHAs and owners. Some stated that allowing local decisions would create inconsistency and would create demand for certain apartments with more relaxed policies. Others stated that allowing discretion would create an atmosphere for litigation and the resulting variation would make it more difficult to audit and monitor PHAs and owners. A commenter stated that without set parameters for what is a hardship, the added research, paperwork, and time required for a PHA to determine the accuracy of a hardship claim would not fit within the Paperwork Reduction Act guidelines.

A commenter suggested that HUD should provide parameters for what constitutes a hardship and a skeleton framework of what would be required, such as how often it would need to be verified, how to verify, and what the family must provide to demonstrate the hardship.

Commenters suggested how HUD may define that a family is facing a hardship. One suggested that HUD define a hardship to be when rent and allowable expenses exceed 40 percent of adjusted income. Another suggested that if the household's housing payment exceeds 30 percent of adjusted household income, the family should be eligible for a hardship exemption.

Other commenters stated that HUD should continue to leave the definition of hardship up to the PHAs, remaining consistent with how the PHA defines it in other related contexts. Commenters stated that PHAs have already developed policies and procedures to document and provide hardship relief. A commenter stated that HUD should require PHAs and owners to include a procedure for exemptions in local policies and procedures along with resident notices.

HUD Response: HUD agrees with commenters that PHAs and owners should continue to be able to determine when a family is eligible for a hardship exemption to their rent. However, given the language of the hardship requirement added by HOTMA, HUD believes that it is appropriate to provide additional parameters on when a family may qualify for a hardship specifically due to HOTMA amendments on the child care and health and medical care and reasonable attendant care and auxiliary apparatus expenses deductions.

Therefore, in § 5.611(c)(1) of this final rule, HUD is creating two ways by which a family may qualify for a health and medical care and reasonable attendant care and auxiliary apparatus expenses hardship. First, a family may qualify for a lower threshold for unreimbursed health and medical care expenses and reasonable attendant care and auxiliary apparatus expenses to be deducted from income if the family, at the time of the effective date of this final rule, is receiving the unreimbursed health and medical care expense and reasonable attendant care and auxiliary apparatus expense deduction at the 3 percent threshold. The form of that deduction is discussed in more detail below.

However, even families not receiving a deduction for health and medical care expenses and reasonable attendant care and auxiliary apparatus expenses at the time that this final rule is effective may still qualify for a hardship exemption if the family is experiencing a change in circumstances (as determined by the responsible entity) that would not otherwise trigger an interim reexamination. Families seeking a hardship exemption in this category must have eligible expenses that exceed 5 percent of the family's annual income in order to receive the benefit of the hardship exemption.

The reason behind creating these two categories is two-fold. First, HUD would like to relieve the financial burden placed on families currently receiving the health and medical care expense and reasonable attendant care and auxiliary apparatus expense deduction that would be affected by the increase in the threshold for such a deduction to be applied by providing a transition period to the new higher ten percent of family annual income threshold. Second, HUD recognizes that families may face financial hardships apart from changes made by HOTMA, where allowing the family to have a lower threshold to take such a deduction may be beneficial to the family. Determinations of what constitutes a financial hardship are fact-based determinations, however, and HUD feels that such determinations are best handled by the responsible entity that is closest to the family, rather than through regulatory text.

HUD is not making changes to the eligibility criteria proposed for hardship exemptions for child care but, as discussed above, is revising the length of time that the hardship exemption for child care may remain in effect.

E. Forms of Hardship Exemptions

Commenters had many suggestions on the form of relief that a hardship exemption should offer. Some suggested keeping the threshold for expenses at 3 percent for as long as the household demonstrates the hardship. Others stated that the PHA or owner should suspend the payment of the difference between what the family would have owed with a threshold of 3 percent and the new amount, allowing the household to repay when it can.

Commenters supported setting a ten percent cap on annual rent increases due to statutory changes in the medical deduction. Others stated that HUD should allow families experiencing a hardship to deduct their full health and medical expenses. One commenter stated that, at the least, HUD should allow for exemptions from the full increase required by amendments made by HOTMA.

Some commenters suggested phasing in the new thresholds for everyone, perhaps by setting the threshold at 6.5 percent for the first year for everyone.

HUD Response: In § 5.611(c)(1) of this final rule, HUD is changing the hardship exemption for health and medical care expenses and reasonable attendant care and auxiliary apparatus expenses for affected families that receive the 3 percent unreimbursed health and medical care expense and reasonable attendant care and/or auxiliary apparatus expense deduction as of the effective date of this final rule from what was proposed in the proposed rule. Rather than simply setting a flat exemption by allowing deductions for expenses meeting or exceeding 6.5 percent of the family's income, the exemption contained in this final rule is a gradually increasing percentage each year so that annual reexaminations beginning after the effective date of this final rule should have the threshold increased to 5 percent the first year, 7.5 percent the second year, and reaching the new statutory standard of 10 percent in the third year.

In addition, this final rule revises the health and medical care expense and reasonable attendant care and auxiliary apparatus expense deduction hardship exemption for elderly or disabled families or families that include a person with disabilities that may not have been receiving the health and medical care and reasonable attendant care and auxiliary apparatus expense deduction on the effective date of the final rule but are experiencing a financial hardship. The family must demonstrate that the family's applicable medical expenses and/or reasonable

attendant care and auxiliary apparatus expenses increased, or the family's financial hardship is a result of a change in circumstances (defined by the responsible entity) that would not otherwise trigger an interim reexamination. A family would only benefit from the exemption in § 5.611(c)(2) if the sum of eligible expenses in 5.611(a)(3) exceed 5 percent of the family's annual income. In such a case, the family will receive a deduction for the eligible expenses that exceed 5 percent of the annual income. The family's hardship relief ends when the circumstances that made the family eligible for the relief are no longer applicable or after 90 days, whichever comes earlier. However, the responsible entity may choose to extend the relief for one or more additional 90-day periods while the family's hardship condition continues.

HUD is not making any changes from the proposed rule to the form of the hardship exemption for child care expenses but, as discussed above, is revising the length of time that the hardship exemption for child care may remain in effect.

F. Duration of Hardship Exemptions

Commenters also opined on how long a family should be eligible to receive a hardship exemption. Some suggested that families should be allowed to retain the exemption as long as it is needed, with no time limit. Commenters stated that the amendments in HOTMA do not limit the hardship provision to only the first year of implementation or to an interim reexamination. Others stated that, with older families, it is unlikely the family will be able to access any additional resources to make them able to afford the full increase in the deduction threshold.

Some commenters stated that allowing hardship exemptions to expire when the PHA or owner determines the family can pay would permit inconsistent and arbitrary determinations. Others stated that the hardship exemption should be extended for at least a year after the need for the exemption is established to allow the family to recover financially. Another commenter stated that HUD should provide a definite duration for exemptions, such as 90 or 180 days, not tied to annual reexaminations.

HUD Response: In this final rule, HUD is providing a financial hardship exemption in § 5.611(c) for families that were receiving the health and medical care expense and reasonable attendant care and auxiliary apparatus expense deduction on the effective date of the final rule that gradually phases out over a 24-month period. Other financial hardship exemptions for health and medical care expenses and reasonable attendant care and auxiliary apparatus expenses will remain in place for a period not to exceed 90 days. However, housing providers may provide exemptions beyond 90 days based on family circumstances at their discretion. Similarly, HUD is placing the same 90-day time restrictions on hardship exemptions available for child care expenses. As a reminder, in addition to the grantee's discretion to provide for longer exemptions, grantees are subject to Federal nondiscrimination requirements, including the obligation to provide reasonable accommodations that may be necessary for households with family members with disabilities.

Over-Income Families in Public Housing

As discussed above, HUD collected public comments in the proposed rule on regulatory provisions regarding the new statutory income restrictions in public housing. However, HUD also re-opened public comments regarding the treatment of OI families and lease provisions for families remaining in a public housing unit and paying the alternative rent as a NPHOI family. This summary includes comments received in both solicitations and responses to those comments.

A. OI Families as Public Housing Residents

Some commenters objected to HUD's statement that OI families should not be considered residents of public housing. A few commenters simply stated that families should be allowed to remain in the PHP.

Other commenters stated that HUD's interpretation that all OI families remaining in their units can no longer participate in the PHP is an incorrect interpretation of the HOTMA amendments. These commenters stated that the statutory text explicitly allows PHAs to either terminate the family's tenancy or to charge the family a higher rent; the termination of tenancy is an alternative to allowing the family to stay. Commenters stated that the interpretation put forth by HUD in the proposed rule is inconsistent with its earlier proposed rule and other publications, including PIH Notice 2019–11, which seemed to support the idea that OI families remaining in a public housing unit would continue to be PHP participants.

A commenter stated that if HUD continues with the proposed interpretation, additional rule changes in parts 5, 960, 966, and 983 (plus changes to the Rental Assistance Demonstration (RAD) notice) would be required to effectuate new requirements impacting the remaining OI families, and that required termination would also impact many provisions dealing with public housing administration in general. Another commenter stated that other requirements on the physical unit would support the idea that the families living in them must be PHP participants: HUD must continue to treat the physical unit as a unit of public housing; the PHA remains obligated to lease the unit to an income-eligible public housing family upon turnover, and the unit remains part of the PHA's Faircloth limit and subject to a HUD Declaration of Trust and an Annual Contributions Contract.

A commenter stated that requiring an end to program participation, even for those families that stay in their units would be disruptive to the family. The commenter stated that if the family experiences a drop in income, they may not be able to find replacement housing that they can afford nearby, disrupting school, employment, and family obligations. The commenter also stated that wage-earning household members may opt to move out of the unit because of the loss of rights due to the end of PHP participation, and any remaining seniors in the family would be hurt because they would lose the support of their family members and would face additional uncertainty.

Several commenters also stated that requiring PHAs to end the program participation of remaining OI families would likely induce families to leave their units, thereby going against the income-mixing goals of various HUD statutes and policies, including Section 16 of the 1937 Act.

HUD Response: HUD agrees that in the proposed rulemaking in 2019 and other publications, such as the July 26, 2018, **Federal Register** notice implementing the public housing OI limit (83 FR 35490), HUD was silent on the status of OI families remaining in a public housing unit after the 24 consecutive month grace period. It was due to HUD's silence on this status that it became necessary to obtain additional public comments on the implementation of the OI limit for public housing. HUD's interpretation of the changes made by Section 103 of HOTMA is that the unit of an OI family must no longer be subsidized and therefore the family can no longer be PHP participants if they stay and pay the alternative non-public housing rent (alternative rent) once the 24 consecutive month grace period ends. In response to concerns that other requirements on the physical unit

conflict with the new statutory requirements, HUD assures the commenters that the current requirements related to the obligation to lease public housing units to income eligible families when units turn over (24 CFR 960.201) as well units continuing to be subject to the Declaration of Trust (42 U.S.C. 1437g(d)(3); 24 CFR 905.108, 905.304), Annual Contributions Contract (42 U.S.C. 1437d(a)) and the PHA's Faircloth limit (42 U.S.C. 1437g(g)(3)) remain unchanged. Furthermore, HUD would like to remind the public that housing OI families is not unique to the PHP and that PHAs can continue to house otherwise ineligible OI families in certain circumstances as per § 960.503. Section 103 of HOTMA simply creates new limitations on tenancy and program participation for formerly income-eligible families who become consistently OI.

While HUD appreciates the public's concern that termination from the public housing program may be disruptive to families; such disruptions caused by implementing this policy will be addressed by requiring adequate notice to families of their status and the effects of such status as stipulated in the final rule. Furthermore, this rule also provides in § 960.507 a new 24 consecutive month grace period once a family becomes OI and allows the OI family to maintain its status in public housing should an OI family experience a drop in income below the OI limit while in the grace period. If a family's income drops below the OI limit before exhausting the 24 consecutive month grace period, this final rule provides in § 960.507(c)(4) that the family shall be entitled to another 24 consecutive month grace period if its income again goes above the OI limit. Additionally, the specific risk to seniors can be mitigated by updates to other HUD regulations made by HOTMA, such as the elderly family deduction, the health and medical care and reasonable attendant care and auxiliary apparatus expense deduction and associated hardship exemptions, as well as the continued use of permissive deductions as applicable. If a family continues to be OI for 24 consecutive months, HUD reasonably believes that their income will continue to be stable and the disruption due to termination or having to pay the alternative rent would be minimal.

In response to the concerns that HUD's HOTMA OI interpretation goes against the income-mixing goals of various HUD statutes and policies, including Section 16 of the 1937 Act, HUD believes that this final rule appropriately balances the need for local flexibility in HUD programs with the interest of meeting the new requirements in HOTMA. It should be noted that income-mixing goals are met at admissions. Per § 960.202(b)(1), 40 percent of the families admitted to the PHP must be 30 percent of AMI or lower. As a result, the income-mixing goals of the PHA are based on the families entering the program, not those exiting the program. Additionally, income-mixing goals will continue to be met by families whose income falls below the OI limit for the jurisdiction.

B. Tenant Protection Vouchers

Commenters stated that the PHA's allotment of tenant protection vouchers (TPVs) should not change simply because some of the families on the property are non-public housing OI families. Commenters stated that HUD should continue to provide a TPV for every occupied unit, regardless of the family's OI status. One commenter stated that PHAs should be able to provide the TPV to the family and offer it to the first available income-eligible family on their waiting list, as the OI family would not be able to use the voucher.

HUD Response: HUD appreciates the concerns raised about the possibility of PHAs having reduced allotments of TPVs. This would only occur in cases where a public housing unit has been unsubsidized for 2 years (*e.g.,* occupied by a NPHOI family for 2 or more years). HUD intends to provide guidance to PHAs to ensure they are aware of this factor should they choose to permit families to remain in a public housing unit as a NPHOI family. The authority of Section 103 of HOTMA is limited to the PHP so the suggestion to provide additional TPVs for all PHAs goes beyond the scope of this provision. Lastly, the ability to issue allotted TPVs to income-eligible families on the PHA's voucher waiting list if the NPHOI family living in the public housing project is not eligible for TPV assistance is already permitted.

C. Preferences for Over-Income Families

Commenters stated that OI families that fall below the OI threshold during their 2-year grace period should not have to start as a new applicant for public housing, as they have not yet transitioned out of the program. Another commenter suggested also including OI families during the period before they have to vacate their tenancy.

Commenters supported the idea that PHAs should be allowed to easily readmit families to the PHP if they fall below the eligible income threshold again. A commenter stated that families that have already finished their grace period but remain on the property should be readmitted to public housing. Commenters stated that it should be up to the PHA to determine whether or not to create a preference for OI families that remain in the property, including whether or not to immediately readmit such families. Another commenter stated that allowing PHAs to adopt policies to facilitate timely (whether immediate or on another timeline set by the PHA) admittance of OI households remaining in their units that requalify for subsidy would help keep people housed and potentially prevent homelessness.

One commenter stated that OI families remaining in their unit should continue to be public housing residents and therefore should not have to face issues of readmittance or waiting lists.

HUD Response: Neither HOTMA nor this final rule requires that families who fall below the OI threshold during the 24 consecutive month grace period become new applicants for public housing. Section 960.507(c)(4) of this final rule provides that if a family's income falls below the OI threshold at any point during the 24 consecutive month grace period, the family's status as a PHP participant remains unchanged. In the event the family becomes OI again, the family would be entitled to a new 24 consecutive month grace period per § 960.507(c)(4). As suggested by the commenters, at § 960.206(b)(6), this final rule allows PHAs to give preference to former public housing program participants paying the alternative rent who once again become income-eligible. PHAs whose policy is to terminate OI families after the 24 consecutive month grace period may not use this preference and this preference may not be applied to current public housing families (*e.g.,* OI families facing termination of tenancy pursuant to PHA policies, consistent with § 960.507(e)) or families who have vacated the public housing project. PHAs will have the discretion to adopt this preference consistent with § 960.206(a) and (b)(6). PHAs must implement this preference consistent with all other program requirements and Federal nondiscrimination requirements.

D. Repositioning

A commenter stated that because many OI families remaining on the public housing property would not be eligible for admission into a Section 8 program, PHAs will need to factor in alternative units within their redevelopment/repositioning plans,

including allowing OI families to transfer to a unit in a non-converting property. Another commenter stated that it is still unclear how PHAs should deal with in-place OI families when the family is ineligible for assistance after conversion under RAD, or how their priority for Section 8 assistance should be handled. A commenter asked about the effect that conversion under RAD would have on OI tenants. The commenter asked whether such family would be considered ''continuously assisted'' and be able to benefit from tenant protections available to other public housing residents after conversion.

A commenter stated that special considerations should be afforded during the period before termination, or after the two-year grace period, if a PHA chooses to allow OI families to stay.

A commenter stated that PHAs should be able to allow remaining OI families to receive similar protections as in-place public housing-assisted families who are not OI when units have assistance converted under RAD or Section 18 of the 1937 Act. According to the commenter, PHAs should have the discretion to (i) allow OI families the right to remain in the unit post-conversion; (ii) permit them a right to return (if displaced due to work in the unit); (iii) allow them the right to be admitted immediately if they become income eligible in the future, delayed only by the time it takes to make an eligibility determination; and (iv) phase in the contract rent post-conversion.

Some commenters stated that HUD should not provide any special consideration to OI households if a PHA repositions their public housing property. One commenter opposed considerations because the families are no longer public housing families. However, the commenter stated that PHAs should be allowed to revisit the landlord-tenant relationship with such families upon repositioning. Another commenter opposed special considerations because the existing requirements for repositioning are sufficient, and policies specific to OI families can be set forth in the applicable relocation plan documents, which are reviewed by HUD. This commenter also stated that HUD should not use this proposed rule to promulgate new requirements for RAD, Section 18, and Section 22 programs; instead, existing program-specific guidance may provide protections, otherwise the URA would govern.

HUD Response: HUD agrees that PHAs need to factor in the presence of OI families and NPHOI families in public housing projects when developing any redevelopment or repositioning plans. However, this final rule implements Section 103 of HOTMA, and HUD agrees with the comment that this provision does not create new requirements for RAD and other repositioning or removal authorities (*e.g.,* Section 18 or Section 22 of the 1937 Act). Thus, most of the comments regarding RAD and other repositioning authorities are outside the scope of this rulemaking. For example, this final rule does not address how PHAs should deal with NPHOI families in RAD conversions. PHAs converting public housing projects under RAD must follow the RAD statute and notices. HUD intends to provide further RAD guidance regarding treatment of OI families who remain public housing participants as well as NPHOI families who are unassisted. This rule does not alter existing RAD and Section 18 requirements regarding OI public housing families. For example, sections 1.6.C.1 (PBV) and 1.7.B.1 (PBRA) of the RAD Notice (revision 4) (H–2019–09 PIH–2019–23 (HA)) address the treatment of OI public housing families (but not NPHOI families) upon conversion, and this rulemaking does not amend either provision. This rulemaking also does not amend Section 18 relocation and ''comparable housing'' requirements in § 970.21. This final rule gives consideration to an NPHOI family paying the alternative rent who becomes income-eligible again. PHAs have the option to adopt a local preference for NPHOI families pursuant to § 960.206(b)(6). However, this rule makes no changes to existing rules and requirements surrounding Section 8 preferences, including RAD PBV and RAD PBRA preferences.

For OI families that must relocate due to a RAD conversion action, the URA may apply, depending upon the fact-specific determinations made under the URA's regulations at 49 CFR part 24 and PIH Notice 2016–17 (''Rental Assistance Demonstration (RAD) Notice Regarding Fair Housing and Civil Rights Requirements and Relocation Requirements Applicable to RAD First Component—Public Housing Conversions'').

However, the URA does not apply to Section 18 actions nor does the RAD 'right to remain.

E. Community Service and Self-Sufficiency

Commenters stated that if OI families are allowed to stay in the unit, they should still be considered public housing families and should be afforded all the rights and responsibilities as any other public housing family, including being subject to the community service requirements.

Other commenters stated that CSSR should not be mandated by HUD. One commenter stated that requiring families not in public housing to perform community service would put a strain on families that are likely already struggling, including possibly already working more than one job.

Some commenters stated that because OI families are not public housing residents, HUD cannot require a PHA to ensure the household meets community service or self-sufficiency requirements. Commenters stated that PHAs should be allowed to choose to add any such requirements to the new lease after the grace period, including CSSR. Another commenter stated that the family is no longer receiving a subsidy, and ostensibly no longer requires support from the PHA to develop marketable skills and a work history, so the household should not be obligated to meet with additional requirements such as CSSR but should have a more traditional landlord-tenant relationship with the PHA.

A commenter stated that OI families still in the FSS program should be allowed to continue to finish their FSS participation, even if they are no longer part of public housing or able to contribute additional money to the escrow, as continued access to the FSS service coordinator may still be beneficial, particularly when HUD allows non heads of households to participate in FSS.

A commenter stated that CSSR is outdated because it requires residents to prove they are worthy of aid, and staff time to administer the requirements would be better spent doing other things; therefore, the commenter advocated that HUD work with Congress to end the requirement entirely.

HUD Response: In this final rule, HUD is clarifying in § 960.507(e) that OI families that the PHA has allowed to remain in a public housing unit, paying the alternative non-public housing rent, are no longer public housing program participants and thus, pursuant to §§ 960.600 and 960.601, are no longer subject to the community service requirements. However, pursuant to § 960.507(e), OI families, in the period before termination, are still considered public housing program participants and so must remain compliant with all public housing program requirements including the community service and self-sufficiency requirements. HUD appreciates that some members of the public disagree with CSSR; however, HOTMA did not alter these existing provisions for public housing program

participants. Families participating in the FSS program who become over-income would also be entitled to the 24 consecutive month grace period after which, if they remain over-income, they would then be subject to their respective PHA's over-income policy. As noted in § 960.507(a)(1), there are no exceptions for families participating in the FSS program.

F. Lease Requirements

Some commenters stated that because remaining OI families would not be public housing families and would not be receiving any subsidy, HUD has does not have authority to mandate lease provisions outside of what the 1937 Act, as amended by HOTMA, specifies. One commenter cited section 2 of the 1937 Act, which states that PHAs should be given ''the maximum amount of responsibility and flexibility in program administration'' and stated that PHAs should be allowed to apply all of the requirements in 24 CFR part 966 to remaining OI families.

Other commenters advocated for allowing PHAs broad discretion in setting the terms of leases for remaining OI families, as long as they are in accordance with State and local laws. A commenter stated that allowing PHAs discretion would allow them to administer OI tenancies in the manner that is most efficient and least disruptive to their operations and to the families involved.

A commenter stated that PHAs should have the discretion to treat remaining OI families as public housing families in all non-rent aspects because all families living in the same building should be treated consistently, including the termination of tenancy process; the transfer process; reasonable accommodation requests; and succession rights. The commenter stated that a family should not be deprived of administrative hearing rights because of their OI status, nor should the PHA have to create a new series of rules and regulations for these families.

Commenters stated that HUD should mandate minimum lease provisions for conduct and occupancy restrictions related to drugs or sex offender status, but a commenter also stated that there should not be any additional grievance or due process rights because the families are choosing to remain as non-public housing residents.

Commenters stated that PHAs should have the discretion to determine whether to conduct income reviews. A commenter stated that HUD should not impose requirements because the HOTMA amendments already set the families' rents separate from their income. Another commenter stated that allowing PHAs to conduct annual and interim examinations would help provide a safety net to families in case their income falls again. A commenter stated that PHAs should specifically be allowed to conduct interim reexaminations for household additions.

A commenter stated that PHAs should be given discretion on how often to conduct unit inspections.

Some commenters felt that over-income residents should be given the same rights as other public housing families in the property, either because the property itself is remaining public housing, or because the families should stay in the public housing program.

A commenter also stated that increased rental charges to remaining OI families will not pay for increased administrative costs if their public housing tenancies are terminated, and HUD should provide additional tools to the PHA to assist administration of non-public housing units.

HUD Response: HUD appreciates all public comments received and agrees that mandated lease provisions for OI families remaining in a public housing property should be minimal outside of the alternative non-public housing rent required by the amended 1937 Act. As a result, in § 960.509 in the final rule PHAs are given the maximum amount of flexibility in deciding what lease requirements (drawn largely from § 966.4 public housing lease requirements) should apply to OI families. Where possible, PHAs are given broad discretion in setting the terms of leases for remaining NPHOI families in accordance with State and local laws to allow PHAs to administer NPHOI tenancies in the manner that is most efficient and least disruptive to their operations and to the families involved. Given this discretion, HUD believes that there should be no increased administrative costs. However, HUD is clarifying in the final rule that NPHOI families are not required to comply with CSSR (§§ 960.600, 960.601), and NPHOI families cannot be subject to income reexaminations (§ 960.257(a)(5)) and are not provided utility allowances (§ 960.507(a)(1)(iv)). PHAs will have discretion in extending certain public housing policies to NPHOI families such as administrative hearing rights (§ 960.509(b)(13)). PHAs have no discretion on lease provisions for NPHOI families remaining in a public housing property concerning requirements related to conduct and occupancy restrictions affecting the health and safety of residents, particularly those pertaining to drugs, drug-related criminal activity, or State registered lifetime sex offenders (see § 960.509(b)(6) and (b)(11)).

PHAs must still comply with Federal nondiscrimination requirements, including but not limited to the Fair Housing Act, Title VI of the Civil Rights Act, Section 504, and Title II of the ADA, as applicable. In response to the public comment regarding reasonable accommodations, PHAs still have a legal obligation to provide for reasonable accommodations that may be necessary for individuals with disabilities. PHAs do not have discretion whether to provide for reasonable accommodations. Moreover, in the context of unit transfers for a family when repairs to improve the life, health, or safety of a resident cannot be made within a reasonable time, consistent with fair housing and civil rights obligations, PHAs must provide comparable alternative accommodations having the appropriate number of bedrooms based on the family's need and accessible accommodations and reasonable accommodations for persons with disabilities.

G. Impact of OI Families on PHAs

A commenter stated that as long as OI households are following the same rules as everyone else, there will not be additional burdens on the PHA. Another commenter stated that even if there are additional burdens on a PHA from allowing OI families to stay, the PHA has the option to not allow the families to stay, so the extra burdens will be willingly assumed by the PHA. A commenter stated that there would be no consequences to PHAs or to OI families who elect to remain in their public housing unit.

A commenter stated that requiring termination of public housing tenancy will impose administrative burdens on PHAs by requiring PHAs to administer different tenancy types within the same development and to develop and translate new forms of leases and develop new procedures for these tenants.

In addition, a commenter stated that keeping OI families in public housing also reduces subsidy costs for HUD. A commenter stated that allowing OI families to stay will decrease PHA administrative burdens, and families will have greater success in achieving self-sufficiency. Another commenter stated that permitting OI families to stay helps maintain a sense of community, rewards self-sufficiency, promotes mixed-income communities, and allows families to live in areas that may be among the least affordable areas in the country that they may not be able to

find suitable housing on the private rental market. A commenter stated that there is a value in allowing OI families to stay as an incentive to other families to gain employment and self-sufficiency, and there is an economic benefit to the PHA and HUD to allow the family to stay.

A commenter stated that allowing OI families to stay will reduce or delay the availability of public housing units for additional families.

HUD Response: HUD agrees that the administrative burden to PHAs should be minimized where possible and HUD believes that this final rule appropriately balances the need for local flexibility in HUD programs with the interest of meeting the requirements in HOTMA. With PHA discretionary flexibility, the PHA could choose to eliminate any additional administrative burden by treating all families the same while also having the ability to make any policy changes deemed necessary to meet their financial goals and community needs of their jurisdiction.

HUD appreciates that some members of the public believe that allowing OI families to stay will lead to greater success in achieving self-sufficiency, help maintain a sense of community, reward self-sufficiency, promote mixed-income communities, and allow families to live in areas that may be among the least affordable areas in the country. However, given the variety of circumstances throughout the country, these priorities are best set by local PHAs. HUD understands that allowing OI families to stay in a public housing unit may reduce or delay the availability of public housing units for additional families; however, HOTMA has made this a matter of PHA discretion.

H. Other OI Comments

Some commenters stated that it is unreasonable to allow OI families to continue to reside in public housing, especially for a period of over 12 months.

A commenter stated that HUD should issue guidance for PHAs on calculating the amount of monthly subsidy provided to the unit as set forth in Section 103 of HOTMA and should develop sample notices that PHAs could provide to OI families, informing them about their right to remain in public housing at the end of the six-month grace period. Commenters also asked for further guidance on the impacts of allowing OI families to stay. Some stated that additional guidance on how the subsidy for the unit is calculated is needed, as that information would be needed to allow families to calculate how much rent they will have to pay if they stay. Others stated that HUD should clarify if the subsidy amounts for the PHA would be decreased if OI families remain and pay higher rent.

Commenters stated that HUD should provide model notices, with translations, for PHAs to give to families once their incomes are over the limit for 2 consecutive years so that there is nationwide uniformity in such documents.

Commenters stated that PHAs should be able to defer termination for a family until the next annual reexamination if there is no housing in the geographic area that would not create a rent hardship or a hardship due to its distance from work, school, medical needs, or other essential services for the family. Commenters also stated that HUD should, in § 960.507(a), allow OI families to stay in public housing as a reasonable accommodation.

Commenters opposed the proposal that would not exempt families participating in FSS or EID from the over-income policy. One commenter stated that not allowing such an exemption would violate the intent of the 2018 Economic Growth, Regulatory Relief, and Consumer Protection Act (Pub. L. 115–174, 132 Stat. 1296).

Other commenters submitted comments on the requirement that PHAs submit certain information for HUD to report to Congress. Some commenters asked for the opportunity to review and comment on the tool to report the number of over-income families and the families on the waiting list. Others stated that HUD has not yet developed the reporting system to collect the needed information.

HUD Response: The limit on OI families residing in public housing is statutory, and therefore required. However, PHAs can consider specific circumstances in which they would provide for flexibility in the administration of over-income requirements, provided such policies are in compliance with the 1937 Act, all public housing regulations, and all applicable fair housing requirements. PHAs are subject to, among other fair housing and civil rights authorities, Section 504, the Fair Housing Act, and Title II of the ADA, which include, among other requirements, the obligation to grant reasonable accommodations that may be necessary for persons with disabilities.

Guidance on calculating the amount of monthly subsidy provided to the unit will be provided by HUD annually. The final rule also provides detailed guidance on the notices PHAs are required to provide to OI families. For this reason, HUD does not plan to develop sample notices for PHAs to provide to OI families. However, HUD will continue to evaluate the need for further guidance on OI policies and procedures.

HUD is modifying the regulatory language in § 960.102(b) to include a definition of alternative non-public housing rent, *i.e.,* the amount a NPHOI family pays in rent. Alternative non-public housing rent is defined as a monthly rent equal to the greater of: (i) The applicable fair market rent, as defined in 24 CFR part 888, subpart A, for the unit; or (ii) The amount of the monthly subsidy provided for the unit, which will be determined by adding the per unit assistance provided to a public housing property as calculated through the applicable formulas for the Public Housing Capital Fund and Public Housing Operating Fund. For the Public Housing Capital Fund, the amount of Capital Funds provided to the unit will be calculated as the per unit Capital Fund assistance provided to a PHA for the development in which the family resides for the most recent funding year for which Capital Funds have been allocated. For the Public Housing Operating Fund, the amount of Operating Funds provided to the unit will be calculated as the per unit amount provided to the public housing project where the unit is located for the most recent funding year for which a final funding obligation determination has been made. In the proposed rule, the rent for a NPHOI family was described in § 960.507(d)(1), and paragraphs (d)(1)(ii)(A) and (B) explained how the monthly subsidy amount for Public Housing Capital Fund and Operating Fund was to be calculated. In the proposed rule, for the Public Housing Operating Fund, HUD proposed that the amount of Operating Funds provided to the unit be calculated as the per unit amount provided to the public housing project where the unit is located for the most recent funding year for which a final funding eligibility determination has been made. However, as noted above, the final rule revises the Operating Fund monthly subsidy amount to be calculated based on the final funding obligation amount, not the eligibility amount. Because such amounts are based on appropriations, HUD will publish the specific amounts annually. If PHA policy allows NPHOI families to remain in the unit and pay the alternative non-public housing rent, the PHA will no longer receive subsidy for these units.

While HUD appreciates the public's concern about the hardships a family whose tenancy is terminated may face, the amendments in HOTMA state that if

a PHA chooses to adopt a policy to terminate families that have been over-income for 24 consecutive months, the family must have their tenancy terminated within no more than 6 months. In addition, whether an OI family is allowed to remain in public housing is determined by the local PHA's policy decision. Federal nondiscrimination requirements under the Fair Housing Act, Title VI, Section 504, and Title II of the ADA continue to apply. Federal nondiscrimination laws that require, among other things, PHAs and owners to make reasonable accommodations for individuals with disabilities continue to exist notwithstanding any changes by HOTMA.

Because the determination of a family's OI status is based on the determination of their income, PHAs must not include income that is excluded from income calculations, such as amounts based on participation in an EID or FSS program when determining if a family is OI.

HOTMA requires PHAs to submit an annual report on the number of OI families in public housing and the number of families on the PHA's waiting list for admission into public housing. HUD recognizes that there are needed system updates, and these updates will be put into place over the time period between the publication of this rule and the overall effective date of January 1, 2024.

De Minimis Errors

Commenters made many suggestions on how HUD should determine ''de minimis'' errors that would not cause a PHA or owner to be out of compliance with HOTMA provisions regarding income review and calculation. Some commenters stated that disregarding errors below a set amount may mask larger problems, such as improper application of regulations, that need to be systematically investigated and corrected.

Many commenters stated that HUD should use the Section Eight Management Assessment Program (SEMAP) de minimis threshold of 5 percent of all income determinations made during a calendar year. A commenter stated that structuring the de minimis protections in this way would avoid penalizing a PHA or owner for a large number of tiny errors or a few substantial errors. Other commenters stated that the threshold should be ten percent of all income determinations during a calendar year and noted that ten percent would match the proposed threshold for interim reexaminations. Some suggested that HUD could set a threshold using determinations made at a property during the year. However, some commenters stated that using a threshold as a percentage of all determinations would require reviewers to conduct a 100 percent file review to determine if the errors were de minimis, creating a large administrative burden.

Many commenters also asked how HUD will determine whether an error fits within the de minimis allowance. Some commenters asked whether the error rate was per file or per total income determinations. Commenters stated that HUD should not aggregate errors on a calendar year, because rent calculation compliance has historically been made at the participant level. Others asked for clarification on the additional activities to which the de minimis threshold might apply.

Several commenters stated that HUD should not use 5 percent of individual income determinations. Others, however, agreed that HUD should use 5 percent of the family's adjusted income. Some suggested that the threshold should be lower, at 1 to 2 percent of household income.

Some commenters stated that HUD should set the threshold at a specific dollar amount instead of a percentage. Other commenters stated that using a percentage standard was more appropriate than using a set dollar amount because a specific dollar amount would not allow that error to scale to meet the income thresholds of families or localities, based on family income and the area cost of living.

Some stated that the threshold should be $30, others $50. Commenters that suggested a $50 threshold stated that it would ease the strain on the PHA. Some commenters stated that, following the requirements of the EIV discrepancy report, HUD should count as de minimis those errors that do not exceed $200 a month for any family.

Some commenters suggested de minimis be defined as a difference less than or equal to $10 per month in the assistance payment. Others suggested a combination approach of allowing errors less than the greater of $50 per month per household or 5 percent per month per household. Commenters also suggested the greater of $5 or 5 percent.

Some stated that every file should demonstrate that the owner or PHA has taken appropriate corrective action to repay the family for any overpayments for purposes of audits. Others stated that HUD should retain language in the regulation that makes it clear an owner or PHA must still repay overcharged families. Commenters asked for clarification on how owners or PHAs should proceed when a de minimis error results in an over-income family being approved for assistance. Commenters also stated that the regulation should be clear that the de minimis protection applies both for upward and downward adjustments.

Commenters also stated that HUD should also allow for de minimis errors made by tenant families. Commenters stated that HUD should work within the Management and Occupancy Review (MOR) process and with industry partners to find a reasonable alternative.

HUD Response: HUD understands that it is important for income determinations to be accurate in its rental assistance programs; however, HUD also recognizes that there are minor calculation errors that an owner, PHA, or grantee may make that result in minimal effects on the rent paid by a family, and HUD does not believe that a PHA or owner or renter would be negatively affected by such small differences. In addition, the amendments to the 1937 Act made by HOTMA explicitly state that PHAs and owners are not considered to be failing to comply with provisions dealing with the determination of income solely due to de minimis errors made by the PHA or owner, nor small errors made by the family in reporting income. The de minimis threshold applies to all income reviews and calculations of a family's adjusted income for PHAs or owners in 1937 Act programs, 202 and 811 programs, or HOPWA grantees and project sponsors subject to 24 CFR part 574.

HUD is revising this final rule (in §§ 574.310(h), 960.257(f), and 982.516(f)) so that rather than defining a de minimis error as a percentage error, de minimis errors will be errors that result in a difference in the determination of a family's adjusted income of $30 or less per month. This change will allow de minimis determinations to be made on a family-by-family basis and will avoid having to do a full portfolio review to determine if a PHA, owner, or grantee exceeds the threshold. In addition, using a dollar amount instead of a percentage will make de minimis errors easier to calculate. However, HUD may issue a **Federal Register** notice for comment in the future to re-define de minimis errors.

HUD is also adding language to clarify that where a PHA, owner, or grantee has made a mistake resulting in the family underpaying their rent, the family will not be held liable for the underpaid rent, regardless of whether the mistake resulted in a de minimis error. This is in addition to language that was included in the proposed rule that

would require PHAs, owners, and grantees to repay or credit families who were overcharged due to miscalculation errors. Improper payments must be reconciled pursuant to existing program requirements, as HOTMA did not change the requirements currently in place.

Enterprise Income Verification (EIV)

Some commenters stated that HUD should continue to require the use of EIV at interim reexaminations. Commenters stated that allowing PHAs the choice would expose PHAs to litigation risks over their decisions on how to verify income, and it could increase fraud and the misreporting of income. Commenters also stated that the information in the reports is significant and is needed to capture potential income changes.

Other commenters agreed with the proposal to make the use of EIV optional at interim reexaminations. Commenters stated that the information is too out of date to be useful and eliminating EIV as a requirement will reduce the burden on PHAs and owners. Commenters stated that they did not believe eliminating the requirement would result in an increase of incorrect income calculations or improper payments.

Commenters wrote that if EIV reveals at an annual examination that there was inaccurate information, the PHA can retroactively charge the family as needed. Commenters also stated that unreported income can be captured at annual reexaminations. Commenters stated that tenants should be advised that inaccurate reporting at interim reexaminations, discovered later, can lead to a requirement to repay any underpayments attributable to errors.

Commenters also stated that the Income Validation Tool (IVT) is redundant of EIV and therefore should not be required, either.

HUD Response: HUD agrees with commenters that eliminating the requirement that PHAs and owners use EIV for interim reexaminations would reduce the burden on PHAs and owners without sacrificing the accuracy of the interim reexaminations. Therefore, HUD is including in this final rule, in § 5.233(a)(2)(i), language that EIV must be used for annual and streamlined reexaminations only and not interim certifications, which replaces the less specific existing regulatory text that EIV must be used for ''mandatory reexaminations or recertifications.'' While a PHA or owner may opt to use EIV at interim reexaminations, it is not required to do so by this final rule.

HUD appreciates the suggestion to eliminate the required use of the IVT. While that is beyond the scope of this current rule, HUD will continue to evaluate what guidance must be updated to reflect these decisions.

In addition, HUD agrees that tenants should be aware that inaccurately reporting income at an interim reexamination could result in the family having to repay the PHA or owner, which is discussed in current HUD guidance. HUD will evaluate the guidance to see if additional clarifications are warranted.

Financial Disclosures

Commenters weighed in on the proposed changes to the financial disclosure requirements. One requested that the changes to the consent form be made effective immediately upon the effective date of the final rule. A commenter also stated that the termination of residency or subsidy should be pursued if a family member revokes consent.

HUD Response: Section 104 of HOTMA amended the 1937 Act to allow for PHA discretion to determine if applicants or recipients are ineligible for assistance if the family revokes its authorization to obtain financial records. The final rule, in § 5.232(c), provides that, in order to exercise this authority, PHAs must establish an admission and continued occupancy policy that revocation of consent to access financial records will result in denial of admission or termination of assistance in order to exercise this authority. Changes to the Authorization for the Release of Information form will coincide with the effective date of this final rule.

Inflation

Commenters suggested that HUD should use the Consumer Price Index (CPI) as the inflation factor when various amounts in the statute are to be adjusted by inflation. Commenters stated that HUD uses it for other data purposes. Some stated that HUD should use the CPI–W, as that affects the Social Security COLA. A commenter opposed using Chained CPI–U, as the commenter stated it underestimates the official poverty measure and the costs that people below the poverty line face.

Commenters stated that HUD should have a ''hold harmless'' provision in the case of a decrease, and that HUD should release the imputed passbook rate information with the release of updated income limits.

Some commenters stated that HUD should allow PHAs to use an inflationary index that is relevant to their geographic location.

Commenters also differed on whether HUD should use a single index for all inflationary adjustments. Some stated that HUD should use a commonly available and understood index for inflating all elements of the income calculation. Another commenter stated that HUD should use different inflationary indexes for different provisions. The commenter stated that passbook savings should be used to impute asset returns, while deductions should be adjusted by no less than the SSI COLA.

Commenters stated that prior to applying inflation factors, HUD should round figures down to the nearest $1,000 for assets and $50 for income to reduce administrative burden by providing round numbers for calculation of value after inflation.

Commenters also weighed in on when inflationary factors should be implemented. One commenter stated that HUD should allow PHAs to use Social Security and Veterans Affairs letters documenting the COLA when the COLA takes place, rather than requiring families to get a letter dated within 60 days of the PHA's request for information, as that would reduce burdens and speed up reexaminations. Others stated that HUD should provide a clear implementation date of when the inflation index is effective. A commenter asked for additional information on how long PHAs and owners have to apply the new amounts. Another recommended that inflationary changes be effective on January 1 of each year, applied on the family's next annual certification. A commenter also asked for specific guidance on inflationary adjustments for reexaminations that do not occur annually.

Commenters stated that adjusting annual dependent deductions based on inflation would create a hardship, because a national factor would generate inequalities but creating localized factors would require too much data.

HUD Response: HUD agrees with commenters that it will be less administratively burdensome and fairer to specify which inflationary factor is appropriate to adjust various amounts, as mandated by the HOTMA amendments. Therefore, HUD has added language throughout this final rule specifying that, where baseline amounts are to receive annual inflationary adjustments, HUD will adjust the amounts using the CPI–W, which HUD believes to be the most appropriate inflationary factor to apply consistently throughout the final rule. The COLA adjustment for Social Security and SSI benefits for approximately 70 million

Americans is based on increases in the CPI–W and consequently many PHAs, owners, grantees, and families are familiar with it.

MTW

A commenter stated that any regulatory changes due to HOTMA should not undercut the flexibility of the MTW program and the ability of MTW agencies to design and test innovative strategies.

HUD Response: Existing MTW agreements allow for significant program flexibility. Those agreements continue to be in place and in effect. HUD remains committed to the significant program flexibility of the MTW program. However, as is stated in the MTW Agreement, MTW agencies remain subject to statutory and regulatory provisions not waived by the MTW Agreement and those statutory and regulatory provisions outside the scope of MTW waiver authority, including any changes thereto. Any provisions of the 1937 Act and its implementing regulations that are amended by HOTMA and already explicitly waived by the MTW Agreement will continue to be waived by the relevant provisions of the MTW Agreement.

RAD

Commenters also submitted comments regarding conversions due to RAD. Some stated that streamlining income and rent rules, both within HUD and with the LIHTC program would reduce confusion and make rent calculations predictable.

A commenter also stated that PHAs need to be able to earn an administrative fee in the first year to be able to pay for additional RAD-related tasks.

HUD Response: HUD agrees that streamlining income and rent rules would benefit tenants and owners, and HUD is seeking to align programs within HUD, but many of the differences with LIHTC are outside the scope of this rulemaking. In addition, changes to funding under RAD are bound by the notices governing that program and are outside the scope of this rule.

Other Miscellaneous Comments

Commenters stated that changing income and asset limits will likely cause an influx of individuals looking for State and local rental assistance and shelter.

Commenters also wrote on the fact that PHAs and owners would have many more flexibilities under the new regulations. Some stated that HUD should require that owners have a policy on how they are implementing voluntary policies, to allow for consistent auditing. Others stated that it is not good to allow PHAs and owners discretion over program eligibility, because income, assets, and deductions should be uniform.

Commenters advocated for additional administrative fees beyond those for RAD, asking for an increase in Section 8 administrative fees to ten percent and to allow for training HOPWA project sponsors on the new regulations. One commenter pointed out that PHAs will have to pay for changes in software programs.

A commenter also asked for additional programmatic changes beyond what is required by HOTMA, such as repealing annual or agency plan requirements, eliminating the utility allowance schedule requirement, mandating enrollment in the FSS program, allowing computer-generated documents for verification to expire in 180 days instead of 60 days, allowing PHAs to charge minimum rents based on market conditions, eliminating the community service requirement, allowing triennial reexaminations for everyone, lowering payment standards when Congress reduces funding, reforming HCV portability, allowing a percentage of HAP and net restricted assets to supplement administrative fees lowered due to proration, reserving HCV funding for fully leased PHAs that have exhausted their budget authority and cannot maintain the lease-up capacity, or establishing a consistent timeline for releasing and finalizing HUD regulatory changes.

HUD Response: HUD does not expect a significant decrease in those eligible for HUD assistance, as the vast majority of participants do not have assets over $100,000 or real property that is suitable for occupancy by the family as a residence. PHAs and owners will be required to update all relevant policy documents and plans, to reflect both new requirements from HOTMA and any new discretionary policies.

HUD will keep the suggestions for additional funding and programmatic changes in mind for future budgetary, statutory and legislative efforts, but they are beyond the scope of this rule.

IV. Findings and Certifications

Regulatory Review—Executive Orders 12866 and 13563

Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.'' The rule would update HUD regulations for various programs to conform to sections 102, 103, and 104 of HOTMA by listing specific criteria for triggering family income reviews, providing methods for calculating family income, revising the definition of income and adjusted income, setting a limit on the amount and type of assets that assisted families may have, revising the definition of net family assets, and requiring that applicants for and recipients of assistance provide authorization to PHAs to obtain financial records. This final rule was determined to be a significant regulatory action under section 3(f) of Executive Order 12866 (although not an economically significant regulatory action under the order). HUD prepared a Regulatory Impact Analysis (RIA) that addresses the costs and benefits of the final rule. HUD's RIA is part of the docket file for this rule at *http://www.regulations.gov.* HUD strongly encourages the public to view the docket file at *www.regulations.gov.*

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

This final rule revises HUD regulations in certain ways that will reduce burden or provide flexibility for PHAs and owners and other housing providers. The final rule provides specific events that trigger an interim reexamination of family income, whereas current regulations provide that families may request reexaminations at any time. The final rule provides methods for calculating family income, but also provides a safe harbor for PHAs and owners who determine a family's income based on other forms of means-tested Federal public assistance. This final rule also provides that applicants and recipients of assistance must provide authorization for PHAs to obtain financial records in order to verify family income.

For the reasons presented, the undersigned certifies that this rule will not have a significant economic impact

on a substantial number of small entities.

Executive Order 13132, Federalism

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

Environmental Impact

The final rule relates to establishment and review of income limits and exclusions with regard to eligibility for or calculation of HUD housing assistance or rental assistance and related external administrative or fiscal requirements and procedures that do not constitute a development decision that affects the physical condition of specific project areas or building sites. Accordingly, under 24 CFR 50.19(c)(6), this final rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4; approved March 22, 1995) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This rule does not impose any Federal mandates on any state, local, or tribal government, or on the private sector, within the meaning of the UMRA.

Paperwork Reduction Act

The information collection requirements contained in this final rule have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and assigned OMB control numbers 2506–0133, 2577–0083, 2506–0215, and 2506–0171. HUD offices will conform the burden estimates associated with these control numbers to changes in this final rule. In accordance with the Paperwork Reduction Act of 1995, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers applicable to the programs that would be affected by this rule are: 14.157, 14.181,14.195, 14.218, 14.239, 14.241, 14.275, 14.850, 14.856, and 14.871.

List of Subjects

24 CFR Part 5

Administrative practice and procedure, Aged, Claims, Crime, Government contracts, Grant programs—housing and community development, Individuals with disabilities, Intergovernmental relations, Loan programs—housing and community development, Low and moderate income housing, Mortgage insurance, Penalties, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages

24 CFR Part 92

Administrative practice and procedure, Low and moderate income housing, Manufactured homes, Rent subsidies, and Reporting and recordkeeping requirements.

24 CFR Part 93

Administrative practice and procedure, Grant programs—housing and community development, Low and moderate income housing, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 570

Administrative practice and procedure, American Samoa, Community development block grants, Grant programs—education, Grant programs—housing and community development, Guam, Indians, Loan programs—housing and community development, Low and moderate income housing, Northern Mariana Islands, Pacific Islands Trust Territory, Puerto Rico, Reporting and recordkeeping requirements, Student aid, Virgin Islands

24 CFR Part 574

Community facilities, Grant programs—housing and community development, Grant programs—social programs, HIV/AIDS, Low and moderate income housing, Reporting and recordkeeping requirements.

24 CFR Part 882

Grant programs—housing and community development, Homeless, Lead poisoning, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 891

Aged, Grant programs—housing and community development, Individuals with disabilities, Loan programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 960

Aged, Grant programs—housing and community development, Individuals with disabilities, Pets, Public housing.

24 CFR Part 964

Grant programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 966

Grant programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 982

Grant programs—housing and community development, Grant programs—Indians, Indians, Public housing, Rent subsidies, Reporting and recordkeeping requirements.

Accordingly, for the reasons described in the preamble, HUD amends 24 CFR parts 5, 92, 93, 570, 574, 882, 891, 960, 964, 966, and 982 as follows:

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

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

Authority: 12 U.S.C. 1701x; 42 U.S.C. 1437a, 1437c, 1437f, 1437n, 3535(d); Sec. 327, Pub. L. 109–115, 119 Stat. 2396; Sec. 607, Pub. L. 109–162, 119 Stat. 3051 (42 U.S.C. 14043e *et seq.*); E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273; E.O 13831, 83 FR 20715, 3 CFR, 2018 Comp., p. 806; 42 U.S.C. 2000bb *et seq.*

■ 2. Effective January 1, 2024, in § 5.100, add alphabetically the definitions ''Earned income'', ''Real property'', and ''Unearned income'' to read as follows:

§ 5.100 Definitions.

* * * * *

Earned income means income or earnings from wages, tips, salaries, other employee compensation, and net income from self-employment. Earned

income does not include any pension or annuity, transfer payments (meaning payments made or income received in which no goods or services are being paid for, such as welfare, social security, and governmental subsidies for certain benefits), or any cash or in-kind benefits.

* * * * *

Real property as used in this part has the same meaning as that provided under the law of the State in which the property is located.

* * * * *

Unearned income means any annual income, as calculated under § 5.609, that is not earned income.

* * * * *

■ 3. Effective January 1, 2024, in § 5.210, revise the second sentence in paragraph (a) and the first sentence in paragraph (b)(2) to read as follows:

§ 5.210 Purpose, applicability, and Federal preemption.

(a) * * * This subpart B also enables HUD and PHAs to obtain income information about applicants and participants in the covered programs through computer matches with State Wage Information Collection Agencies (SWICAs) and Federal agencies, and from financial institutions and employers, in order to verify an applicant's or participant's eligibility for or level of assistance. * * *

(b) * * *

(2) The information covered by consent forms described in this subpart involves income information from SWICAs, wages, income, and resource information from financial institutions, net earnings from self-employment, payments of retirement income, and unearned income as referenced at 26 U.S.C. 6103. * * *

* * * * *

■ 4. Effective January 1, 2024, in § 5.230, revise paragraphs (b)(1), (b)(2), and (c)(4), and add paragraph (c)(5) to read as follows:

§ 5.230 Consent by assistance applicants and participants.

* * * * *

(b) * * *

(1) *Applicants.* The assistance applicant must submit the signed consent forms to the processing entity when eligibility under a covered program is being determined.

(2) *Subsequent consent forms.* Prior to January 1, 2024, participants signed and submitted consent forms at each regularly scheduled income reexamination. On or after January 1, 2024, a participant must sign and submit consent forms at their next interim or regularly scheduled income reexamination. After all applicants or participants over the age of 18 in a family have signed and submitted a consent form once on or after January 1, 2024, family members do not need to sign and submit subsequent consent forms at the next interim or regularly scheduled income examination except under the following circumstances:

(i) When any person 18 years or older becomes a member of the family, that family member must sign and submit a consent form;

(ii) When a member of the family turns 18 years of age, that family member must sign and submit a consent form; or

(iii) As required by HUD or the PHA in administrative instructions.

(c) * * *

(4) A provision authorizing PHAs to obtain any financial record from any financial institution, as the terms financial record and financial institution are defined in the Right to Financial Privacy Act (12 U.S.C. 3401), whenever the PHA determines the record is needed to determine an applicant's or participant's eligibility for assistance or level of benefits; and

(5) A statement that the authorization to release the information requested by the consent form will remain effective until the earliest of:

(i) The rendering of a final adverse decision for an assistance applicant;

(ii) The cessation of a participant's eligibility for assistance from HUD and the PHA; or

(iii) The express revocation by the assistance applicant or recipient (or applicable family member) of the authorization, in a written notification to HUD.

■ 5. Effective January 1, 2024, in § 5.232, add paragraph (c) to read as follows:

§ 5.232 Penalties for failing to sign consent form.

* * * * *

(c) This section does not apply if the applicant or participant, or any member of the assistance applicant's or participant's family revokes his/her consent with respect to the ability of the PHA to access financial records from financial institutions, unless the PHA establishes an admission and occupancy policy that revocation of consent to access financial records will result in denial or termination of assistance or admission.

■ 6. Effective January 1, 2024, in § 5.233, revise paragraph (a)(2)(i) to read as follows:

§ 5.233 Mandated use of HUD's Enterprise Income Verification (EIV) System.

(a) * * *

(2) * * *

(i) As a third-party source to verify tenant employment and income information during annual and streamlined reexaminations of family composition and income, in accordance with § 5.236 and administrative guidance issued by HUD; and

* * * * *

■ 7. Effective January 1, 2024, in § 5.403, revise the definition of ''Family'' to read as follows:

§ 5.403 Definitions.

* * * * *

Family includes, but is not limited to, the following, regardless of actual or perceived sexual orientation, gender identity, or marital status:

(1) A single person, who may be:

(i) An elderly person, displaced person, disabled person, near-elderly person, or any other single person;

(ii) An otherwise eligible youth who has attained at least 18 years of age and not more than 24 years of age and who has left foster care, or will leave foster care within 90 days, in accordance with a transition plan described in section 475(5)(H) of the Social Security Act (42 U.S.C. 675(5)(H)), and is homeless or is at risk of becoming homeless at age 16 or older; or

(2) A group of persons residing together, and such group includes, but is not limited to:

(i) A family with or without children (a child who is temporarily away from the home because of placement in foster care is considered a member of the family);

(ii) An elderly family;

(iii) A near-elderly family;

(iv) A disabled family;

(v) A displaced family; and

(vi) The remaining member of a tenant family.

* * * * *

§ 5.520 [Amended]

■ 8. Effective March 16, 2023, in § 5.520(d)(1) introductory text, add '', except as provided in § 960.507 of this title,'' after ''the family's assistance''.

■ 9. Effective January 1, 2024, in § 5.601, revise paragraphs (d) and (e) to read as follows:

§ 5.601 Purpose and applicability.

* * * * *

(d) Determining adjusted income, as provided in § 5.611(a) and (c) through (e), for families who apply for or receive assistance under the following programs: Section 202 Supportive

Housing Program for the Elderly (24 CFR 891, subpart B); Section 202 Direct Loans for Housing for the Elderly and Persons with Disabilities (24 CFR part 891, subpart E); and the Section 811 Supportive Housing for Persons with Disabilities (24 CFR part 891, subpart C). Unless specified in the regulations for each of the programs listed in this paragraph (d) or in another regulatory section of this part 5, subpart F, then the regulations in part 5, subpart F, generally are not applicable to these programs; and

(e) Limitations on eligibility for assistance based on assets, as provided in § 5.618, in the Section 8 (tenant-based and project-based) and public housing programs.

■ 10. Effective January 1, 2024, amend § 5.603(b) by:

■ a. Adding in alphabetical order definitions for ''Day laborer'', ''Foster adult'', ''Foster child'', ''Health and medical care expenses'', ''Independent contractor'', and ''Minor'';

■ b. Revising the definitions for ''Net family assets'', and ''Responsible entity''; and

■ c. Adding in alphabetical order the definition of ''Seasonal worker''.

The additions and revisions read as follows:

§ 5.603 Definitions.

* * * * *

(b) * * *

Day laborer. An individual hired and paid one day at a time without an agreement that the individual will be hired or work again in the future.

* * * * *

Dependent. A member of the family (which excludes foster children and foster adults) other than the family head or spouse who is under 18 years of age, or is a person with a disability, or is a full-time student.

* * * * *

Foster adult. A member of the household who is 18 years of age or older and meets the definition of a foster adult under State law. In general, a foster adult is a person who is 18 years of age or older, is unable to live independently due to a debilitating physical or mental condition and is placed with the family by an authorized placement agency or by judgment, decree, or other order of any court of competent jurisdiction.

Foster child. A member of the household who meets the definition of a foster child under State law. In general, a foster child is placed with the family by an authorized placement agency (*e.g.,* public child welfare agency) or by judgment, decree, or other order of any court of competent jurisdiction.

* * * * *

Health and medical care expenses. Health and medical care expenses are any costs incurred in the diagnosis, cure, mitigation, treatment, or prevention of disease or payments for treatments affecting any structure or function of the body. Health and medical care expenses include medical insurance premiums and long-term care premiums that are paid or anticipated during the period for which annual income is computed.

* * * * *

Independent contractor. An individual who qualifies as an independent contractor instead of an employee in accordance with the Internal Revenue Code Federal income tax requirements and whose earnings are consequently subject to the Self-Employment Tax. In general, an individual is an independent contractor if the payer has the right to control or direct only the result of the work and not what will be done and how it will be done.

* * * * *

Minor. A member of the family, other than the head of family or spouse, who is under 18 years of age.

* * * * *

Net family assets. (1) Net family assets is the net cash value of all assets owned by the family, after deducting reasonable costs that would be incurred in disposing real property, savings, stocks, bonds, and other forms of capital investment.

(2) In determining net family assets, PHAs or owners, as applicable, must include the value of any business or family assets disposed of by an applicant or tenant for less than fair market value (including a disposition in trust, but not in a foreclosure or bankruptcy sale) during the two years preceding the date of application for the program or reexamination, as applicable, in excess of the consideration received therefor. In the case of a disposition as part of a separation or divorce settlement, the disposition will not be considered to be for less than fair market value if the applicant or tenant receives consideration not measurable in dollar terms. Negative equity in real property or other investments does not prohibit the owner from selling the property or other investments, so negative equity alone would not justify excluding the property or other investments from family assets.

(3) Excluded from the calculation of net family assets are:

(i) The value of necessary items of personal property;

(ii) The combined value of all non-necessary items of personal property if the combined total value does not exceed $50,000 (which amount will be adjusted by HUD in accordance with the Consumer Price Index for Urban Wage Earners and Clerical Workers);

(iii) The value of any account under a retirement plan recognized as such by the Internal Revenue Service, including individual retirement arrangements (IRAs), employer retirement plans, and retirement plans for self-employed individuals;

(iv) The value of real property that the family does not have the effective legal authority to sell in the jurisdiction in which the property is located;

(v) Any amounts recovered in any civil action or settlement based on a claim of malpractice, negligence, or other breach of duty owed to a family member arising out of law, that resulted in a family member being a person with a disability;

(vi) The value of any Coverdell education savings account under section 530 of the Internal Revenue Code of 1986, the value of any qualified tuition program under section 529 of such Code, the value of any Achieving a Better Life Experience (ABLE) account authorized under Section 529A of such Code, and the value of any ''baby bond'' account created, authorized, or funded by Federal, State, or local government.

(vii) Interests in Indian trust land;

(viii) Equity in a manufactured home where the family receives assistance under 24 CFR part 982;

(ix) Equity in property under the Homeownership Option for which a family receives assistance under 24 CFR part 982;

(x) Family Self-Sufficiency Accounts; and

(xi) Federal tax refunds or refundable tax credits for a period of 12 months after receipt by the family.

(4) In cases where a trust fund has been established and the trust is not revocable by, or under the control of, any member of the family or household, the trust fund is not a family asset and the value of the trust is not included in the calculation of net family assets, so long as the fund continues to be held in a trust that is not revocable by, or under the control of, any member of the family or household.

* * * * *

Responsible entity. For § 5.611, in addition to the definition of ''responsible entity'' in § 5.100, ''responsible entity'' means:

(1) For the Section 202 Supportive Housing Program for the Elderly, the ''Owner'' as defined in 24 CFR 891.205;

(2) For the Section 202 Direct Loans for Housing for the Elderly and Persons with Disabilities, the ''Borrower'' as defined in 24 CFR 891.505; and

(3) For the Section 811 Supportive Housing Program for Persons with Disabilities, the ''Owner'' as defined in 24 CFR 891.305.

Seasonal worker. An individual who is hired into a short-term position and the employment begins about the same time each year (such as summer or winter). Typically, the individual is hired to address seasonal demands that arise for the particular employer or industry.

* * * * *

■ 11. Effective January 1, 2024, revise § 5.609 to read as follows:

§ 5.609 Annual income.

(a) Annual income includes, with respect to the family:

(1) All amounts, not specifically excluded in paragraph (b) of this section, received from all sources by each member of the family who is 18 years of age or older or is the head of household or spouse of the head of household, plus unearned income by or on behalf of each dependent who is under 18 years of age, and

(2) When the value of net family assets exceeds $50,000 (which amount HUD will adjust annually in accordance with the Consumer Price Index for Urban Wage Earners and Clerical Workers) and the actual returns from a given asset cannot be calculated, imputed returns on the asset based on the current passbook savings rate, as determined by HUD.

(b) Annual income does not include the following:

(1) Any imputed return on an asset when net family assets total $50,000 or less (which amount HUD will adjust annually in accordance with the Consumer Price Index for Urban Wage Earners and Clerical Workers) and no actual income from the net family assets can be determined.

(2) The following types of trust distributions:

(i) For an irrevocable trust or a revocable trust outside the control of the family or household excluded from the definition of net family assets under § 5.603(b):

(A) Distributions of the principal or corpus of the trust; and

(B) Distributions of income from the trust when the distributions are used to pay the costs of health and medical care expenses for a minor.

(ii) For a revocable trust under the control of the family or household, any distributions from the trust; except that any actual income earned by the trust, regardless of whether it is distributed, shall be considered income to the family at the time it is received by the trust.

(3) Earned income of children under the 18 years of age.

(4) Payments received for the care of foster children or foster adults, or State or Tribal kinship or guardianship care payments.

(5) Insurance payments and settlements for personal or property losses, including but not limited to payments through health insurance, motor vehicle insurance, and workers' compensation.

(6) Amounts received by the family that are specifically for, or in reimbursement of, the cost of health and medical care expenses for any family member.

(7) Any amounts recovered in any civil action or settlement based on a claim of malpractice, negligence, or other breach of duty owed to a family member arising out of law, that resulted in a member of the family becoming disabled.

(8) Income of a live-in aide, foster child, or foster adult as defined in §§ 5.403 and 5.603, respectively.

(9)(i) Any assistance that section 479B of the Higher Education Act of 1965, as amended (20 U.S.C. 1087uu), requires be excluded from a family's income; and

(ii) Student financial assistance for tuition, books, and supplies (including supplies and equipment to support students with learning disabilities or other disabilities), room and board, and other fees required and charged to a student by an institution of higher education (as defined under Section 102 of the Higher Education Act of 1965 (20 U.S.C. 1002)) and, for a student who is not the head of household or spouse, the reasonable and actual costs of housing while attending the institution of higher education and not residing in an assisted unit.

(A) Student financial assistance, for purposes of this paragraph (9)(ii), means a grant or scholarship received from—

(*1*) The Federal government;

(*2*) A State, Tribe, or local government;

(*3*) A private foundation registered as a nonprofit under 26 U.S.C. 501(c)(3);

(*4*) A business entity (such as corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, or nonprofit entity); or

(*5*) An institution of higher education.

(B) Student financial assistance, for purposes of this paragraph (9)(ii), does not include—

(*1*) Any assistance that is excluded pursuant to paragraph (b)(9)(i) of this section;

(*2*) Financial support provided to the student in the form of a fee for services performed (*e.g.,* a work study or teaching fellowship that is not excluded pursuant to paragraph (b)(9)(i) of this section);

(*3*) Gifts, including gifts from family or friends; or

(*4*) Any amount of the scholarship or grant that, either by itself or in combination with assistance excluded under this paragraph or paragraph (b)(9)(i), exceeds the actual covered costs of the student. The actual covered costs of the student are the actual costs of tuition, books and supplies (including supplies and equipment to support students with learning disabilities or other disabilities), room and board, or other fees required and charged to a student by the education institution, and, for a student who is not the head of household or spouse, the reasonable and actual costs of housing while attending the institution of higher education and not residing in an assisted unit. This calculation is described further in paragraph (b)(9)(ii)(E) of this section.

(C) Student financial assistance, for purposes of this paragraph (b)(9)(ii) must be:

(*1*) Expressly for tuition, books, room and board, or other fees required and charged to a student by the education institution;

(*2*) Expressly to assist a student with the costs of higher education; or

(*3*) Expressly to assist a student who is not the head of household or spouse with the reasonable and actual costs of housing while attending the education institution and not residing in an assisted unit.

(D) Student financial assistance, for purposes of this paragraph (b)(9)(ii), may be paid directly to the student or to the educational institution on the student's behalf. Student financial assistance paid to the student must be verified by the responsible entity as student financial assistance consistent with this paragraph (b)(9)(ii).

(E) When the student is also receiving assistance excluded under paragraph (b)(9)(i) of this section, the amount of student financial assistance under this paragraph (b)(9)(ii) is determined as follows:

(*1*) If the amount of assistance excluded under paragraph (b)(9)(i) of this section is equal to or exceeds the actual covered costs under paragraph

(b)(9)(ii)(B)(4) of this section, none of the assistance described in this paragraph (b)(9)(ii) of this section is considered student financial assistance excluded from income under this paragraph (b)(9)(ii)(E).

(*2*) If the amount of assistance excluded under paragraph (b)(9)(i) of this section is less than the actual covered costs under paragraph (b)(9)(ii)(B)(4) of this section, the amount of assistance described in paragraph (b)(9)(ii) of this section that is considered student financial assistance excluded under this paragraph is the lower of:

(*i*) the total amount of student financial assistance received under this paragraph (b)(9)(ii) of this section, or

(*ii*) the amount by which the actual covered costs under paragraph (b)(9)(ii)(B)(4) of this section exceeds the assistance excluded under paragraph (b)(9)(i) of this section.

(10) Income and distributions from any Coverdell education savings account under section 530 of the Internal Revenue Code of 1986 or any qualified tuition program under section 529 of such Code; and income earned by government contributions to, and distributions from, ''baby bond'' accounts created, authorized, or funded by Federal, State, or local government.

(11) The special pay to a family member serving in the Armed Forces who is exposed to hostile fire.

(12)(i) Amounts received by a person with a disability that are disregarded for a limited time for purposes of Supplemental Security Income eligibility and benefits because they are set aside for use under a Plan to Attain Self-Sufficiency (PASS);

(ii) Amounts received by a participant in other publicly assisted programs which are specifically for or in reimbursement of out-of-pocket expenses incurred (*e.g.,* special equipment, clothing, transportation, child care, etc.) and which are made solely to allow participation in a specific program;

(iii) Amounts received under a resident service stipend not to exceed $200 per month. A resident service stipend is a modest amount received by a resident for performing a service for the PHA or owner, on a part-time basis, that enhances the quality of life in the development.

(iv) Incremental earnings and benefits resulting to any family member from participation in training programs funded by HUD or in qualifying Federal, State, Tribal, or local employment training programs (including training programs not affiliated with a local government) and training of a family member as resident management staff. Amounts excluded by this provision must be received under employment training programs with clearly defined goals and objectives and are excluded only for the period during which the family member participates in the employment training program unless those amounts are excluded under paragraph (b)(9)(i) of this section.

(13) Reparation payments paid by a foreign government pursuant to claims filed under the laws of that government by persons who were persecuted during the Nazi era.

(14) Earned income of dependent full-time students in excess of the amount of the deduction for a dependent in § 5.611.

(15) Adoption assistance payments for a child in excess of the amount of the deduction for a dependent in § 5.611.

(16) Deferred periodic amounts from Supplemental Security Income and Social Security benefits that are received in a lump sum amount or in prospective monthly amounts, or any deferred Department of Veterans Affairs disability benefits that are received in a lump sum amount or in prospective monthly amounts.

(17) Payments related to aid and attendance under 38 U.S.C. 1521 to veterans in need of regular aid and attendance.

(18) Amounts received by the family in the form of refunds or rebates under State or local law for property taxes paid on the dwelling unit.

(19) Payments made by or authorized by a State Medicaid agency (including through a managed care entity) or other State or Federal agency to a family to enable a family member who has a disability to reside in the family's assisted unit. Authorized payments may include payments to a member of the assisted family through the State Medicaid agency (including through a managed care entity) or other State or Federal agency for caregiving services the family member provides to enable a family member who has a disability to reside in the family's assisted unit.

(20) Loan proceeds (the net amount disbursed by a lender to or on behalf of a borrower, under the terms of a loan agreement) received by the family or a third party (*e.g.,* proceeds received by the family from a private loan to enable attendance at an educational institution or to finance the purchase of a car).

(21) Payments received by Tribal members as a result of claims relating to the mismanagement of assets held in trust by the United States, to the extent such payments are also excluded from gross income under the Internal Revenue Code or other Federal law.

(22) Amounts that HUD is required by Federal statute to exclude from consideration as income for purposes of determining eligibility or benefits under a category of assistance programs that includes assistance under any program to which the exclusions set forth in paragraph (b) of this section apply. HUD will publish a notice in the **Federal Register** to identify the benefits that qualify for this exclusion. Updates will be published when necessary.

(23) Replacement housing ''gap'' payments made in accordance with 49 CFR part 24 that offset increased out of pocket costs of displaced persons that move from one federally subsidized housing unit to another Federally subsidized housing unit. Such replacement housing ''gap'' payments are not excluded from annual income if the increased cost of rent and utilities is subsequently reduced or eliminated, and the displaced person retains or continues to receive the replacement housing ''gap'' payments.

(24) Nonrecurring income, which is income that will not be repeated in the coming year based on information provided by the family. Income received as an independent contractor, day laborer, or seasonal worker is not excluded from income under this paragraph, even if the source, date, or amount of the income varies. Nonrecurring income includes:

(i) Payments from the U.S. Census Bureau for employment (relating to decennial census or the American Community Survey) lasting no longer than 180 days and not culminating in permanent employment.

(ii) Direct Federal or State payments intended for economic stimulus or recovery.

(iii) Amounts directly received by the family as a result of State refundable tax credits or State tax refunds at the time they are received.

(iv) Amounts directly received by the family as a result of Federal refundable tax credits and Federal tax refunds at the time they are received.

(v) Gifts for holidays, birthdays, or other significant life events or milestones (*e.g.,* wedding gifts, baby showers, anniversaries).

(vi) Non-monetary, in-kind donations, such as food, clothing, or toiletries, received from a food bank or similar organization.

(vii) Lump-sum additions to net family assets, including but not limited to lottery or other contest winnings.

(25) Civil rights settlements or judgments, including settlements or judgments for back pay.

(26) Income received from any account under a retirement plan

recognized as such by the Internal Revenue Service, including individual retirement arrangements (IRAs), employer retirement plans, and retirement plans for self-employed individuals; except that any distribution of periodic payments from such accounts shall be income at the time they are received by the family.

(27) Income earned on amounts placed in a family's Family Self Sufficiency Account.

(28) Gross income a family member receives through self-employment or operation of a business; except that the following shall be considered income to a family member:

(i) Net income from the operation of a business or profession. Expenditures for business expansion or amortization of capital indebtedness shall not be used as deductions in determining net income. An allowance for depreciation of assets used in a business or profession may be deducted, based on straight line depreciation, as provided in Internal Revenue Service regulations; and

(ii) Any withdrawal of cash or assets from the operation of a business or profession will be included in income, except to the extent the withdrawal is reimbursement of cash or assets invested in the operation by the family.

(c) *Calculation of Income.* The PHA or owner must calculate family income as follows:

(1) *Initial occupancy or assistance and interim reexaminations.* The PHA or owner must estimate the income of the family for the upcoming 12-month period:

(i) To determine family income for initial occupancy or for the initial provision of housing assistance; or

(ii) To determine family income for an interim reexamination of family income under §§ 5.657(c), 960.257(b), or 982.516(c) of this title.

(2) *Annual Reexaminations.* (i) The PHA or owner must determine the income of the family for the previous 12-month period and use this amount as the family income for annual reexaminations, except where the PHA or owner uses a streamlined income determination under §§ 5.657(d), 960.257(c), or 982.516(b) of this title.

(ii) In determining the income of the family for the previous 12-month period, the PHA or owner must take into consideration any redetermination of income during the previous 12-month period resulting from an interim reexamination of family income under §§ 5.657(c), 960.257(b), or 982.516(c) of this title.

(iii) The PHA or owner must make adjustments to reflect current income if there was a change in income during the previous 12-month period that was not accounted for in a redetermination of income.

(3) *Use of other programs' determination of income.* (i) The PHA or owner may, using the verification methods in paragraph (c)(3)(ii) of this section, determine the family's income prior to the application of any deductions applied in accordance with § 5.611 based on income determinations made within the previous 12-month period for purposes of the following means-tested forms of Federal public assistance:

(A) The Temporary Assistance for Needy Families block grant (42 U.S.C. 601, *et seq.*).

(B) Medicaid (42 U.S.C. 1396 *et seq.*).

(C) The Supplemental Nutrition Assistance Program (42 U.S.C. 2011 *et seq.*).

(D) The Earned Income Tax Credit (26 U.S.C. 32).

(E) The Low-Income Housing Credit (26 U.S.C. 42).

(F) The Special Supplemental Nutrition Program for Woman, Infants, and Children (42 U.S.C. 1786).

(G) Supplemental Security Income (42 U.S.C. 1381 *et seq.*).

(H) Other programs administered by the Secretary.

(I) Other means-tested forms of Federal public assistance for which HUD has established a memorandum of understanding.

(J) Other Federal benefit determinations made in other forms of means-tested Federal public assistance that the Secretary determines to have comparable reliability and announces through the **Federal Register**.

(ii) If a PHA or owner intends to use the annual income determination made by an administrator for allowable forms of Federal means-tested public assistance under this paragraph (c)(3), the PHA or owner must obtain it using the appropriate third-party verification. If the appropriate third-party verification is unavailable, or if the family disputes the determination made for purposes of the other form of Federal means-tested public assistance, the PHA or owner must calculate annual income in accordance with 24 CFR part 5, subpart F. The verification must indicate the tenant's family size and composition and state the amount of the family's annual income. The verification must also meet all HUD requirements related to the length of time that is permitted before the third-party verification is considered out-of-date and is no longer an eligible source of income verification.

(4) *De minimis errors.* The PHA or owner will not be considered out of compliance with the requirements in this paragraph (c) solely due to de minimis errors in calculating family income. A de minimis error is an error where the PHA or owner determination of family income deviates from the correct income determination by no more than $30 per month in monthly adjusted income ($360 in annual adjusted income) per family.

(i) The PHA or owner must still take any corrective action necessary to credit or repay a family if the family has been overcharged for their rent or family share as a result of the de minimis error in the income determination, but families will not be required to repay the PHA or owner in instances where a PHA or owner has miscalculated income resulting in a family being undercharged for rent or family share.

(ii) HUD may revise the amount of de minimis error in this paragraph (c)(4) through a rulemaking published in the **Federal Register** for public comment.

■ 12. Effective January 1, 2024, revise § 5.611 to read as follows:

§ 5.611 Adjusted income.

Adjusted income means annual income (as determined under § 5.609) of the members of the family residing or intending to reside in the dwelling unit, after making the following deductions:

(a) *Mandatory deductions.* (1) $480 for each dependent, which amount will be adjusted by HUD annually in accordance with the Consumer Price Index for Urban Wage Earners and Clerical Workers, rounded to the next lowest multiple of $25;

(2) $525 for any elderly family or disabled family, which amount will be adjusted by HUD annually in accordance with the Consumer Price Index for Urban Wage Earners and Clerical Workers, rounded to the next lowest multiple of $25;

(3) The sum of the following, to the extent the sum exceeds ten percent of annual income:

(i) Unreimbursed health and medical care expenses of any elderly family or disabled family; and

(ii) Unreimbursed reasonable attendant care and auxiliary apparatus expenses for each member of the family who is a person with a disability, to the extent necessary to enable any member of the family (including the member who is a person with a disability) to be employed. This deduction may not exceed the combined earned income received by family members who are 18 years of age or older and who are able to work because of such attendant care or auxiliary apparatus; and

(4) Any reasonable child care expenses necessary to enable a member of the family to be employed or to further his or her education.

(b) *Additional deductions.* (1) For public housing, the Housing Choice Voucher (HCV) and the Section 8 moderate rehabilitation programs (including the moderate rehabilitation Single-Room Occupancy (SRO) program), a PHA may adopt additional deductions from annual income.

(i) *Public housing.* A PHA that adopts such deductions will not be eligible for an increase in Capital Fund and Operating Fund formula grants based on the application of such deductions. The PHA must establish a written policy for such deductions.

(ii) *HCV, moderate rehabilitation, and moderate rehabilitation Single-Room Occupancy (SRO) programs.* A PHA that adopts such deductions must have sufficient funding to cover the increased housing assistance payment cost of the deductions. A PHA will not be eligible for an increase in HCV renewal funding or moderate rehabilitation program funding for subsidy costs resulting from such deductions. For the HCV program, the PHA must include such deductions in its administrative plan. For moderate rehabilitation, the PHA must establish a written policy for such deductions.

(2) For the HUD programs listed in § 5.601(d), the responsible entity must calculate such other deductions as required and permitted by the applicable program regulations.

(c) *Financial hardship exemption for unreimbursed health and medical care expenses and reasonable attendant care and auxiliary apparatus expenses.* (1) *Phased-in relief.* This paragraph provides financial hardship relief for families affected by the statutory increase in the threshold to receive health and medical care expense and reasonable attendant care and auxiliary apparatus expense deductions from annual income.

(i) *Eligibility for relief.* To receive hardship relief under this paragraph (c)(1), the family must have received a deduction from annual income because their sum of expenses under paragraph (a)(3) of this section exceeded 3 percent of annual income as of January 1, 2024.

(ii) *Form of relief.* (A) The family will receive a deduction totaling the sum of the expenses under paragraph (a)(3) of this section that exceed 5 percent of annual income.

(B) Twelve months after the relief in this paragraph (c)(1)(ii) is provided, the family must receive a deduction totaling the sum of expenses under paragraph (a)(3) of this section that exceed 7.5 percent of annual income.

(C) Twenty-four months after the relief in this paragraph (c)(1)(ii) is provided, the family must receive a deduction totaling the sum of expenses under paragraph (a)(3) of this section that exceed ten percent of annual income and the only remaining relief that may be available to the family will be paragraph (d)(1) of this section.

(D) A family may request hardship relief under paragraph (c)(2) of this section prior to the end of the twenty-four-month transition period. If a family making such a request is determined eligible for hardship relief under paragraph (c)(2) of this section, hardship relief under this paragraph ends and the family's hardship relief shall be administered in accordance with paragraph (c)(2) of this section. Once a family chooses to obtain relief under paragraph (c)(2) of this section, a family may no longer receive relief under this paragraph.

(2) *General.* This paragraph (c)(2) provides financial relief for an elderly or disabled family or a family that includes a person with disabilities that is experiencing a financial hardship.

(i) *Eligibility for relief.* (A) To receive hardship relief under this paragraph (c)(2), a family must demonstrate that the family's applicable health and medical care expenses or reasonable attendant care and auxiliary apparatus expenses increased or the family's financial hardship is a result of a change in circumstances (as defined by the responsible entity) that would not otherwise trigger an interim reexamination.

(B) Relief under this paragraph (c)(2) is available regardless of whether the family previously received deductions under paragraph (a)(3) of this section, is currently receiving relief under paragraph (c)(1) of this section, or previously received relief under paragraph (c)(1) of this section.

(ii) *Form and duration of relief.* (A) The family will receive a deduction for the sum of the eligible expenses in paragraph (a)(3) of this section that exceed 5 percent of annual income.

(B) The family's hardship relief ends when the circumstances that made the family eligible for the relief are no longer applicable or after 90 days, whichever comes earlier. However, responsible entities may, at their discretion, extend the relief for one or more additional 90-day periods while the family's hardship condition continues.

(d) *Exemption to continue child care expense deduction.* A family whose eligibility for the child care expense deduction is ending may request a financial hardship exemption to continue the child care expense deduction under paragraph (a)(4) of this section. The responsible entity must recalculate the family's adjusted income and continue the child care deduction if the family demonstrates to the responsible entity's satisfaction that the family is unable to pay their rent because of loss of the child care expense deduction, and the child care expense is still necessary even though the family member is no longer employed or furthering his or her education. The hardship exemption and the resulting alternative adjusted income calculation must remain in place for a period of up to 90 days. Responsible entities, at their discretion, may extend such hardship exemptions for additional 90-day periods based on family circumstances.

(e) *Hardship policy requirements.* (1) *Responsible entity determination of family's inability to pay the rent.* The responsible entity must establish a policy on how it defines what constitutes a hardship under paragraphs (c) and (d) of this section, which includes determining the family's inability to pay the rent, for purposes of determining eligibility for a hardship exemption under paragraph (d) of this section.

(2) *Family notification.* The responsible entity must promptly notify the family in writing of the change in the determination of adjusted income and the family's rent resulting from the hardship exemption. The notice must also inform the family of when the hardship exemption will begin and expire (*i.e.,* the time periods specified under paragraph (c)(1)(ii) of this section or within 90 days or at such time as the responsibility entity determines the exemption is no longer necessary in accordance with paragraphs (c)(2)(ii)(B) or (d) of this section).

■ 13. Effective January 1, 2024, amend § 5.617 by adding paragraphs (e) and (f) to read as follows:

§ 5.617 Self-sufficiency incentives for persons with disabilities—Disallowance of increase in annual income.

* * * * *

(e) *Limitation.* This section applies to a family that is receiving the disallowance of earned income under this section on December 31, 2023

(f) *Sunset.* This section will lapse on January 1, 2026.

■ 14. Effective January 1, 2024, add § 5.618 to subpart F to read as follows:

§ 5.618 Restriction on assistance to families based on assets.

(a) *Restrictions based on net assets and property ownership.* (1) A dwelling unit in the public housing program may

not be rented, and assistance under the Section 8 (tenant-based and project-based) programs may not be provided, either initially or upon reexamination of family income, to any family if:

(i) The family's net assets (as defined in § 5.603) exceed $100,000, which amount will be adjusted annually by HUD in accordance with the Consumer Price Index for Urban Wage Earners and Clerical Workers; or

(ii) The family has a present ownership interest in, a legal right to reside in, and the effective legal authority to sell, based on State or local laws of the jurisdiction where the property is located, real property that is suitable for occupancy by the family as a residence, except this real property restriction does not apply to:

(A) Any property for which the family is receiving assistance under 24 CFR 982.620; or under the Homeownership Option in 24 CFR part 982;

(B) Any property that is jointly owned by a member of the family and at least one non-household member who does not live with the family, if the non-household member resides at the jointly owned property;

(C) Any person who is a victim of domestic violence, dating violence, sexual assault, or stalking, as defined in this part 5 (subpart L); or

(D) Any family that is offering such property for sale.

(2) A property will be considered ''suitable for occupancy'' under paragraph (a)(1)(ii) of this section unless the family demonstrates that it:

(i) Does not meet the disability-related needs for all members of the family (*e.g.,* physical accessibility requirements, disability-related need for additional bedrooms, proximity to accessible transportation, etc.);

(ii) Is not sufficient for the size of the family;

(iii) Is geographically located so as to be a hardship for the family (*e.g.,* the distance or commuting time between the property and the family's place of work or school would be a hardship to the family, as determined by the PHA or owner);

(iv) Is not safe to reside in because of the physical condition of the property (*e.g.,* property's physical condition poses a risk to the family's health and safety and the condition of the property cannot be easily remedied); or

(v) Is not a property that a family may reside in under the State or local laws of the jurisdiction where the property is located.

(b) *Acceptable documentation; confidentiality.* (1) A PHA or owner may determine the net assets of a family based on a certification by the family that the net family assets (as defined in § 5.603) do not exceed $50,000, which amount will be adjusted annually in accordance with the Consumer Price Index for Urban Wage Earners and Clerical Workers, without taking additional steps to verify the accuracy of the declaration. The declaration must state the amount of income the family expects to receive from such assets; this amount must be included in the family's income.

(2) A PHA or owner may determine compliance with paragraph (a)(1)(ii) of this section based on a certification by a family that certifies that such family does not have any present ownership interest in any real property at the time of the income determination or review.

(3) When a family asks for or about an exception to the real property restriction because a family member is a victim of domestic violence, dating violence, sexual assault, or stalking, the PHA or owner must comply with the confidentiality requirements under § 5.2007. The PHA or owner must accept a self-certification from the family member, and the restrictions on requesting documentation under § 5.2007 apply.

(c) *Enforcement.* (1) When recertifying the income of a family that is subject to the restrictions in paragraph (a) of this section, a PHA or owner may choose not to enforce such restrictions, or alternatively, may establish exceptions to the restrictions based on eligibility criteria.

(2) The PHA or owner may choose not to enforce the restrictions in paragraph (a) of this section or establish exceptions to such restrictions only pursuant to a policy adopted by the PHA or owner.

(3) Eligibility criteria for establishing exceptions may provide for separate treatment based on family type and may be based on different factors, such as age, disability, income, the ability of the family to find suitable alternative housing, and whether supportive services are being provided. Such policies must be in conformance with all applicable fair housing statutes and regulations, as discussed in this part 5.

(d) *Delay of eviction or termination of assistance.* The PHA or owner may delay for a period of not more than 6 months the initiation of eviction or termination proceedings of a family based on noncompliance under this provision unless it conflicts with other provisions of law.

(e) *Applicability.* This section applies to the Section 8 (tenant-based and project-based) and public housing programs.

■ 15. Effective March 16, 2023 amend § 5.628(a) by:

■ a. Removing ''or'' at the end of in paragraph (a)(3);

■ b. Removing the period at the end of paragraph (a)(4) and add in its place ''; or''; and

■ c. Adding paragraph (a)(5);

The addition reads as follows:

§ 5.628 Total tenant payment.

(a) * * *

(5) For public housing only, the alternative non-public housing rent, as determined in accordance with § 960.102 of this title.

* * * * *

■ 16. Effective January 1, 2024, in § 5.657, revise paragraph (c) and add paragraphs (e) and (f) to read as follows:

§ 5.657 Section 8 project-based assistance programs: Reexamination of family income and composition.

* * * * *

(c) *Interim reexaminations.* (1) *Generally.* A family may request an interim reexamination of family income because of any changes since the last examination. The owner must conduct any interim reexamination within a reasonable time after the family request or when the owner becomes aware of an increase in family adjusted income under paragraph (c)(3) of this section. What qualifies as a ''reasonable time'' may vary based on the amount of time it takes to verify information, but such time generally should not exceed 30 days from the date a family reports changes in income to an owner.

(2) *Decreases in the family's annual adjusted income.* The owner may decline to conduct an interim reexamination of family income if the owner estimates that the family's adjusted income will decrease by an amount that is less than ten percent of the family's annual adjusted income (or a lower amount established by HUD through notice), or such lower threshold established by the owner.

(3) *Increases in the family's annual adjusted income.* The owner must conduct an interim reexamination of family income when the owner becomes aware that the family's adjusted income (as defined in § 5.611) has changed by an amount that the owner estimates will result in an increase of ten percent or more in annual adjusted income or such other amount established by HUD through notice, except:

(i) The owner may not consider any increase in the earned income of the family when estimating or calculating whether the family's adjusted income has increased, unless the family has previously received an interim reduction under paragraph (c)(1) of this

section during the certification period; and

(ii) The owner may choose not to conduct an interim reexamination in the last three months of a certification period.

(4) *Policies on reporting changes in family income or composition.* The owner must adopt policies consistent with this paragraph (c), prescribing when and under what conditions the family must report a change in family income or composition.

(5) *Effective date of rent changes.* (i) If the family has reported a change in family income or composition in a timely manner according to the owner's policies, the owner must provide the family with 30 days advance notice of any rent increase, and such rent increase will be effective the first day of the month beginning after the end of that 30-day notice period. Rent decreases will be effective on the first day of the first month after the date of the actual change leading to the interim reexamination of family income.

(ii) If the family has failed to report a change in family income or composition in a timely manner according to the owner's policies, owners must implement any resulting rent increases retroactively to the first of the month following the date of the change leading to the interim reexamination of family income. Any resulting rent decrease must be implemented no later than the first rent period following completion of the reexamination. However, rent decreases may be applied retroactively at the discretion of the owner, in accordance with the owner's conditions as established in written policy, and subject to paragraph (c)(5)(iii) of this section.

(iii) A retroactive rent decrease may not be applied by the owner prior to the later of the first of the month following:

(A) The date of the change leading to the interim reexamination of family income; or

(B) The effective date of the family's most recent previous interim or annual reexamination (or initial examination if that was the family's last examination).

* * * * *

(e) *Other applicable requirements.* Reviews of family income under this section are subject to the provisions in Section 904 of the Stewart B. McKinney Homeless Assistance Amendments Act of 1988, as amended (42 U.S.C. 3544), and any applicable privacy rules in subpart B of this part.

(f) *De minimis errors.* The owner will not be considered out of compliance with the requirements in this section due solely to de minimis errors in calculating family income but is still obligated to correct errors once the owner becomes aware of the errors. A de minimis error is an error where the owner determination of family income varies from the correct income determination by no more than $30 per month in monthly adjusted income ($360 in annual adjusted income) per family.

(1) The owner must take any corrective action necessary to credit or repay a family if the family has been overcharged for their rent as a result of the de minimis error in the income determination. Families will not be required to repay the owner in instances where the owner has miscalculated income resulting in a family being undercharged for rent or family share.

(2) HUD may revise the amount of de minimis error in this paragraph (f) through a rulemaking published in the **Federal Register** for public comment.

■ 17. Effective January 1, 2024, in § 5.659, revise paragraph (e) to read as follows:

§ 5.659 Family information and verification.

* * * * *

(e) *Verification of assets.* For a family with net family assets (as the term is defined in § 5.603) equal to or less than $50,000, which amount will be adjusted annually by HUD in accordance with the Consumer Price Index for Urban Wage Earners and Clerical Workers, an owner may accept, for purposes of recertification of income, a family's declaration under § 5.618(b), except that the owner must obtain third-party verification of all family assets every 3 years.

PART 92—HOME INVESTMENT PARTNERSHIPS PROGRAM

■ 18. Effective January 1, 2024, the authority citation for part 92 is revised to read as follows:

Authority: 42 U.S.C. 3535(d) and 12701—12839, 12 U.S.C. 1701x.

■ 19. Effective January 1, 2024 in § 92.2, add alphabetically the definitions ''Foster adult'', ''Foster child'', ''Full-time student'', and ''Live-in aide'' to read as follows:

§ 92.2 Definitions.

* * * * *

Foster adult has the same meaning given that term in 24 CFR 5.603.

Foster child has the same meaning given that term in 24 CFR 5.603.

Full-time student has the same meaning given that term in 24 CFR 5.603.

* * * * *

Live-in aide has the same meaning given that term in 24 CFR 5.403.

* * * * *

■ 20. Effective January 1, 2024, revise § 92.203 to read as follows:

§ 92.203 Income determinations.

(a) *Methods of determining annual income.* The HOME program has income targeting requirements for the HOME program and for HOME projects. Therefore, the participating jurisdiction must determine each family is income eligible by determining the family's annual income.

(1) If a family is applying for or living in a HOME-assisted rental unit, and the unit is assisted by a Federal or State project-based rental subsidy program, then a participating jurisdiction must accept the public housing agency, owner, or rental subsidy provider's determination of the family's annual income and adjusted income under that program's rules.

(2) If a family is applying for or living in a HOME-assisted rental unit, and the family is assisted by a Federal tenant-based rental assistance program (*e.g.,* housing choice vouchers, etc.), then a participating jurisdiction may accept the rental assistance provider's determination of the family's annual income and adjusted income under that program's rules.

(3) In all other cases, the participating jurisdiction must calculate annual income in accordance with paragraphs (b) through (e) of this section and calculate adjusted income in accordance with paragraph (f) of this section.

(b) *Required documentation for annual income calculations.* (1) For families who are tenants in HOME-assisted housing and not receiving HOME tenant-based rental assistance, the participating jurisdiction must initially determine annual income using the method in paragraph (b)(1)(i) of this section. For subsequent income determinations during the period of affordability, the participating jurisdiction may use any one of the following methods in accordance with § 92.252(h):

(i) Examine at least 2 months of source documents evidencing annual income (*e.g.,* wage statement, interest statement, unemployment compensation statement) for the family.

(ii) Obtain from the family a written statement of the amount of the family's annual income and family size, along with a certification that the information is complete and accurate. The certification must state that the family will provide source documents upon request.

(iii) Obtain a written statement from the administrator of a government program under which the family receives benefits and which examines each year the annual income of the family. The statement must indicate the tenant's family size and state the amount of the family's annual income; or alternatively, the statement must indicate the current dollar limit for very low- or low-income families for the family size of the tenant and state that the tenant's annual income does not exceed this limit.

(2) For all other families (*i.e.,* homeowners receiving rehabilitation assistance, homebuyers, and recipients of HOME tenant-based rental assistance), the participating jurisdiction must determine annual income by examining at least 2 months of source documents evidencing annual income (*e.g.,* wage statement, interest statement, unemployment compensation statement) for the family.

(c) *Defining income for eligibility.* When determining whether a family is income eligible, the participating jurisdiction must use one of the following two definitions of ''annual income'':

(1) Annual income as defined at §§ 5.609(a) and (b) of this title (except when determining the income of a homeowner for an owner-occupied rehabilitation project, the value of the homeowner's principal residence may be excluded from the calculation of net family assets, as defined in § 5.603 of this title); or

(2) Adjusted gross income as defined for purposes of reporting under Internal Revenue Service (IRS) Form 1040 series for individual Federal annual income tax purposes.

(d) *Using income definitions.* The participating jurisdiction may use only one definition of annual income for each HOME-assisted program (*e.g.,* downpayment assistance program) that it administers and only one definition for each rental housing project. A participating jurisdiction may use either of the definitions of ''annual income'' permitted in paragraph (c) of this section. For rental housing projects containing units assisted by a Federal or State project-based rental subsidy program or for rental housing projects where a participating jurisdiction is accepting a public housing agency, owner, or rental assistance provider's determination of annual and adjusted income for tenants receiving Federal tenant-based rental assistance, the participating jurisdiction must calculate annual income in accordance with paragraph (c)(i) of this section so that only one definition of annual income is used in the rental housing project.

(e) *Determining family composition and projecting income.* (1) The participating jurisdiction must calculate the annual income of the family by projecting the prevailing rate of income of the family at the time the participating jurisdiction determines that the family is income eligible. Annual income includes income from all persons in the household, except live-in aides, foster children, and foster adults. Income or asset enhancement derived from the HOME-assisted project shall not be considered in calculating annual income. Families may use the certification process in § 5.618 of this title to certify that their net family assets are below the threshold for imputing income used in § 5.609(a)(2) of this title, as applicable. Families using the certification process in § 5.618 of this title that are homeowners applying for an owner-occupied rehabilitation project may also exclude the value of the homeowner's principal residence from the calculation of their Net Family Assets for purposes of the certification. For families living in HOME-assisted rental housing units, any rental assistance provided to the family under a Federal tenant-based rental assistance program or any Federal or State project-based rental subsidy provided to the HOME rental housing unit shall not be counted as tenant income for purposes of determining annual income.

(2) The participating jurisdiction is not required to re-examine the family's income at the time the HOME assistance is provided, unless more than six months has elapsed since the participating jurisdiction determined that the family qualified as income eligible.

(3) The participating jurisdiction must follow the requirements in § 5.617 of this title when making subsequent income determinations of persons with disabilities who are tenants in HOME-assisted rental housing or who receive HOME tenant-based rental assistance. This paragraph (e)(3) will lapse on January 1, 2026.

(f) *Determining Adjusted Income.* (1) The three cases where a participating jurisdiction must calculate a tenant's adjusted income are as follows:

(i) A participating jurisdiction must calculate the adjusted income of a family receiving tenant-based rental assistance to determine the amount of assistance in accordance with § 92.209(h). To calculate the family's adjusted income for a family in tenant-based rental assistance, the participating jurisdiction must apply the deductions in § 5.611(a) of this title and may choose to grant financial hardship exemptions in accordance with the process described in §§ 5.611(c) through (e) of this title.

(ii) A participating jurisdiction must calculate a tenant's adjusted income if the tenant is living in a Low HOME Rent unit and is subject to the provisions of § 92.252(b)(2)(i). To calculate a family's adjusted income to determine the Low HOME Rent in accordance with § 92.252(b)(2)(i), a participating jurisdiction must apply the deductions in § 5.611(a) of this title and may choose to grant financial hardship exemptions in accordance with the process described in §§ 5.611(c) through (e) of this title.

(iii) A participating jurisdiction must calculate a tenant's adjusted income if the tenant is over-income, and rent must be recalculated in accordance with § 92.252(i)(2). To calculate the family's adjusted income for an over-income family, the participating jurisdiction must apply the deductions in § 5.611(a) of this title.

(2) If a unit is assisted by a Federal or State project-based rental subsidy program, then a participating jurisdiction is not required to calculate the family's adjusted income and must accept the public housing agency, owner, or rental subsidy provider's determination of adjusted income under that program's rules.

■ 22. Effective January 1, 2024, in § 92.252, revise paragraphs (b)(2) and (h) to read as follows:

§ 92.252 Qualification as affordable housing: Rental housing.

* * * * *

(b) * * *

(2)(i) The rent does not exceed 30 percent of the family's adjusted income.

(ii) If the unit receives Federal or State project-based rental subsidy and the very low-income family pays as a contribution toward rent not more than 30 percent of the family's adjusted income, then the maximum rent (*i.e.,* tenant contribution plus project-based rental subsidy) is the rent allowable under the Federal or State project-based rental subsidy program.

* * * * *

(h) *Tenant income.* The income of each tenant must be determined initially in accordance with § 92.203(b)(1)(i). In addition, each year during the period of affordability the project owner must re-examine each tenant's annual income in accordance with one of the options in § 92.203(b)(1) selected by the participating jurisdiction. An owner of a multifamily project with an affordability period of ten years or more who re-examines tenant's annual income

through a statement and certification in accordance with § 92.203(b)(1)(ii), must examine the income of each tenant, in accordance with § 92.203(b)(1)(i), every sixth year of the affordability period, except that, for units that receive Federal or State project-based rental subsidy, the owner must accept the income determination pursuant to § 92.203(a)(1); and for a Federal tenant-based rental assistance program (*e.g.* housing choice vouchers, etc.) a participating jurisdiction may accept the income determination pursuant to § 92.203(a)(2). Otherwise, an owner who accepts the tenant's statement and certification in accordance with § 92.203(b)(1)(ii) is not required to examine the income of tenants in multifamily or single-family projects unless there is evidence that the tenant's written statement failed to completely and accurately state information about the family's size or income.

* * * * *

PART 93—HOUSING TRUST FUND

■ 23. The authority citation for part 93 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 12 U.S.C. 4568.

■ 24. Effective January 1, 2024, in § 93.2, add alphabetically the definitions ''Foster adult'', ''Foster child'', ''Full-time student'', ''Live-in aide'', and ''Public Housing Agency (PHA)'' to read as follows:

§ 93.2 Definitions.

* * * * *

Foster adult has the same meaning given that term in 24 CFR 5.603.

Foster child has the same meaning given that term in 24 CFR 5.603.

Full-time student has the same meaning given that term in 24 CFR 5.603.

* * * * *

Live-in aide has the same meaning given that term in 24 CFR 5.403.

* * * * *

Public Housing Agency (PHA) has the same meaning given that term in 24 CFR 5.100.

* * * * *

■ 25. Effective January 1, 2024, revise § 93.151 to read as follows:

§ 93.151 Income determinations.

(a) *General.* The HTF program has income-targeting requirements. Therefore, the grantee must determine that each family occupying an HTF-assisted unit is income-eligible by determining the family's annual income.

(1) If a family is applying for or living in an HTF-assisted rental unit, and the unit is assisted under the public housing program, then a grantee must accept the public housing agency's determination of the family's annual income and adjusted income under §§ 5.609 and 5.611 of this title, respectively.

(2) If a family is applying for or living in an HTF-assisted rental unit, and the family is assisted under a Federal tenant-based rental assistance program (*e.g.,* housing choice voucher program, HOME tenant based rental assistance, etc.), then a grantee must accept the rental assistance provider's determination of the family's annual income and adjusted income under the rules of that program.

(3) If a family is applying for or living in an HTF-assisted rental unit, and the unit is assisted with a Federal or State project-based rental subsidy program, then a grantee must accept the public housing agency, owner, or rental subsidy provider's determination of the family's annual income and adjusted income under the rules of that program.

(4) In all other cases, the grantee must calculate annual income in accordance with paragraphs (b) through (e) of this section.

(b) *Definition of ''annual income.''* (1) When determining whether a family is income-eligible, the grantee must use one of the following two definitions of ''annual income'':

(i) ''*Annual income*'' as defined at §§ 5.609 (a) and (b) of this title; or

(ii) ''*Adjusted gross income*'' as defined for purposes of reporting under the Internal Revenue Service (IRS) Form 1040 series for individual Federal annual income tax purposes.

(2) The grantee may use only one definition of annual income for each HTF-assisted program (*e.g.,* down payment assistance program) that it administers and only one definition for each rental housing project. For projects where either a family or unit is assisted under the public housing program, a Federal tenant-based rental assistance program (*e.g.,* housing choice voucher program, HOME tenant-based rental assistance, etc.), or a Federal or State project-based rental subsidy program, the grantee must calculate annual income in accordance with paragraph (b)(1)(i) of this section so that only one definition of annual income is used in the project.

(c) *Determining annual income*—(1) *Tenants in HTF-assisted housing.* For families who are tenants in HTF-assisted housing, the grantee must initially determine annual income using the method in paragraph (d)(1) of this section. For subsequent income determinations during the period of affordability, the grantee may use any one of the methods described in paragraph (d) of this section, in accordance with § 93.302(e).

(2) *HTF-assisted homebuyers.* For families who are HTF-assisted homebuyers, the grantee must determine annual income using the method described in paragraph (d)(1) of this section.

(d) *Required documentation for Annual Income calculations.* (1) Examine at least 2 months of source documents evidencing annual income (*e.g.,* wage statement, interest statement, unemployment compensation statement) for the family.

(2) Obtain from the family a written statement of the amount of the family's annual income and family size, along with a certification that the information is complete and accurate. The certification must state that the family will provide source documents upon request.

(3) Obtain a written statement from the administrator of a government program under which the family receives benefits and which examines each year the annual income of the family. The statement must indicate the tenant's family size and state the amount of the family's annual income; or alternatively, the statement must indicate the current dollar limit for very low- or low-income families for the family size of the tenant and state that the tenant's annual income does not exceed this limit.

(e) *Determining family composition and projecting income.* (1) The grantee must calculate the annual income of the family by projecting the prevailing rate of income of the family at the time the grantee determines that the family is income eligible. Annual income includes income from all persons in the household, except live-in aides, foster children, and foster adults. Income or asset enhancement derived from the HTF-assisted project shall not be considered in calculating annual income. Families may use the certification process in § 5.618 of this title to certify that their net family assets are below the threshold for imputing income used in § 5.609(a)(2) of this title. For families living in HTF-assisted rental housing units, any rental assistance provided to the family under a Federal tenant-based rental assistance program or any Federal or State project-based rental subsidy provided to the HTF rental housing unit shall not be counted as tenant income for purposes of determining annual income.

(2) The grantee is not required to re-examine the family's income at the time the HTF assistance is provided, unless

more than six months has elapsed since the grantee determined that the family qualified as income eligible.

(f) *Adjusted Income.* The HTF program does not require that adjusted income be used or calculated by HTF grantees. If a family or unit is assisted with public housing, Federal tenant-based rental assistance, (*e.g.,* housing choice voucher program, HOME tenant-based rental assistance, etc.), or by a Federal or State project-based rental subsidy program, then a grantee must accept the determination of adjusted income made under the rules of that program in accordance with paragraphs (a)(1) through (3) of this section, as applicable.

■ 26. Effective January 1, 2024, in § 93.302, revise paragraph (e) to read as follows:

§ 93.302 Qualification as affordable housing: rental housing.

* * * * *

(e) *Tenant income.* (1) The income of each tenant must be determined initially in accordance with § 93.151. In addition, in each year during the period of affordability, the project owner must re-examine each tenant's annual income in accordance with one of the options in § 93.151(d) selected by the grantee.

(2) An owner who re-examines a tenant's annual income through a statement and certification in accordance with § 93.151(d)(2) must examine the source documentation of the income of each tenant every 6th year of the affordability period unless the tenant or unit is assisted under the public housing program, Federal or State project-based rental assistance program, or a Federal tenant-based rental assistance program (*e.g.,* housing choice voucher assistance, HOME tenant-based rental assistance, etc.). For families or units that receive assistance under the public housing program, a Federal or State project-based rental subsidy program, or Federal tenant-based rental assistance program, the grantee must accept the calculation of a tenant's annual and adjusted income in accordance with the rules of those programs pursuant to § 93.151(a)(1) through (3). Otherwise, an owner who accepts the tenant's statement and certification in accordance with § 93.151(d)(2) is not required to examine the income of tenants unless there is evidence that the tenant's written statement failed to completely and accurately state information about the family's size or income.

* * * * *

PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS

■ 27. The authority citation for part 570 continues to read as follows:

Authority: 12 U.S.C. 1701x, 1701x–1; 42 U.S.C. 3535(d) and 5301–5320.

§ 570.3 [Amended]

■ 28. Effective January 1, 2024, in § 570.3, in paragraph (1)(i) of the definition of ''Income,'' remove the citation ''24 CFR 813.106'' and add in its place ''24 CFR 5.609''.

PART 574—HOUSING OPPORTUNITIES FOR PERSONS WITH AIDS

■ 29. The authority citation for part 574 continues to read as follows:

Authority: 12 U.S.C. 1701x, 1701x–1; 42 U.S.C. 3535(d) and 5301–5320.

■ 30. Effective January 1, 2024, in § 574.310, revise paragraphs (d)(1) and (2), redesignate paragraph (e) as paragraph (g), and add new paragraphs (e), (f), and (h) to read as follows:

§ 574.310 General Standards for eligible housing activities.

* * * * *

(d) * * *

(1) 30 percent of the family's monthly adjusted income;

(2) Ten percent of the family's monthly income; or

* * * * *

(e) *Calculating income to determine resident rent payment*—(1) *In general.* When determining resident rent payments, the family's monthly income and monthly adjusted income must be calculated as provided by §§ 5.609 and 5.611 of this title, respectively, except that:

(i) As with the references to ''grantee'' and ''grantees'' in paragraphs (e), (f), and (h) of this section, the references to ''PHA'' and ''responsible entity'' in §§ 5.609 and 5.611 of this title refer to the ''grantee'' or ''project sponsor'' that is determining income;

(ii) References in § 5.609(c) of this title to an interim reexamination of family income under §§ 5.657(c), 960.257(b), or 982.516(c) of this title refer to an interim reexamination provided under paragraph (e)(4) of this section;

(iii) References in § 5.609(c) of this title to a streamlined income determination under §§ 5.657(d), 960.257(c), or 982.516(b) of this title refer to a streamlined income determination provided under paragraph (e)(5) of this section;

(iv) Section 5.611(b) of this title does not apply;

(v) The grantee may choose to grant financial hardship exemptions in accordance with the process described in §§ 5.611(c) through (e);

(vi) During the period that § 5.617 of this title remains in effect, the calculation of monthly adjusted income must also include the disallowance of earned income as provided by § 5.617 of this title.

(2) *Annual reexaminations.* For purposes of determining resident rent payments, grantees will conduct a reexamination and redetermination of family income and family composition every year.

(3) *Third-party verification.* (i) Except as provided in paragraph (e)(3)(ii) of this section, the grantee must obtain and document in the tenant file third-party verification of the following factors, or must document in the tenant file why third-party verification was not available:

(A) Reported family annual income;

(B) The value of assets;

(C) Expenses related to deductions from annual income; and

(D) Other factors that affect the determination of adjusted income.

(ii) For a family with net family assets (as the term is defined in paragraph (f) of this section) equal to or less than $50,000, which amount will be adjusted annually in accordance with the Consumer Price Index for Urban Wage Earners and Clerical Worker, the grantee may accept, for purposes of recertification of income, a family's declaration under § 5.618(b) of this title, except that the grantee must obtain third-party verification of all family assets every 3 years.

(iii) The grantee must establish procedures that are appropriate and necessary to require that income data provided by applicant or participant families is complete and accurate.

(4) *Interim reexaminations*—(i) *Generally.* A family may request an interim reexamination of family income or composition because of any changes since the last determination. The grantee must make any interim reexamination within a reasonable period of time after the family's request or when the grantee becomes aware of an increase in family adjusted income under paragraph (e)(4)(iii) of this section. What qualifies as a ''reasonable time'' may vary based on the amount of time it takes to verify information, but generally should not exceed 30 days from the date a family reports changes in income to a grantee.

(ii) *Decreases in the family's annual adjusted income.* Grantees may decline to conduct an interim reexamination of family income if the grantee estimates

that the family's adjusted income will decrease by an amount that is less than ten percent of the family's annual adjusted income (or a lower amount established by HUD through notice), or a lower threshold established by the grantee.

(iii) *Increases in the family's annual adjusted income.* Grantees must conduct the interim reexamination of family income when the grantee becomes aware that the family's adjusted income has changed by an amount that the grantee estimates will result in an increase of ten percent or more in annual adjusted income or such other amount established by HUD through notice, except:

(A) The grantee may not consider any increase in the earned income of the family when estimating or calculating whether the family's adjusted income has increased unless the family has previously received an interim reduction under paragraph (e)(4)(i) of this section during the certification period; and

(B) The grantee may choose not to conduct an interim reexamination in the last three months of a certification period.

(iv) *Policies on reporting changes in family income or composition.* The grantee must adopt policies consistent with this section prescribing when and under what conditions the family must report a change in family income or composition.

(v) *Effective date of rent changes.* (A) If the family has reported a change in family income or composition in a timely manner according to the grantee's policies, the grantee must provide the family with 30 days advance notice of any rent increase, and such rent increase will be effective the first day of the month beginning after the end of that 30-day period. Rent decreases will be effective on the first day of the first month after the date of the actual change leading to the interim reexamination of family income.

(B) If the family has failed to report a change in family income or composition in a timely manner according to the grantee's policies, grantees must implement any resulting rent increases retroactively to the first of the month following the date of the change leading to the interim reexamination of family income. Any resulting rent decrease must be implemented no later than the first rent period following completion of the reexamination. However, rent decreases may be applied retroactively at the discretion of the grantee, in accordance with the grantee's conditions as established in written policy, and subject to paragraph (e)(4)(v)(C) of this section.

(C) A retroactive rent decrease may not be applied by the grantee prior to the later of the first of the month following:

(*1*) The date of the change leading to the interim reexamination of family income; or

(*2*) The effective date of the family's most recent previous interim or annual reexamination (or initial examination if that was the family's last examination).

(5) *Streamlined income determinations*—(i) *Generally.* A grantee may elect to apply a streamlined income determination to families receiving fixed income as described in paragraph (e)(5)(iii) of this section.

(ii) *Definition of fixed income.* For purposes of this section, ''fixed income'' means periodic payments at reasonably predictable levels from one or more of the following sources:

(A) Social Security, Supplemental Security Income, Supplemental Disability Insurance.

(B) Federal, state, local, or private pension plans.

(C) Annuities or other retirement benefit programs, insurance policies, disability or death benefits, or other similar types of periodic receipts.

(D) Any other source of income subject to adjustment by a verifiable Cost-of-Living Adjustment (COLA) or current rate of interest.

(iii) *Method of streamlined income determination.* Grantees using the streamlined income determination must adjust a family's income according to the percentage of a family's unadjusted income that is from fixed income.

(A) When 90 percent or more of a family's unadjusted income consists of fixed income, grantees using streamlined income determinations must apply a COLA or COLAs to the family's fixed-income sources, provided that the family certifies both that 90 percent or more of their unadjusted income is fixed income and that their sources of fixed income have not changed from the previous year. For non-fixed income, grantees may choose, but are not required, to make appropriate adjustments pursuant to paragraph (e)(2) of this section.

(B) When less than 90 percent of a family's unadjusted income consists of fixed income, grantees using streamlined income determinations must apply a COLA to each of the family's sources of fixed income. Grantees must determine all other income pursuant to paragraph (e)(2) of this section.

(iv) *COLA rate applied by grantees.* Grantees using streamlined income determinations must adjust a family's fixed income using a COLA or current interest rate that applies to each specific source of fixed income and is available from a public source or through tenant-provided, third-party-generated documentation. If no public verification or tenant-provided documentation is available, then the grantee must obtain third-party verification of the income amounts in order to calculate the change in income for the source.

(v) *Triennial verification.* For any income determined pursuant to a streamlined income determination, a grantee must obtain third-party verification of all income amounts every 3 years.

(f) *Net family assets and restriction on assistance to families based on assets.* The ''net family assets'' definition in § 5.603 of this section applies for purposes of calculating resident rent payments under this section and applying the asset-based restrictions in §§ 5.618(a) through (d) this title. The ''net family assets'' definition in § 5.603 of this section may also apply where a grantee elects to apply § 5.609 of this title alone or in combination with § 5.611(a) of this title for other purposes under this part; however, the value of real property a family owns and occupies as its primary residence must be excluded from the calculation of ''net family assets'' for purposes of assistance for which homeowners are eligible under this part. The asset-based restrictions in §§ 5.618(a) through (d) of this title apply only to housing activities subject to the resident rent payment requirements in this section. References to ''PHA'' in §§ 5.618(a) through (d) of this title refer to the grantee or project sponsor that is determining the asset-based restrictions.

* * * * *

(h) *De minimis errors.* The grantee will not be considered out of compliance with the requirements in paragraphs (e)(2), (e)(4), or (e)(5) of this section due solely to de minimis errors in calculating family income but is still obligated to correct errors once the grantee becomes aware of the errors. A de minimis error is an error where the grantee's determination of family income varies from the correct income determination by no more than $30 per month in monthly adjusted income ($360 in annual adjusted income) per family.

(1) The grantee must take any corrective action necessary to credit or repay a family if the family has been overcharged for their resident rent payment as a result of the de minimis error in the income determination.

Families will not be required to repay the grantee in instances where the grantee has miscalculated income resulting in a family being undercharged for their resident rent payment.

(2) HUD may revise the amount of de minimis error in this paragraph (h) through a rulemaking published in the **Federal Register** for public comment.

PART 882—SECTION 8 MODERATE REHABILITATION PROGRAMS

■ 31. The authority citation for part 882 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535(d).

■ 32. Effective January 1, 2024, amend § 882.515 by adding a sentence to the end of paragraph (a), revising paragraphs (b) and (d), and adding paragraphs (e) and (f) to read as follows:

§ 882.515 Reexamination of family income and composition.

(a) * * * For a family with net family assets (as the term is defined in § 5.603 of this title) equal to or less than $50,000, which amount will be adjusted annually by HUD in accordance with the Consumer Price Index for Urban Wage Earners and Clerical Workers, a PHA may accept, for purposes of recertification of income, a family's declaration under § 5.618(b) of this title, except that the PHA must obtain third-party verification of all family assets every 3 years.

(b) *Interim reexaminations.* (1) A family may request an interim determination of family income or composition because of any changes since the last determination. The PHA must conduct any interim reexamination within a reasonable period of time after the family request or when the PHA becomes aware of an increase in family adjusted income under paragraph (b)(3) of this section. What qualifies as a ''reasonable time'' may vary based on the amount of time it takes to verify information, but generally should not be longer than 30 days after changes in income are reported.

(2) The PHA may decline to conduct an interim reexamination of family income if the PHA estimates the family's adjusted income will decrease by an amount that is less than ten percent of the family's annual adjusted income (or a lower amount established by HUD through notice), or a lower threshold established by the PHA.

(3) The PHA must conduct an interim reexamination of family income when the PHA becomes aware that the family's adjusted income (§ 5.611 of this title) has changed by an amount that the PHA estimates will result in an increase of ten percent or more in annual adjusted income or such other amount established by HUD through notice, except:

(i) The PHA may not consider any increase in the earned income of the family when estimating or calculating whether the family's adjusted income has increased, unless the family has previously received an interim reduction under paragraph (c)(1) of this section during the certification period; and

(ii) The PHA may choose not to conduct an interim reexamination in the last three months of a certification period.

(4)(i) If the family has reported a change in family income or composition in a timely manner according to the PHA's policies, the PHA must provide the family with 30 days advance notice of any increase in the Total Tenant Payment and Tenant Rent, and such increases will be effective the first day of the month beginning after the end of that 30-day period. Total Tenant Payment and Tenant Rent decreases will be effective on the first day of the first month after the date of the actual change leading to the interim reexamination of family income.

(ii) If the family has failed to report a change in family income or composition in a timely manner according to the PHA's policies, PHAs must implement any resulting Total Tenant Payment and Tenant Rent increases retroactively to the first of the month following the date of the change leading to the interim reexamination of family income. Any resulting Total Tenant Payment and Tenant Rent decrease must be implemented no later than the first rent period following completion of the reexamination. However, a PHA may apply a Total Tenant Payment and Tenant Rent decrease retroactively at the discretion of the PHA, in accordance with the conditions established by the PHA in the administrative plan and subject to paragraph (c)(4)(iii) of this section.

(iii) A retroactive Total Tenant Payment and Tenant Rent decrease may not be applied prior to the later of the first of the month following:

(A) The date of the change leading to the interim reexamination of family income; or

(B) The effective date of the family's most recent previous interim or annual reexamination (or initial examination if that was the family's last examination).

(5) The PHA must adopt policies consistent with this section prescribing how to determine the effective date of a change in the housing assistance payment resulting from an interim redetermination.

* * * * *

(d) *Continuation of housing assistance payments.* A family's eligibility for Housing Assistance Payments shall continue until the Total Tenant Payment equals the Gross Rent. The termination of eligibility at such point will not affect the family's other rights under its lease, nor will such termination preclude the resumption of payments as a result of later changes in income, rents or other relevant circumstances during the term of the Contract. However, eligibility also may be terminated in accordance with HUD requirements for such reasons as failure to submit requested verification information, including failure to meet the disclosure and verification requirements for Social Security Numbers, as provided by part 5, subpart B, of this title, failure to sign and submit consent forms for the obtaining of wage and claim information from State Wage Information Collection Agencies, as provided by part 5, subpart B, of this title, or because of the restrictions on net assets and property ownership as provided by § 5.618 of this title. For provisions requiring termination of assistance when the PHA determines that a family member is not a U.S. citizen or does not have eligible immigration status, see 24 CFR parts 5 and 982 for provisions concerning certain assistance for mixed families (families whose members include those with eligible immigration status, and those without eligible immigration status) in lieu of termination of assistance, and for provisions concerning deferral of termination of assistance.

(e) *Family reporting of change.* The PHA must adopt policies consistent with this section prescribing when and under what conditions the family must report a change in family income or composition.

(f) *Accuracy of family income data.* The PHA must establish procedures that are appropriate and necessary to assure that income data provided by applicant or participant families is complete and accurate. The PHA will not be considered out of compliance with the requirements in this section solely due to de minimis errors in calculating family income but is still obligated to correct errors once the PHA becomes aware of the errors. A de minimis error is an error where the PHA determination of family income deviates from the correct income determination by no more than $30 per month in

monthly adjusted income ($360 in annual adjusted income).

(1) The PHA must take any corrective action necessary to credit or repay a family if the family has been overcharged for their Tenant Rent or Total Tenant Payment as a result of an error (including a de minimis error) in the income determination. Families will not be required to repay the PHA in instances where the PHA has miscalculated income resulting in a family being undercharged for Tenant Rent or Total Tenant Payment.

(2) HUD may revise the amount of de minimis error in this paragraph (f) through a notice published in the **Federal Register** for public comment.

■ 33. Effective January 1, 2024, amend § 882.808 by adding a sentence at the end of paragraph (i)(1) and adding paragraphs (i)(4) and (5) to read as follows:

§ 882.808 Management.

* * * * *

(i) * * *

(1) *Regular reexaminations.* * * * For an individual with net family assets (as the term is defined in § 5.603 of this title) equal to or less than $50,000, which amount will be adjusted annually by HUD in accordance with the Consumer Price Index for Urban Wage Earners and Clerical Workers, a PHA may accept, for purposes of recertification of income, an individual's declaration under § 5.618(b) of this title, except that the PHA must obtain third-party verification of all family assets every 3 years.

* * * * *

(4) *Individual reporting of change.* The PHA must adopt policies consistent with this section prescribing when and under what conditions the individual must report a change in family income or composition.

(5) *Accuracy of family income data.* The PHA must establish procedures that are appropriate and necessary to assure that income data provided by applicant or participant individuals is complete and accurate. The PHA will not be considered out of compliance with the requirements in this section solely due to de minimis errors in calculating family income but is still obligated to correct errors once the PHA becomes aware of the errors. A de minimis error is an error where the PHA determination of family income deviates from the correct income determination by no more than $30 per month in monthly adjusted income ($360 in annual adjusted income).

(A) The PHA must take any corrective action necessary to credit or repay an individual if the individual has been overcharged for their Tenant Rent or Total Tenant Payment as a result of an error (including a de minimis error) in the income determination. Individuals will not be required to repay the PHA in instances where the PHA has miscalculated income resulting in an individual being undercharged for Tenant Rent or Total Tenant Payment.

(B) HUD may revise the amount of de minimis error in this paragraph (i)(5) through a rulemaking published in the **Federal Register** for public comment.

* * * * *

PART 891—SUPPORTIVE HOUSING FOR THE ELDERLY AND PERSONS WITH DISABILITIES

■ 34. The authority citation for Part 891 continues to read as follows:

Authority: 12 U.S.C. 1701q; 42 U.S.C. 1437f, 3535(d), and 8013.

■ 35. Effective January 1, 2024, amend § 891.105 by:

■ a. Adding in alphabetical order the definitions ''Gross rent'' and ''Net family assets'';

■ b. Removing the definition of ''Tenant payment to Owner''; and

■ c. Adding the definition of ''Tenant rent''.

The additions read as follows:

§ 891.105 Definitions.

* * * * *

Gross rent means contract rent plus any utility allowance.

* * * * *

Net family assets is defined in § 5.603 of this title.

* * * * *

Tenant rent equals total tenant payment less utility allowance, if any.

* * * * *

§ 891.230 [Removed]

■ 36. Effective January 1, 2024, remove § 891.230.

■ 37. Effective January 1, 2024, in § 891.410, revise paragraphs (g)(1), (2), and (3)(i) to read as follows:

§ 891.410 Selection and admission of tenants.

* * * * *

(g) * * * (1) *Regular reexaminations.* The Owner must reexamine the income and composition of the household at least every 12 months. Upon verification of the information, the Owner must make appropriate adjustments in the total tenant payment in accordance with § 5.657 of this title and must adjust the tenant rent. The Owner must also request an appropriate adjustment to the project rental assistance payment. Further, the Owner must determine whether the household's unit size is still appropriate and must carry out any unit transfer in accordance with HUD standards. At the time of reexamination, the Owner must require the household to meet the disclosure and verification requirements for Social Security Numbers, as provided by 24 CFR part 5, subpart B. For requirements regarding the signing and submitting of consent forms by families for obtaining wage and claim information from State Wage Information Collection Agencies, see 24 CFR part 5, subpart B.

(2) *Interim reexaminations.* The household must comply with the provisions in § 5.657 of this title regarding interim reporting of changes in income. If the Owner receives information concerning a change in the household's income or other circumstances between regularly scheduled reexaminations, the Owner must consult with the household and make any adjustments determined to be appropriate. See 24 CFR part 5, subpart B, for the requirements for the disclosure and verification of Social Security Number at interim reexaminations involving new household members. For requirements regarding the signing and submitting of consent forms by families for obtaining wage and claim information from State Wage Information Collection Agencies, see 24 CFR part 5, subpart B. Any change in the household's income or other circumstances that result in an adjustment in the total tenant payment, tenant rent, or project rental assistance payment must be verified.

(3) * * * (i) A household shall remain eligible for subsidy until the total tenant payment equals or exceeds the gross rent (or a pro rata share of the gross rent in a group home). The termination of subsidy eligibility will not affect the household's other rights under its lease, nor will the unit or residential space be removed from the PRAC. Project rental assistance payments may be resumed if, as a result of changes in income, rent, or other relevant circumstances during the term of the PRAC, the household meets the income eligibility requirements of § 5.657 of this title (as modified in § 891.105) and project rental assistance is available for the unit or residential space under the terms of the PRAC. The household will not be required to establish its eligibility for admission to the project under the remaining requirements of paragraph (c) of this section.

* * * * *

■ 38. Effective January 1, 2024, in § 891.435, revise paragraphs (a) and (c)(2) to read as follows:

§ 891.435 Security deposits.

* * * * *

(a) *Collection of security deposits.* At the time of the initial execution of the lease, the Owner (or Borrower, as applicable) will require each household (or family, as applicable) occupying an assisted unit or residential space in a group home to pay a security deposit in an amount equal to one month's tenant rent or $50, whichever is greater. The household (or family) is expected to pay the security deposit from its own resources or other available public or private resources. The Owner (or Borrower) may collect the security deposit on an installment basis.

* * * * *

(c) * * *

(2) One month's per unit operating cost (or contract rent, if applicable), minus the amount of the household's (or family's) security deposit balance. Any reimbursement under this section will be applied first toward any unpaid tenant rent due under the lease. No reimbursement may be claimed for any unpaid tenant rent for the period after termination of the tenancy. The Owner (or Borrower) may be eligible for vacancy payments following a vacancy in accordance with the requirements of § 891.445 (or §§ 891.650 or 891.790, as applicable).

§ 891.440 [Amended]

■ 39. Effective January 1, 2024, in § 891.440, in the third sentence, remove the word ''should'' and add in its place ''must,'' and in the fifth sentence, remove the phrase ''tenant payment (or rent, as applicable)'' and add in its place ''tenant rent''.

§ 891.445 [Amended]

■ 40. Effective January 1, 2024, in § 891.445(d), remove ''tenant payment'' and add in its place ''tenant rent''.

§ 891.520 [Amended]

■ 41. Effective January 1, 2024, in § 891.520, remove the definition of ''Gross rent.''

■ 42. Effective January 1, 2024, in § 891.610, revise paragraphs (e), (g)(1), (2), and (3)(i) to read as follows:

§ 891.610 Selection and admission of tenants.

* * * * *

(e) *Ineligibility determination.* If the Borrower determines that an applicant is ineligible for admission or the Borrower is not selecting the applicant for other reasons, the Borrower will promptly notify the applicant in writing of the determination, the reasons for the determination, and that the applicant has a right to request a meeting with the Borrower or managing agent to review the rejection, in accordance with HUD requirements. The review, if requested, may not be conducted by a member of the Borrower's staff who made the initial decision to reject the applicant. The applicant may also exercise other rights (*e.g.,* rights granted under Federal, State, or local civil rights laws) if the applicant believes he or she is being discriminated against on a prohibited basis.

* * * * *

(g) * * * (1) *Regular reexaminations.* The Borrower must reexamine the income and composition of the family at least every 12 months. Upon verification of the information, the Borrower shall make appropriate adjustments in the total tenant payment in accordance with § 5.657 of this title and determine whether the family's unit size is still appropriate. The Borrower must adjust tenant rent and the housing assistance payment and must carry out any unit transfer in accordance with the administrative instructions issued by HUD. At the time of reexamination, the Borrower must require the family to meet the disclosure and verification requirements for Social Security Numbers, as provided by 24 CFR part 5, subpart B.

(2) *Interim reexaminations.* The family must comply with the provisions in § 5.657 of this title regarding interim reporting of changes in income. If the Borrower receives information concerning a change in the family's income or other circumstances between regularly scheduled reexaminations, the Borrower must consult with the family and make any adjustments determined to be appropriate. Any change in the family's income or other circumstances that results in an adjustment in the total tenant payment, tenant rent, or housing assistance payment must be verified.

(3) * * * (i) A family shall remain eligible for housing assistance payments until the total tenant payment equals or exceeds the gross rent. The termination of subsidy eligibility will not affect the family's other rights under its lease. Housing assistance payments may be resumed if, as a result of changes in income, rent, or other relevant circumstances during the term of the HAP contract, the family meets the income eligibility requirements of § 5.657 of this title and housing assistance is available for the unit under the terms of the HAP contract. The family will not be required to establish its eligibility for admission to the project under the remaining requirements of paragraph (c) of this section.

* * * * *

§ 891.655 [Amended]

■ 43. In § 891.655, remove the definition of ''Gross rent.''

PART 960—ADMISSION TO, AND OCCUPANCY OF, PUBLIC HOUSING

■ 44. The authority citation for part 960 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437d, 1437n, 1437z–3, and 3535(d).

■ 45. Effective March 16, 2023, in § 960.102 amend paragraph (b) by adding, in alphabetical order, the definitions of ''Alternative non-public housing rent'', ''Covered person'', ''Non-public housing over-income family'', ''Over-income limit'', and revising the definition of ''Over-income family'' to read as follows:

§ 960.102 Definitions.

* * * * *

(b) * * *

Alternative non-public housing rent. A monthly rent equal to the greater of—

(i) The applicable fair market rent, as defined in 24 CFR part 888, subpart A, for the unit; or

(ii) The amount of the monthly subsidy provided for the unit, which will be determined by adding the per unit assistance provided to a public housing property as calculated through the applicable formulas for the Public Housing Capital Fund and Public Housing Operating Fund.

(A) For the Public Housing Capital Fund, the amount of Capital Funds provided to the unit will be calculated as the per unit Capital Fund assistance provided to a PHA for the development in which the family resides for the most recent funding year for which Capital Funds have been allocated;

(B) For the Public Housing Operating Fund, the amount of Operating Funds provided to the unit will be calculated as the per unit amount provided to the public housing project where the unit is located for the most recent funding year for which a final funding obligation determination has been made;

(C) HUD will publish such funding amounts no later than December 31 each year.

* * * * *

Covered person. For purposes of this part, covered person means a tenant, any member of the tenant's household,

a guest or another person under the tenant's control.

* * * * *

Non-public housing over-income family. A family whose income exceeds the over-income limit for 24 consecutive months and is paying the alternative non-public housing rent. See subpart E of this part.

Over-income family. A family whose income exceeds the over-income limit. See subpart E of this part.

Over-income limit. The over-income limit is determined by multiplying the applicable income limit for a very low-income family, as defined in § 5.603(b) of this title, by a factor of 2.4. See § 960.507(b).

* * * * *

■ 46. Effective January 1, 2024, in § 960.201, revise paragraph (a)(1) to read as follows:

§ 960.201 Eligibility.

(a) * * * (1) Basic eligibility. An applicant must meet all eligibility requirements in order to receive housing assistance. At a minimum, the applicant must be a family, as defined in § 5.403 of this title, must be income-eligible, as described in this section, and must meet the net asset and property ownership restriction requirements in § 5.618 of this title. Such eligible applicants include single persons.

* * * * *

■ 47. Effective March 16, 2023, amend § 960.206 by adding paragraph (b)(6) to read as follows:

§ 960.206 Waiting list: Local preferences in admission to public housing program.

* * * * *

(b) * * *

(6) *Preference for non-public housing over-income families.* The PHA may adopt a preference for admission of non-public housing over-income families paying the alternative non-public housing rent and are on a NPHOI lease who become an income-eligible low-income family as defined in § 5.603(b) of this title and are eligible for admission to the public housing program.

* * * * *

■ 48. Effective March 16, 2023, in § 960.253, add paragraph (a)(3) and revise paragraph (f)(1) to read as follows:

§ 960.253 Choice of rent.

(a) * * *

(3) *Relation to non-public housing over-income families.* Non-public housing over-income families must pay the alternative non-public housing rent, as applicable, as determined in accordance with § 960.102.

* * * * *

(f) * * *

(1) For a family that chooses the flat rent option, the PHA must conduct a reexamination of family income and composition at least once every three years, except for families a PHA determines exceed the over-income limit described in § 960.507(b). Once a PHA determines that a family has an income exceeding the over-income limit, the PHA must follow the income examination and notification requirements under § 960.507(c).

* * * * *

■ 49. Effective January 1 2024, in § 960.255, add paragraphs (e) and (f) to read as follows:

§ 960.255 Self-sufficiency incentives—Disallowance of increase in annual income.

* * * * *

(e) *Limitation.* This section applies to a family that is:

(1) Receiving the disallowance of earned income under this section on December 31, 2023 or

(2) Eligible to receive the Jobs Plus program rent incentive pursuant to the Jobs Plus FY2023 notice of funding opportunity (NOFO) or earlier appropriations and distributed through prior Jobs Plus NOFOs.

(f) *Sunset.* This section will lapse on January 1, 2030.

■ 50. Effective March 16, 2023 amend § 960.257 by:

■ a. Adding paragraph (a)(5); and

■ b. In paragraph (d) by adding the word ''continued'' before ''occupancy policies''.

The addition reads as follows:

§ 960.257 Family income and composition: Annual and interim reexaminations.

(a) * * *

(5) For all non-public housing over-income families, the PHA may not conduct an annual reexamination of family income.

■ 51. Effective January 1, 2024, amend § 960.257 by revising paragraph (b) and adding paragraphs (e) and (f) to read as follows:

§ 960.257 Family income and composition: Annual and interim reexaminations.

* * * * *

(b) *Interim reexaminations.* (1) A family may request an interim reexamination of family income or composition because of any changes since the last determination. The PHA must conduct any interim reexamination within a reasonable period of time after the family request or when the PHA becomes aware of an increase in family adjusted income under paragraph (3) of this section. What qualifies as a ''reasonable time'' may vary based on the amount of time it takes to verify information, but generally should not be longer than 30 days after changes in income are reported.

(2) The PHA may decline to conduct an interim reexamination of family income if the PHA estimates the family's adjusted income will decrease by an amount that is less than ten percent of the family's annual adjusted income (or a lower amount established by HUD by notice), or a lower threshold established by the PHA.

(3) The PHA must conduct an interim reexamination of family income when the PHA becomes aware that the family's adjusted income (as defined in § 5.611 of this title) has changed by an amount that the PHA estimates will result in an increase of ten percent or more in annual adjusted income or such other amount established by HUD through notice, except:

(i) The PHA may not consider any increase in the earned income of the family when estimating or calculating whether the family's adjusted income has increased, except that, based on the PHA's established written policy, the PHA may consider increases in earned income if the PHA has processed an interim reexamination for a decrease in the family's income under paragraph (b)(1) of this section within the same annual or biennial reexamination cycle; and

(ii) The PHA may choose not to conduct an interim reexamination in the last three months of a family's certification period, in accordance with the PHA's established written policy.

(4) For over-income families in the period of up to six months before their tenancy termination pursuant to § 960.507(d)(2), the PHA must conduct an interim reexamination of family income as otherwise required under this paragraph. However, the resulting income determination will not make the family eligible to remain in the public housing program beyond the period before termination as defined by PHA policy.

(5) The PHA must adopt policies consistent with this section prescribing when and under what conditions the family must report a change in family income or composition.

(6) *Effective date of rent changes.* (i) If the family has reported a change in family income or composition in a timely manner according to the PHA's policies, the PHA must provide the family with 30 days advance notice of any rent increases, and such rent

increases will be effective the first day of the month beginning after the end of that 30-day period. Rent decreases will be effective on the first day of the first month after the date of the actual change leading to the interim reexamination of family income.

(ii) If the family has failed to report a change in family income or composition in a timely manner according to the PHA's policies, PHAs must implement any resulting rent increases retroactively to the first of the month following the date of the change leading to the interim reexamination of family income. Any resulting rent decrease must be implemented no later than the first rent period following completion of the reexamination. However, a PHA may apply rent decreases retroactively at the discretion of the PHA, in accordance with the conditions established by the PHA in written policy and subject to paragraph (b)(6)(iii) of this section.

(iii) A retroactive rent decrease may not be applied by the PHA prior to the later of the first of the month following:

(A) The date of the change leading to the interim reexamination of family income; or

(B) The effective date of the family's most recent previous interim or annual reexamination (or initial examination if that was the family's last examination).

* * * * *

(e) Reviews of family income under this section are subject to the provisions in section 904 of the Stewart B. McKinney Homeless Assistance Amendments Act of 1988, as amended (42 U.S.C. 3544).

(f) *De minimis errors.* The PHA will not be considered out of compliance with the requirements in this section solely due to de minimis errors in calculating family income but is still obligated to correct errors once the PHA becomes aware of the errors. A de minimis error is an error where the PHA determination of family income varies from the correct income determination by no more than $30 per month in monthly adjusted income ($360 in annual adjusted income).

(i) The PHA must take any corrective action necessary to credit or repay a family if the family has been overcharged for their rent as a result of an error (including a de minimis error) in the income determination. Families will not be required to repay the PHA in instances where the PHA has miscalculated income resulting in a family being undercharged for rent or family share.

(ii) HUD may revise the amount of de minimis error in this paragraph (f) through a rulemaking published in the **Federal Register** for public comment.

■ 52. Effective January 1, 2024, in § 960.259, revise paragraph (c)(2) to read as follows:

§ 960.259 Family information and verification.

* * * * *

(c) * * *

(2) For a family with net family assets (as the term is defined in § 5.603 of this title) equal to or less than $50,000, which amount will be adjusted annually by HUD in accordance with the Consumer Price Index for Urban Wage Earners and Clerical Workers, a PHA may accept, for purposes of recertification of income, a family's declaration under § 5.618(b) of this title, except that the PHA must obtain third-party verification of all family assets every 3 years.

* * * * *

§ 960.261 [Removed]

■ 53. Effective March 16, 2023, remove § 960.261.

■ 54. Effective March 16, 2023, add §§ 960.507 and 960.509 to subpart E to read as follows:

§ 960.507 Families exceeding the income limit.

(a) *In general.* Families participating in the public housing program must not have incomes that exceed the over-income limit, as determined by paragraph (b) of this section, for more than 24 consecutive months.

(1) This provision applies to all families in the public housing program, including FSS families and all families receiving EID.

(i) Mixed families (as defined in § 5.504 of this title) who are non-public housing over-income families pay the alternative non-public housing rent (as defined in § 960.102), as applicable.

(ii) All non-public housing over-income families are precluded from participating in a public housing resident council.

(iii) Furthermore, non-public housing over-income families cannot participate in programs that are only for public housing or low-income families.

(iv) PHAs cannot provide any Federal assistance, including a utility allowance, to non-public housing over-income families.

(2) PHAs must implement the requirements of this section by amending all applicable admission and continued occupancy policies according to the provisions in 24 CFR part 903. All PHAs must have effective over-income policies, consistent with the requirements of this section, no later than June 14, 2023.

(b) *Determination of over-income limit.* The over-income limit is determined by multiplying the applicable income limit for a very low-income family as defined in § 5.603(b) of this title, by a factor of 2.4.

(c) *Notifying over-income families.* (1) If the PHA determines the family has exceeded the over-income limit pursuant to an income examination, the PHA must provide written notice to the family of the over-income determination no later than 30 days after the income examination. The notice must state that the family has exceeded the over-income limit and continuing to exceed the over-income limit for a total of 24 consecutive months will result in the PHA following its continued occupancy policy for over-income families in accordance with paragraph (d) of this section. Pursuant to 24 CFR part 966, subpart B, the PHA must afford the family an opportunity for a hearing if the family disputes within a reasonable time the PHA's determination that the family has exceeded the over-income limit.

(2) The PHA must conduct an income examination 12 months after the initial over-income determination described in paragraph (c)(1) of this section, unless the PHA determined the family's income fell below the over-income limit since the initial over-income determination. If the PHA determines the family has exceeded the over-income limit for 12 consecutive months, the PHA must provide written notification of this 12-month over-income determination no later than 30 days after the income examination that led to the 12-month over-income determination. The notice must state that the family has exceeded the over-income limit for 12 consecutive months and continuing to exceed the over-income limit for a total of 24 consecutive months will result in the PHA following its continued occupancy policy for over-income families in accordance with paragraph (d) of this section. Additionally, if applicable under PHA policy, the notice must include an estimate (based on current data) of the alternative non-public housing rent for the family's unit. Pursuant to 24 CFR part 966, subpart B, the PHA must afford the family an opportunity for a hearing if the family disputes within a reasonable time the PHA's determination that the family has exceeded the over-income limit.

(3) The PHA must conduct an income examination 24 months after the initial over-income determination described in paragraph (c)(1) of this section, unless the PHA determined the family's income fell below the over-income limit

since the second over-income determination. If the PHA determines the family has exceeded the over-income limit for 24 consecutive months, then the PHA must provide written notification of this 24-month over-income determination no later than 30 days after the income examination that led to the 24-month over-income determination. The notice must state:

(i) That the family has exceeded the over-income limit for 24 consecutive months.

(ii) That the PHA must either terminate the family's tenancy or charge the family the alternative non-public housing rent, in accordance with it continued occupancy policy for over-income families in accordance with paragraph (d) of this section.

(A) If the PHA determines that under its policy the family's tenancy must be terminated in accordance with paragraph (d)(2) of this section, then the notice must inform the family of this determination and state the period of time before tenancy termination.

(B) If the PHA determines that under its policy the family must be charged the alternative non-public housing rent in accordance with paragraph (d)(1) of this section, then the notice must inform the family of this determination and state that the family be charged the alternative non-public housing rent in accordance with paragraph (d)(1) of this section. The PHA must also present the family with a new lease, in accordance with the requirements at § 960.509, and inform the family that the lease must be executed no later than 60 days of the date of the notice or at the next lease renewal, whichever is sooner.

(iii) Pursuant to 24 CFR part 966, subpart B, the PHA must afford the family an opportunity for a hearing if the family disputes within a reasonable time the PHA's determination that the family has exceeded the over-income limit.

(4) If, at any time during the consecutive 24-month period following the initial over-income determination described in paragraph (c)(1) of this section, a PHA determines that the family's income is below the over-income limit, the family is entitled to a new 24 consecutive month period of being over-income and new notices under paragraphs (c)(1), (c)(2), and (c)(3) of this section if the PHA later determines that the family income exceeds the over-income limit.

(d) *End of the 24 consecutive month grace period.* Once a family has exceeded the over-income limit for 24 consecutive months, the PHA must, as detailed in its admissions and continued occupancy policies—

(1) Require the family to execute a new lease consistent with § 960.509 and charge the family the alternative non-public housing rent, as defined in § 960.102, no later than 60-days after the notice is provided pursuant to paragraph (c)(3) of this section or at the next lease renewal, whichever is sooner; or

(2) Terminate the tenancy of the family no more than 6 months after the notification under paragraph (c)(3) of this section as determined by the PHA's continued occupancy policy. PHAs must continue to charge these families the family's choice of income-based, flat rent, or prorated rent for mixed families during the period before termination. The PHA must give appropriate notice of lease tenancy termination (notice to vacate) in accordance with State and local laws.

(e) *Status of families.* An over-income family will continue to be a public housing program participant until their tenancy is terminated by the PHA in accordance with paragraph (d)(2) of this section or the family executes a new non-public housing lease in accordance with paragraph (d)(1) of this section.

(f) *Reporting.* Each PHA must submit a report annually to HUD that specifies, as of the end of the year, the number of families residing in public housing with incomes exceeding the over-income limit and the number of families on the waiting lists for admission to public housing projects and provide any other information regarding over-income families requested by HUD. These reports must also be publicly available.

§ 960.509 Lease requirements for non-public housing over-income families.

(a) *In general.* If a family, when permitted by written PHA's continued occupancy policy, elects to remain in a public housing unit paying the alternative non-public housing rent, the PHA and each non-public housing over-income (NPHOI) family (referred to as the ''tenant'' in this section) must enter into a lease. The tenant and the PHA must execute the lease, as presented by the PHA pursuant to § 960.507(c)(3)(ii)(B) no later than 60 days after the notice provided pursuant to § 960.507(c)(3) or at the next lease renewal, whichever is sooner. If the tenant does not execute the lease within this time period, the PHA must terminate the tenancy of the tenant no more than 6 months after the notification under § 960.507(c)(3) in accordance with 960.507(d)(2). Notwithstanding, a PHA may permit, in accordance with its policies, an over-income family to execute the lease beyond this time period, but before termination of the tenancy, if the over-income family pays the PHA the total difference between the alternative non-public housing rent and their public housing rent dating back to the point in time that the over-income family was required to execute the lease.

(b) *Lease provisions.* The non-public housing over-income lease must contain at a minimum the following provisions.

(1) *Parties, dwelling unit, and term.* The lease must state:

(i) The name of the PHA and names of the tenants.

(ii) The unit rented (address, apartment number, and any other information needed to identify the dwelling unit).

(iii) The term of the lease (lease term and renewal in accordance with paragraph (b)(2) of this section).

(iv) A statement of the utilities, services, and equipment to be supplied by the PHA without additional cost, and the utilities and appliances to be paid for by the tenant.

(v) The composition of the household as approved by the PHA (family members, foster children and adults, and any PHA-approved live-in aides). The family must promptly inform the PHA of the birth, adoption, or court-awarded custody of a child. The family must request PHA approval to add any other family member as an occupant of the unit.

(2) *Lease term and renewal.* (i) The lease must have a term as determined by the PHA and included in PHA policy.

(ii) At any time, the PHA may terminate the tenancy in accordance with paragraph (b)(11) of this section.

(3) *Payments due under the lease.* (i) *Tenant rent.* (A) The tenant must pay the amount of the monthly tenant rent determined by the PHA in accordance with § 960.507(e)(1).

(B) The lease must specify the initial amount of the tenant rent at the beginning of the initial lease term. The PHA must comply with State or local law in giving the tenant written notice stating any change in the amount of tenant rent.

(ii) *PHA charges.* The lease must provide for charges to the tenant for repair beyond normal wear and tear and for consumption of excess utilities. The lease must state the basis for the determination of such charges (*e.g.,* by a posted schedule of charges for repair, amounts charged for excess utility consumption, etc.). The imposition of charges for consumption of excess utilities is permissible only if such charges are determined by an individual check meter servicing the leased unit or result from the use of major tenant-supplied appliances.

(iii) *Late payment penalties.* The lease may provide for penalties for late payment of rent.

(iv) *When charges are due.* The lease must provide that charges assessed under paragraphs (b)(3)(ii) and (b)(3)(iii) of this section are due in accordance with PHA policy.

(v) *Security deposits.* The lease must provide that any previously paid security deposit will be applied to the tenancy upon signing a new lease. The lease must also inform the tenant of the circumstances under which a security deposit will be returned to the tenant or when the tenant will be charged for damage to the unit, consistent with State and local security deposit laws.

(4) *Tenant's right to use and occupancy.* The lease must provide that the tenant has the right to exclusive use and occupancy of the leased unit by the members of the household authorized to reside in the unit in accordance with the lease, as well as their guests. The term *guest* is defined in § 5.100 of this title.

(5) *The PHA's obligations.* The PHA's obligations under the lease must include the following:

(i) To maintain the dwelling unit and the project in decent, safe, and sanitary condition.

(ii) To comply with requirements of applicable State and local building codes, housing codes, and HUD regulations materially affecting health and safety.

(iii) To make necessary repairs to the dwelling unit.

(iv) To keep project buildings, facilities, and common areas, not otherwise assigned to the tenant for maintenance and upkeep, in a clean and safe condition.

(v) To maintain in good and safe working order and condition electrical, plumbing, sanitary, heating, ventilating, and other facilities, and appliances, including elevators, supplied, or required to be supplied by the PHA.

(vi) To provide and maintain appropriate receptacles and facilities (except containers for the exclusive use of an individual tenant family) for the deposit of ashes, garbage, rubbish, and other waste removed from the dwelling unit by the tenant in accordance with paragraph (b)(6)(vii) of this section.

(vii) To supply running water, including an adequate source of potable water, and reasonable amounts of hot water and reasonable amounts of heat at appropriate times of the year (according to local custom and usage), except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or where heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct utility connection.

(viii) To notify the tenant of the specific grounds for any proposed adverse action by the PHA as required by State and local law.

(ix) To comply with Federal, State, and local nondiscrimination and fair housing requirements, including Federal accessibility requirements and providing reasonable accommodations for persons with disabilities.

(x) To establish necessary and reasonable policies for the benefit and well-being of the housing project and the tenants, post the policies in the project office, and incorporate the regulations by reference in the lease.

(6) *Tenant's obligations.* The lease must, at a minimum and consistent with State and local law, provide that the tenant must:

(i) Not assign the lease or sublease the dwelling unit.

(ii) Not provide accommodations for boarders or lodgers.

(iii) Use the dwelling unit solely as a private dwelling for the tenant and the tenant's household as identified in the lease, and not use or permit its use for any other purpose.

(iv) Abide by necessary and reasonable policies established by the PHA for the benefit and well-being of the housing project and the tenants, which must be posted in the project office and incorporated by reference in the lease.

(v) Comply with all applicable State and local building and housing codes materially affecting health and safety.

(vi) Keep the dwelling unit and such other areas as may be assigned to the tenant for the tenant's exclusive use in a clean and safe condition.

(vii) Dispose of all waste from the dwelling unit in a sanitary and safe manner.

(viii) Use in a reasonable manner all electrical, plumbing, sanitary, heating, ventilating, air-conditioning and other facilities, including elevators.

(ix) Refrain from, and cause members of the household and guests to refrain from destroying, defacing, damaging, or removing any part of the dwelling unit or housing project.

(x) Pay reasonable charges (other than for wear and tear) for the repair of damages to the dwelling unit, or to the housing project (including damages to buildings, facilities, or common areas) caused by the tenant, a member of the household or a guest.

(xi) Act, and cause household members and guests to act, in a manner which will not disturb other residents' peaceful enjoyment of their accommodations and will be conducive to maintaining the project in a decent, safe, and sanitary condition.

(xii) Assure that no tenant, member of the tenant's household, guest, or any other person under the tenant's control engages in:

(A) *Criminal activity.* (*1*) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents.

(*2*) Any drug-related criminal activity on or off the premises; or

(B) *Civil activity.* For non-public housing over-income units that are not within mixed-finance projects, any smoking of prohibited tobacco products in the tenant's unit as well as restricted areas, as defined by § 965.653(a) of this chapter, or in other outdoor areas that the PHA has designated as smoke-free.

(xii) To assure that no member of the household engages in an abuse or pattern of abuse of alcohol that affects the health, safety, or right to peaceful enjoyment of the premises by other residents.

(7) *Tenant maintenance.* The lease may provide that the tenant must perform seasonal maintenance or other maintenance tasks, where performance of such tasks by tenants of dwellings units of a similar design and construction is customary, as long as such provisions are not for the purpose of evading the obligations of the PHA. In cases where a PHA adopts such lease provisions, the PHA must exempt tenants who are unable to perform such tasks because of age or disability.

(8) *Defects hazardous to life, health, or safety.* The lease must set forth the rights and obligations of the tenant and the PHA if to the dwelling unit is damaged to the extent that conditions are created which are hazardous to life, health, or safety of the occupants. The lease must provide that:

(i) The tenant must immediately notify project management of the damage.

(ii) The PHA must repair the unit within a reasonable time. The PHA must charge the tenant the reasonable cost of the repairs if the damage was caused by the tenant, the tenant's household, or the tenant's guests.

(iii) The PHA must offer standard alternative accommodations, if available, where necessary repairs cannot be made within a reasonable time, subject to paragraph (b)(5)(ix) of this section; and

(iv) The lease must allow for abatement of rent in proportion to the seriousness of the damage and loss in value as a dwelling if repairs are not made in accordance with paragraph (b)(8)(ii) of this section or alternative accommodations not provided in

accordance with paragraph (b)(8)(iii) of this section, except that no abatement of rent may occur if the tenant rejects the alternative accommodation or if the damage was caused by the tenant, tenant's household or guests.

(9) *Entry of dwelling unit during tenancy.* The lease must set forth the circumstances under which the PHA may enter the dwelling unit during the tenant's possession and must include the following requirements:

(i) The PHA is, upon reasonable advance notification to the tenant, permitted to enter the dwelling unit during reasonable hours for the purpose of performing routine inspections and maintenance, for making improvement or repairs, or to show the dwelling unit for re-leasing. A written statement specifying the purpose of the PHA entry delivered to the dwelling unit at least two days before such entry is reasonable advance notification.

(ii) The PHA may enter the dwelling unit at any time without advance notification when there is reasonable cause to believe that an emergency exists; and

(iii) If the tenant and all adult members of the household are absent from the dwelling unit at the time of entry, the PHA must leave in the dwelling unit a written statement specifying the date, time, and purpose of entry prior to leaving the dwelling unit.

(10) *Notice procedures.* The lease must provide procedures, in accordance with State and local laws, the PHA and tenant must follow when giving notices, which must include:

(i) Except as provided in paragraph (b)(9) of this section, notice to a tenant must be provided in a form to allow meaningful access for persons who are limited English proficient and, in a form, to ensure effective communication with individuals with disabilities; and

(ii) Notice to the PHA can be in writing, hand delivered, or sent by prepaid first-class mail to PHA address provided in the lease, orally, or submitted electronically through a communications system established by the PHA for that purpose.

(11) *Termination of tenancy and eviction.* (i) *Procedures.* The lease must state the procedures to be followed by the PHA and the tenant to terminate the tenancy.

(ii) *Grounds for termination of tenancy.* The PHA must terminate the tenancy for good cause, which includes, but is not limited to, the following:

(A) Criminal activity or alcohol abuse as provided in paragraph (b)(11)(iv) of this section.

(B) Failure to accept the PHA's offer of a lease revision to an existing lease: with written notice of the offer of the revision at least 60 calendar days before the lease revision is scheduled to take effect; and with the offer specifying a reasonable time limit within that period for acceptance by the family.

(iii) *Lease termination notice.* The PHA must give notice of lease termination in accordance with State and local laws.

(iv) *PHA termination of tenancy for criminal activity or alcohol abuse.* (A) *Evicting drug criminals.* (*1*) *Methamphetamine conviction.* The PHA must immediately terminate the tenancy if the PHA determines that any member of the household has been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of Federally assisted housing.

(*2*) *Drug crime on or off the premises.* The lease must provide that drug-related criminal activity engaged in on or off the premises by any tenant, member of the tenant's household or guest, and any such activity engaged in on the premises by any other person under the tenant's control, is grounds for the PHA to terminate tenancy. In addition, the lease must provide that a PHA may evict a family when the PHA determines that a household member is illegally using a drug or when the PHA determines that a pattern of illegal use of a drug interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

(B) *Evicting other criminals.* (*1*) *Threat to other residents.* The lease must provide that any criminal activity by a covered person that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents (including PHA management staff residing on the premises) or threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises is grounds for termination of tenancy.

(*2*) *Fugitive felon or parole violator.* The PHA may terminate the tenancy if a tenant is fleeing to avoid prosecution, or custody or confinement after conviction, for a crime, or attempt to commit a crime, that is a felony under the laws of the place from which the individual flees, or that, in the case of the State of New Jersey, is a high misdemeanor; or violating a condition of probation or parole imposed under Federal or State law.

(C) *Eviction for criminal activity.* (*1*) *Evidence.* The PHA may evict the tenant by judicial action for criminal activity in accordance with this section if the PHA determines that the covered person has engaged in the criminal activity, regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction.

(*2*) *Notice to Post Office.* When a PHA evicts an individual or family for criminal activity, the PHA must notify the local post office serving the dwelling unit that the individual or family is no longer residing in the unit.

(D) *Use of criminal record.* If the PHA seeks to terminate the tenancy for criminal activity as shown by a criminal record, the PHA must notify the household of the proposed action to be based on the information and must provide the subject of the record and the tenant with a copy of the criminal record before a PHA grievance hearing, as applicable, or court trial concerning the termination of tenancy or eviction. The tenant must be given an opportunity to dispute the accuracy and relevance of that record in the grievance hearing or court trial.

(E) *Cost of obtaining criminal record.* The PHA may not pass along to the tenant the costs of a criminal records check.

(F) *Evicting alcohol abusers.* The PHA must establish standards that allow termination of tenancy if the PHA determines that a household member has:

(*1*) Engaged in abuse or pattern of abuse of alcohol that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents; or

(*2*) Furnished false or misleading information concerning illegal drug use, alcohol abuse, or rehabilitation of illegal drug users or alcohol abusers.

(G) *PHA action, generally.* (*1*) *Consideration of circumstances.* In a manner consistent with policies, procedures and practices, the PHA may consider all circumstances relevant to a particular case such as the nature and severity of the offending action, the extent of participation by the leaseholder in the offending action, the effects that the eviction would have on family members not involved in the offending activity, the extent to which the leaseholder has taken steps to prevent or mitigate the offending action, the amount of time that has passed since the criminal conduct occurred, whether the crime or conviction was related to a disability, and whether the individual has engaged in rehabilitative or community services.

(*2*) *Exclusion of culpable household member.* The PHA may require a tenant to exclude a household member to

continue to reside in the dwelling unit, where that household member has participated in or been culpable for action or failure to act that warrants termination.

(*3*) *Consideration of rehabilitation.* In determining whether to terminate tenancy for illegal drug use or a pattern of illegal drug use by a household member who is no longer engaging in such use, or for abuse or a pattern of abuse of alcohol by a household member who is no longer engaging in such abuse, the PHA may consider whether such household member is participating in or has successfully completed a supervised drug or alcohol rehabilitation program or has otherwise been rehabilitated successfully (42 U.S.C. 13662). For this purpose, the PHA may require the tenant to submit evidence of the household member's current participation in, or successful completion of, a supervised drug or alcohol rehabilitation program or evidence of otherwise having been rehabilitated successfully.

(*4*) *Nondiscrimination limitation.* The PHA's eviction actions must be consistent with fair housing and equal opportunity provisions of § 5.105 of this title.

(12) *No automatic lease renewal.* Upon expiration of the lease term, the lease shall not automatically renew.

(13) *Grievance procedures.* The lease may include hearing or grievance procedures and may explain when the procedures are available to the family.

(14) *Provision for modifications.* The lease may be modified at any time by written agreement of the tenant and the PHA. The lease must provide that modification of the lease must be evidenced by a written rider or amendment to the lease, executed by both parties, except as permitted under § 966.5 of this chapter, which allows modifications of the lease by posting of policies, rules and regulations.

(15) *Signature clause.* The lease must provide a signature clause attesting that the lease has been executed by the parties.

■ 55. Effective March 16, 2023, revise § 960.600 to read as follows:

§ 960.600 Implementation.

PHAs and residents must comply with the requirements of this subpart beginning with PHA fiscal years that commence on or after October 1, 2000. Unless otherwise provided by § 903.11 of this chapter, Annual Plans submitted for those fiscal years are required to contain information regarding the PHA's compliance with the community service requirement, as described in § 903.7 of this chapter. Non-public housing over-income families are not required to comply with the requirements of this subpart.

■ 56. Effective March 16, 2023, in § 960.601(b), revise the definition of *Exempt individual* to read as follows:

§ 960.601 Definitions.

* * * * *

Exempt individual. An adult who:

(1) Is 62 years or older;

(2)(i) Is a blind or disabled individual, as defined under Section 216(i)(1) or Section 1614 of the Social Security Act (42 U.S.C. 416(i)(1); 1382c), and who certifies that because of this disability she or he is unable to comply with the service provisions of this subpart, or

(ii) Is a primary caretaker of such individual;

(3) Is engaged in work activities;

(4) Meets the requirements for being exempted from having to engage in a work activity under the State program funded under part A of title IV of the Social Security Act (42 U.S.C. 601 *et seq.*) or under any other welfare program of the State in which the PHA is located, including a State-administered welfare-to-work program;

(5) Is a member of a family receiving assistance, benefits or services under a State program funded under part A of title IV of the Social Security Act (42 U.S.C. 601 *et seq.*) or under any other welfare program of the State in which the PHA is located, including a State-administered welfare-to-work program, and has not been found by the State or other administering entity to be in noncompliance with such a program; or

(6) is a member of a non-public housing over-income family.

* * * * *

PART 964—TENANT PARTICIPATION AND TENANT OPPORTUNITIES IN PUBLIC HOUSING

■ 57. The authority citation for part 964 continues to read as follows:

Authority: 42 U.S.C. 1437d, 1437g, 1437r, 3535(d).

§ 964.125 [Amended]

■ 58. Effective March 16, 2023, amend § 964.125(a) by inserting ‘‘, not including members of a non-public housing over-income family as defined in § 960.102 of this chapter,’’ after ‘‘public housing household’’.

PART 966—PUBLIC HOUSING LEASE AND GRIEVANCE PROCEDURE

■ 59. The authority citation for part 966 continues to read as follows:

Authority: 42 U.S.C. 1437d and 3535(d).

■ 60. Effective March 16, 2023, amend § 966.4 by:

■ a. Revising paragraph (a)(2)(iii);

■ b. Adding paragraph (a)(2)(iv);

■ c. In paragraph (l)(2)(ii) by removing the citation to ‘‘24 CFR 960.261’’ and adding ‘‘24 CFR 960.507’’ in its place, and

■ d. By redesignating paragraph (l)(2)(iii) as (l)(2)(iv), and adding new paragraph (l)(2)(iii);

The revision and addition read as follows:

§ 966.4 Lease requirements.

(a) * * *

(2) * * *

(iii) The lease shall convert to a month-to-month term for families determined to be over-income whose tenancy will be terminated in accordance with § 960.507(d)(2) of this chapter as of the date of the notice provided under § 960.507(c)(3) of this chapter. PHAs must charge these families, who continue to be public housing program participants, the family's choice of income-based, flat rent, or prorated rent for mixed families during the period before termination.

(iv) At any time, the PHA may terminate the tenancy in accordance with paragraph (l) of this section.

* * * * *

(l) * * *

(2) * * *

(iii) No longer meeting the restrictions on net assets and property ownership as provided in § 5.618 of this title.

* * * * *

PART 982—SECTION 8 TENANT-BASED ASSISTANCE: HOUSING CHOICE VOUCHER PROGRAM

■ 61. The authority citation for part 982 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535(d).

■ 62. Effective January 1, 2024, in § 982.516, revise paragraphs (a)(3), (c), (d), (e)(1), and (f) and add paragraph (h) to read as follows:

§ 982.516 Family income and composition: Annual and interim examinations.

(a) * * *

(3) For a family with net family assets (as the term is defined in § 5.603 of this title) equal to or less than $50,000, which amount will be adjusted annually by HUD in accordance with the Consumer Price Index for Urban Wage Earners and Clerical Workers, a PHA may accept, for purposes of recertification of income, a family's declaration under § 5.618(b) of this title, except that the PHA must obtain third-

party verification of all family assets every 3 years.

* * * * *

(c) *Interim reexaminations.* (1) A family may request an interim determination of family income or composition because of any changes since the last determination. The PHA must conduct any interim reexamination within a reasonable period of time after the family request or when the PHA becomes aware of an increase in family adjusted income under paragraph (c)(3) of this section. What qualifies as a ''reasonable time'' may vary based on the amount of time it takes to verify information, but generally should not be longer than 30 days after changes in income are reported.

(2) The PHA may decline to conduct an interim reexamination of family income if the PHA estimates the family's adjusted income will decrease by an amount that is less than ten percent of the family's annual adjusted income (or a lower amount established by HUD through notice), or a lower threshold established by the PHA.

(3) The PHA must conduct an interim reexamination of family income when the PHA becomes aware that the family's adjusted income (as defined in § 5.611 of this title) has changed by an amount that the PHA estimates will result in an increase of ten percent or more in annual adjusted income or such other amount established by HUD through notice, except:

(i) The PHA may not consider any increase in the earned income of the family when estimating or calculating whether the family's adjusted income has increased, unless the family has previously received an interim reduction under paragraph (c)(1) of this section during the certification period; and

(ii) The PHA may choose not to conduct an interim reexamination in the last three months of a certification period.

(4) *Effective date of rent changes.* (i) If the family has reported a change in family income or composition in a timely manner according to the PHA's policies, the PHA must provide the family with 30 days advance notice of any family share and family rent to owner increases, and such increases will be effective the first day of the month beginning after the end of that 30-day period. Family share and family rent to owner decreases will be effective on the first day of the first month after the date of the reported change leading to the interim reexamination of family income.

(ii) If the family has failed to report a change in family income or composition in a timely manner according to the PHA's policies, PHAs must implement any resulting family share and family rent to owner increases retroactively to the first of the month following the date of the change leading to the interim reexamination of family income. Any resulting family share and family rent to owner decrease must be implemented no later than the first rent period following completion of the reexamination. However, a PHA may apply a family share and family rent to owner decrease retroactively at the discretion of the PHA, in accordance with the conditions established by the PHA in the administrative plan and subject to paragraph (c)(4)(iii) of this section.

(iii) A retroactive family share and family rent to owner decrease may not be applied prior to the later of the first of the month following:

(A) The date of the change leading to the interim reexamination of family income; or

(B) The effective date of the family's most recent previous interim or annual reexamination (or initial examination if that was the family's last examination).

(d) *Family reporting of change.* The PHA must adopt policies consistent with this section prescribing when and under what conditions the family must report a change in family income or composition.

(e) * * *

(1) The PHA must adopt policies consistent with this section prescribing how to determine the effective date of a change in the housing assistance payment resulting from an interim redetermination.

* * * * *

(f) *Accuracy of family income data.* The PHA must establish procedures that are appropriate and necessary to assure that income data provided by applicant or participant families is complete and accurate. The PHA will not be considered out of compliance with the requirements in this section solely due to de minimis errors in calculating family income but is still obligated to correct errors once the PHA becomes aware of the errors. A de minimis error is an error where the PHA determination of family income deviates from the correct income determination by no more than $30 per month in monthly adjusted income ($360 in annual adjusted income).

(i) The PHA must take any corrective action necessary to credit or repay a family if the family has been overcharged for their rent or family share as a result of an error (including a de minimis error) in the income determination. Families will not be required to repay the PHA in instances where the PHA has miscalculated income resulting in a family being undercharged for rent or family share.

(ii) HUD may revise the amount of de minimis error in this paragraph (f) through a rulemaking published in the **Federal Register** for public comment.

* * * * *

(h) Reviews of family income under this section are subject to the provisions in section 904 of the Stewart B. McKinney Homeless Assistance Amendments Act of 1988, as amended (42 U.S.C. 3544).

■ 63. Effective January 1, 2024, in § 982.552, add paragraph (b)(6) to read as follows:

§ 982.552 PHA denial or termination of assistance for family.

* * * * *

(b) * * *

(6) The PHA must deny or terminate assistance based on the restrictions on net assets and property ownership when required by § 5.618 of this title.

Adrianne Todman,

Deputy Secretary.

[FR Doc. 2023–01617 Filed 2–13–23; 8:45 am]

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Part III

Securities and Exchange Commission

17 CFR Part 230

Prohibition Against Conflicts of Interest in Certain Securitizations; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

[Release No. 33–11151; File No. S7–01–23]

RIN 3235–AL04

Prohibition Against Conflicts of Interest in Certain Securitizations

AGENCY: Securities and Exchange Commission.

ACTION: Supplemental proposed rule.

SUMMARY: The Securities and Exchange Commission (''SEC'' or ''Commission'') is reissuing and revising a proposal that was initially published in September 2011 that would implement a provision under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act'') prohibiting an underwriter, placement agent, initial purchaser, or sponsor of an asset-backed security (including a synthetic asset-backed security), or any affiliate or subsidiary of any such entity, from engaging in any transaction that would involve or result in certain material conflicts of interest.

DATES: Comments should be received on or before March 27, 2023.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/submitcomments.htm*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number S7–01–23 on the subject line.

Paper Comments

- Send paper comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–01–23. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's website (*http://www.sec.gov/rules/proposed.shtml*). Comments also are available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Operating conditions may limit access to the Commission's Public Reference Room. All comments received will be posted without change. Persons submitting comments are cautioned that we do not edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such items will be made available on our website. To ensure direct electronic receipt of such notifications, sign up through the ''Stay Connected'' option at *www.sec.gov* to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Benjamin Meeks, Special Counsel, or Brandon Figg, Attorney-Adviser, in the Office of Structured Finance, Division of Corporation Finance at (202) 551–3850, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are proposing to add the following rule under 15 U.S.C. 77a *et seq.* (''Securities Act''):

Commission reference		CFR citation (17 CFR)
General Rules and Regulations, Securities Act of 1933	Rule 192	§ 230.192

Table of Contents

I. Introduction

A. Background

Section 621 of the Dodd-Frank Act [1] added Section 27B to the Securities Act (''Section 27B''). Section 27B(a) provides that an underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of any such entity (collectively, ''securitization

[1] Sec. 621, Public Law 111–203, 124 Stat. 1376, 1632.

participants''),[2] of an asset-backed security, including a synthetic asset-backed security (''ABS''), shall not, at any time for a period ending on the date that is one year after the date of the first closing of the sale of the asset-backed security, engage in any transaction that would involve or result in any material conflict of interest with respect to any investor in a transaction arising out of such activity.[3] Section 27B(b) further requires that the Commission issue rules for the purpose of implementing the prohibition in Section 27B(a).[4] Section 27B(c) provides exceptions from the prohibition in Section 27B(a) for certain risk-mitigating hedging activities, liquidity commitments, and bona fide market-making activities.[5]

In September 2011, the Commission proposed for comment a rule designed to implement Section 27B.[6] The 2011 proposed rule was based substantially on the text of Section 27B and would have made it unlawful for a securitization participant to engage in any transaction that would involve or result in any material conflict of interest between the securitization participant and any investor in an ABS that the securitization participant created or sold at any time for a period ending on the date that is one year after the date of the first closing of the sale of the ABS.[7] Consistent with Section 27B, the 2011 proposed rule would have provided exceptions for risk-mitigating hedging activities, liquidity commitments, and bona fide market-making activities.

B. Overview

We are proposing new Rule 192 (the ''re-proposed rule'') pursuant to Section 27B(b), which requires the Commission to issue rules for the purpose of implementing the prohibition in Section 27B(a).[8] Senator Carl Levin stated that the ''conflict of interest prohibition . . . is intended to prevent firms that assemble, underwrite, place or sponsor these instruments from making proprietary bets against those same instruments.'' [9] The re-proposed rule targets transactions that effectively represent a bet against a securitization and focuses on the types of transactions that were the subject of regulatory and Congressional investigations and were among the most widely cited examples of ABS-related misconduct during the lead up to the financial crisis of 2007–2009.[10] For example, according to a Senate report, Goldman Sachs used net short positions to benefit from the downturn in the mortgage market, and designed, marketed, and sold collateralized debt obligation (''CDO'') securities in ways that created conflicts of interest with the firm's clients.[11] In the 2011 Proposing Release, the Commission recognized that securitization participants may in some circumstances engage in a range of different activities and transactions that give rise to potential conflicts of interest.[12] Securitization markets have undergone various changes since that time, including as a result of other rules that regulate securitization activity that the Commission adopted following the publication of the 2011 Proposing Release.[13] As discussed below in Section III.B.3., while we do not have data on the extent of such conduct following the financial crisis of 2007–2009, we believe that securitization transactions continue to present securitization participants with the opportunity to engage in the conduct that is prohibited by Section 27B. Implementing the prohibition in Section 27B would provide an important safeguard against the misconduct that led up to the 2007–2009 financial crisis. The re-proposed rule would complement the existing Federal securities laws that specifically apply to securitization, as well as the general anti-fraud and anti-manipulation provisions of the Federal securities laws, by explicitly protecting ABS investors against material conflicts of interest.

The re-proposed rule takes into account developments in the ABS market since 2011 and the comments received in response to the 2011 proposed rule to provide greater clarity regarding the scope of prohibited and permitted conduct.[14] Fundamentally, the re-proposed rule is intended to prevent the sale of ABS that are tainted by material conflicts of interest. It seeks to accomplish this goal by prohibiting securitization participants [15] from engaging in certain transactions that could incentivize a securitization participant to structure an ABS in a way that would put the securitization participant's interests ahead of those of ABS investors. By focusing on transactions that represent a ''bet'' against the performance of an ABS, the re-proposed rule seeks to provide an explicit standard for determining which types of transactions would be prohibited. We believe this standard would provide strong protection against material conflicts of interest while not unnecessarily hindering routine securitization activities that do not give rise to the risks that Section 27B was intended to address.

To achieve these objectives, the re-proposed rule would:

• *Prohibit, for a specified period, a securitization participant from engaging in any transaction that would result in a ''material conflict of interest'' between the securitization participant and an investor in the relevant ABS.* A securitization participant could not, for a period ending on the date that is one year after the date of the first closing of the sale of an ABS, directly or indirectly engage in any transaction that would involve or result in any material conflict of interest between the securitization participant and an investor in such ABS. Under the re-proposed rule, such transactions would be ''conflicted transactions'' and would include, for example, a short sale of the relevant ABS or the purchase of a credit default

[2] The proposed definition of ''securitization participant'' for purposes of the re-proposed rule is discussed below in Section II.B.

[3] 15 U.S.C. 77z–2a(a).

[4] 15 U.S.C. 77z–2a(b).

[5] 15 U.S.C. 77z–2a(c).

[6] *See Prohibition against Conflicts of Interest in Certain Securitizations,* Release No. 34–65355 (Sept. 19, 2011) [76 FR 60320 (Sept. 28, 2011)] (''2011 Proposing Release'' or ''2011 proposed rule''). Section 27B is not effective until the adoption of final rules issued by the Commission. Section 621(b) of the Dodd-Frank Act states that ''Section 27B of the Securities Act of 1933, as added by this section, shall take effect on the effective date of final rules issued by the Commission . . . .''

[7] *See* 2011 Proposing Release at 60320.

[8] The numbering of the proposed rule under the 2011 Proposing Release was Rule 127B. Under this re-proposal, the numbering of the re-proposed rule is Rule 192.

[9] *See* 156 Cong. Rec. S3470 (daily ed. May 10, 2010) (statement of Sen. Levin).

[10] *See, e.g.,* 156 Cong. Rec. S3470 (daily ed. May 10, 2010) (statement of Sen. Levin) (''Goldman Sachs assembled and sold mortgage-related financial instruments, then placed large bets, for the firm's own accounts, against those very same instruments.''); *see also* 156 Cong. Rec. S1363 (daily ed. Mar. 10, 2010) (statement of Sen. Levin) (''As has been widely reported, some institutions at the height of the boom in asset-backed securities were creating these securities, selling them to investors, and then placing bets that their product would fail. Phil Angelides, the chairman of the Financial Crisis Inquiry Commission, has likened this practice to selling customers a car with faulty brakes, and then buying life insurance on the driver.'').

[11] *See* Wall Street and The Financial Crisis: Anatomy of a Financial Collapse, Majority and Minority Staff Report, Permanent Subcommittee on Investigations, United States Senate (Apr. 13, 2011) (''Senate Financial Crisis Report'') (describing the role of Goldman Sachs in various transactions, including Abacus 2007–AC1 where ''Goldman did not take the short position, but allowed a hedge fund . . . that planned on shorting the CDO to play a major but hidden role in selecting the assets'' and that ''Goldman marketed Abacus securities to its clients, knowing the CDO was designed to lose value'').

[12] *See* 2011 Proposing Release at 60324.

[13] *See, e.g.,* discussion of other rules applicable to securitization transactions in Sections II.A. and III.B.3.

[14] Comments received on the 2011 proposed rule are available on our website at *https://www.sec.gov/comments/s7-38-11/s73811.shtml.*

[15] *See* Section II.B.

swap or other credit derivative that entitles the securitization participant to receive payments upon the occurrence of specified credit events in respect of the ABS; [16]

• *Define the persons that would be subject to the re-proposed rule.* The terms ''underwriter,'' ''placement agent,'' ''initial purchaser,'' and ''sponsor'' (collectively, together with their affiliates and subsidiaries, ''securitization participants'') would capture the persons subject to the re-proposed rule and would be functional definitions based on a person's activities in connection with a securitization, which would generally be based on existing definitions of such terms under the Federal securities laws and the rules thereunder to ease compliance with the re-proposed rule; [17]

• *Define asset-backed securities that would be subject to the prohibition.* Prohibited transactions would be those with respect to an ''asset-backed security.'' An ''asset-backed security'', for purposes of the re-proposed rule, would be defined based on the Section 3 definition of asset-backed security in the Securities Exchange Act of 1934 (''Exchange Act'') [18] and also would specifically include synthetic ABS, as well as hybrid cash and synthetic ABS,[19] which is consistent with Section 27B; [20] and

• *Provide certain exceptions to the prohibition.* The re-proposed rule would implement certain exceptions for risk-mitigating hedging activities, bona fide market-making activities, and liquidity commitments as specified in Section 27B. The proposed exceptions would focus on distinguishing the characteristics of such activities from speculative trading. The proposed exceptions would also seek to avoid disrupting current liquidity commitment, market-making, and balance sheet management activities that we do not believe would give rise to the risks that Section 27B was intended to address.[21]

We believe that the re-proposed rule would help to prevent the abusive conduct that Section 27B is designed to prevent by reducing the incentive for a securitization participant to structure an ABS in a way that would put the securitization participant's interests ahead of those of ABS investors.

II. Discussion of Proposed Rule 192

A. Scope: Transactions With Respect to ABS

Under proposed Rule 192(a)(1), a securitization participant would be prohibited, for a specified time period with respect to an asset-backed security, from engaging in any transaction that would involve or result in a material conflict of interest between such securitization participant and an investor in such asset-backed security. For purposes of the re-proposed rule, the term ''asset-backed security'' would be defined in proposed Rule 192(c) to have the same meaning as set forth in Section 3 of the Exchange Act [22] (''Exchange Act ABS'') (which, by extension, means that the re-proposed rule would cover both registered and unregistered offerings) and also would include synthetic ABS as well as hybrid cash and synthetic ABS. This approach is consistent with Section 27B [23] and the views of certain commenters who supported the 2011 proposed rule's definition of asset-backed security, which was based on the Exchange Act ABS definition [24] and also included synthetic ABS.[25] The Exchange Act ABS definition captures fixed-income and other securities that are collateralized by any type of self-liquidating asset,[26] regardless of whether the ABS is registered with the Commission under the Securities Act. We are proposing a definition of the term ''asset-backed security'' that includes Exchange Act ABS primarily for consistency with Section 27B(a). Additionally, we believe that it is appropriate for the definition to apply both to ABS sold in offerings registered with the Commission and ABS sold in offerings that are exempt from registration because both types of offerings could present securitization participants with the opportunity to engage in the conduct that is prohibited by Section 27B. In particular, we note that a number of the transactions that were the subject of regulatory and Congressional investigations in the wake of the financial crisis of 2007–2009 involved unregistered ABS offerings.[27]

We received comment in response to the 2011 proposed rule requesting clarification whether certain products, such as certain types of municipal securities, would be Exchange Act ABS.[28] Municipal securitizations [29] that are collateralized by any type of self-liquidating financial asset that allows the holder of the security to receive payments that depend primarily on the cash flow from such self-liquidating financial asset fall within the Exchange Act ABS definition and are, for example, already subject to the rules adopted in 2011 to implement Section 943 of the Dodd-Frank Act [30] and the

[16] The proposed definition of ''conflicted transaction'' would also include any purchase or sale of any other financial instrument (other than the relevant ABS) or entry into a transaction through which the securitization participant would benefit from certain actual, anticipated, or potential adverse events with respect to the relevant ABS or its underlying asset pool. *See* Section II.D.

[17] The proposed definition of the term ''sponsor'' would not include the United States or an agency of the United States with respect to any asset-backed security that is fully insured or fully guaranteed as to the timely payment of principal and interest by the United States. The proposed definition of ''sponsor'' would also not include the Federal National Mortgage Association (''Fannie Mae'') or the Federal Home Loan Mortgage Corporation (''Freddie Mac'' and, together with Fannie Mae, the ''Enterprises'') while operating under conservatorship or receivership of the Federal Housing Finance Agency (''FHFA'') with capital support from the United States with respect to any asset-backed security that is fully insured or fully guaranteed as to the timely payment of principal and interest by such entity. *See* Section II.B.

[18] 15 U.S.C. 78a *et seq.*

[19] For purposes of this release, we use the term ''cash ABS'' to refer to ABS where the underlying pool consists of one or more financial assets. We use the term ''hybrid cash and synthetic ABS'' to refer to ABS where the underlying pool consists of one or more financial assets as well as synthetic exposure to other assets.

[20] *See* Section II.A.

[21] For example, the proposed exceptions for risk-mitigating hedging activities and bona fide market-making activities are similar to the equivalent exceptions under other rules applicable to certain securitization participants and other financial institutions. *See* discussion below in Sections II.E. through II.G.

[22] 17 U.S.C. 78c(a)(79).

[23] Section 27B applies to an ''asset-backed security (as such term is defined in section 3 of the Securities and Exchange Act of 1934 . . . which for purposes of this section shall include a synthetic asset-backed security).''

[24] *See* comment letter from Better Markets, Inc. (Feb. 13, 2012) (''Better Markets Letter'') at 4; comment letter from U.S. Senators Jeff Merkley and Carl Levin (Jan. 12, 2012) (''Merkley-Levin Letter'') at 4.

[25] *See* Merkley-Levin Letter at 4.

[26] The Commission has described a ''self-liquidating asset'' as an asset that by its terms converts into cash payments within a finite time period. *See* Section III.A.2. of *Asset-Backed Securities,* Release No. 33–8518 (Dec. 22, 2004) [70 FR 1506 (Jan. 7, 2005)] (''2004 Regulation AB Adopting Release'').

[27] *See supra* note 10.

[28] *See* comment letter from The Securities Industry and Financial Markets Association (Feb. 13, 2012) (''SIFMA Letter'') at 17.

[29] Most municipal entities do not typically issue ABS directly. Under the re-proposed rule, a municipal entity would be a sponsor of municipal ABS if the municipal entity met the proposed definition of ''sponsor.'' Further, a municipal entity would be subject to the re-proposed rule's prohibition to the extent the municipal entity was a sponsor and the municipal ABS were Exchange Act ABS. *See* Section II.B. for discussion of the proposed definition of ''sponsor'' and its application to municipal entities. *See also* request for comment 9 regarding other parties related to a municipal securitization that could be ''securitization participants'' under the re-proposed rule.

[30] *See* Sections II.A.1. and II.A.3. of *Disclosure For Asset-Backed Securities Required by Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act,* Release No. 33–9175 (Jan. 20, 2011) [76 FR 4489 (Jan. 26, 2011)] (stating the broader definition of Exchange Act ABS and its application to municipal securities, such as student

rules adopted in 2014 to implement the credit risk retention requirements of Section 941 of the Dodd-Frank Act.[31] In this regard, we believe that market participants are familiar with analyzing whether such a security meets the Exchange Act ABS definition as the Commission has adopted other rules and regulations under the Securities Act and the Exchange Act that use the Exchange Act ABS definition or a substantially similar definition.[32] Therefore, we believe that the re-proposed rule's definition of ''asset-backed security'' is sufficiently clear. We seek comment below on whether the re-proposed rule should provide additional specificity regarding the types of ABS that would be covered by the re-proposed rule.

We also received comment suggesting an exclusion from the rule for certain types of ABS, including ABS with underlying assets for which information is readily available or where the investor is involved in asset selection.[33] However, even if an investor is involved in asset selection or has access to information regarding the underlying assets, such investor may not know of the involvement of other parties with a potential conflict of interest. Such an investor would not necessarily know to be alert for potential selection of assets or structuring of an ABS that might disadvantage such investor.[34] Also, the participation of one investor in asset selection would not necessarily protect any other investors. Accordingly, the Commission does not believe that such an exclusion would be appropriate.

We also received comment on the 2011 proposed rule recommending that the rule should only cover synthetic ABS because greater risk arises out of synthetic ABS.[35] However, Section 27B specifies that the prohibition applies to both Exchange Act ABS and synthetic ABS, and the misconduct that Section 27B is designed to prevent can occur with respect to both synthetic ABS and non-synthetic ABS. For example, a securitization participant could enter into a bilateral credit default swap (''CDS'') contract referencing a non-synthetic ABS in order to bet against the performance of the ABS. Therefore, excluding non-synthetic ABS from the re-proposed rule would be inconsistent with the conflict of interest protection intended by Section 27B.

With regard to synthetic ABS, we received comment suggesting that the term ''synthetic ABS'' should be defined.[36] In contrast, we also received comment that a definition of the term ''synthetic ABS'' is not warranted because the term is well understood.[37] The re-proposed rule does not define ''synthetic ABS.'' We have previously described synthetic securitizations, in general, as securitizations that are designed to create exposure to an asset that is not transferred to or otherwise part of the asset pool.[38] These synthetic transactions are generally effectuated through the use of derivatives such as a CDS or a total return swap, or an ABS structure that replicates the terms of such a swap. We believe that our previous descriptions of synthetic securitizations are well understood by market participants and adequately address the key issues raised by commenters, and that market participants have been able to readily distinguish synthetic ABS from other types of transactions. We are concerned that any particular definition of ''synthetic ABS'' that we might propose would be susceptible to potential overinclusiveness or underinclusiveness. Because of the inherent complexity of the transactions involved in a synthetic ABS, we are also concerned that a securitization participant might attempt to evade the re-proposed rule's prohibition by structuring such transactions around any particular definition of ''synthetic ABS'' while nonetheless creating a product that would be a synthetic ABS within the commonly-understood meaning of the term, which would weaken the re-proposed rule's conflict of interest protection for investors.

We received comment in response to the 2011 proposed rule that the rule should explicitly cover hybrid ABS that contain a mix of financial and synthetic assets.[39] Given that Section 27B specified that the prohibition applies to both Exchange Act ABS and synthetic ABS, it would be inconsistent for the rule not to apply to a hybrid ABS that has characteristics of both cash ABS and synthetic ABS. Furthermore, the ability and incentive for a person to engage in the type of conduct that Section 27B is intended to prevent are present with respect to hybrid ABS. Therefore, the definition of the term ''asset-backed security'' in the re-proposed rule would explicitly cover hybrid cash and synthetic ABS that contain a mix of underlying financial and synthetic assets.

We also received comment recommending that the rule include a catch-all provision to cover any product that functions as the economic equivalent of a cash ABS, synthetic ABS, or hybrid ABS.[40] However, Section 27B prohibits material conflicts of interest with respect to Exchange Act ABS and synthetic ABS, and consistent with Section 27B, the re-proposed rule covers Exchange Act ABS as well as synthetic ABS and hybrid ABS. A security that functions as the economic equivalent of a cash ABS, synthetic ABS, or hybrid ABS, as contemplated by these comments, should already meet the re-proposed rule's definition of ABS. Therefore, we do not believe a catch-all provision to capture other products beyond the proposed definition of ''asset-backed security'' is necessary.

We received comment on the 2011 proposed rule from portfolio managers

loan bonds, housing, and mortgage bonds). For a discussion of municipal securitizations, see generally Robert A. Fippinger, The Securities Law of Public Finance, Chapter 4 (3rd. ed. Practicing Law Institute, Sept. 2011, Supplement Oct. 2022).

[31] 17 CFR 246 (''Regulation RR''). *See Credit Risk Retention,* Release No. 34–73407 (Oct. 22, 2014) [79 FR 77602 (Dec. 24, 2014)] (''RR Adopting Release'') at 77661 (adopting certain provisions that apply to municipal tender option bonds). *See also* Section IV.A.D.6. of *Credit Risk Retention,* Release No. 34–70277 (Aug. 28, 2013) [78 FR 57928 (Sept. 20, 2013)] (explaining why an exemption from risk retention for securitizations of tax lien-backed securities sponsored by municipal entities was not proposed). Also, an ABS that is backed by a single asset or one or more obligations of a single borrower (often referred to as ''single asset, single borrower'' or ''SASB'' transactions) meets the definition of an Exchange Act ABS. *See* RR Adopting Release at 77680 (explaining why separate loan underwriting criteria for single borrower or single credit commercial mortgage transactions were not adopted).

[32] *See, e.g.,* 17 CFR 240.15Ga–1(a), 17 CFR 240.17g–7(a)(1)(ii)(N), and 17 CFR 246.2. Similarly, regarding a commenter's request that we also specify whether mutual funds, exchange traded funds, or certain other products would be Exchange Act ABS (*see* SIFMA Letter at 17), we believe that there is a common market understanding of whether such products are Exchange Act ABS and whether other rules that use the definition of Exchange Act ABS, such as Regulation RR, apply to them.

[33] *See, e.g.,* SIFMA Letter at 37–38.

[34] Moreover, even if an investor were aware of a potential conflict of interest, the re-proposed rule does not include an exception based on disclosure of material conflicts of interest, as discussed below in Section II.D.

[35] *See* comment letter from Association of Institutional Investors (Feb. 13, 2012) (''AII Letter'') at 4–5.

[36] *See* comment letter from Americans for Financial Reform (Feb. 13, 2012) (''AFR Letter'') at 7; comment letter from Chris Barnard (Sept. 28, 2011) (''Barnard Letter'') at 2; Better Markets Letter at 4; Merkley-Levin Letter at 5 (suggesting as a possible definition a ''fixed-income or other security that references any type of financial assets . . . and allows the holder of the security to receive payments that depend primarily on the value or performance of the referenced assets'').

[37] *See* comment letter from American Securitization Forum (Feb. 13, 2012) (''ASF Letter'') at 23.

[38] For a general discussion of synthetic securitizations, see Section III.A.2. of 2004 Regulation AB Adopting Release.

[39] *See* Merkley-Levin Letter at 5.

[40] *See* Better Markets Letter at 4; Merkley-Levin Letter at 5.

at large banks [41] and collateralized loan obligation (''CLO'') investors [42] that suggested an exception for certain synthetic balance sheet CLOs to retain the use of such CLOs as a risk management tool and an investment.[43] We are concerned that an exception for such a product has the potential to weaken conflict of interest protections for ABS investors because the relevant securitization participant could structure synthetic ABS products that entitle the securitization participant to receive cash payments in the event that the referenced ABS, which the securitization participant also structured and sold to investors, fails. Therefore, we have not included such an exception.

Finally, we received comment on the 2011 proposal stating that not excluding Enterprise or Ginnie Mae ABS from the scope of the rule would have significant economic and market impacts.[44] As discussed below, the re-proposed rule does not include an exception for Enterprise or Ginnie Mae ABS.[45] However, the proposed definition of ''sponsor'' does include an exception that, subject to certain conditions, would apply to the Enterprises and Ginnie Mae with respect to an ABS that is fully insured or fully guaranteed as to the timely payment of principal and interest by such entity.

Request for Comment

1. We seek comment on the proposed definition of asset-backed security for purposes of proposed Rule 192. Is it necessary to further clarify components of the proposed definition?

2. Are market participants familiar with which securities products fall under the definition of Exchange Act ABS? Should the re-proposed rule provide more specificity regarding the types of ABS that would be subject to the re-proposed rule?

3. Should we add a catch-all provision to the proposed definition of asset-backed security to cover any product that functions as the economic equivalent of a cash ABS, synthetic ABS, or hybrid cash and synthetic ABS? Please comment on the advantages or disadvantages. If so, what additional types of securities or transactions should be included that would not be covered by the definition of asset-backed security in the re-proposed rule?

4. The re-proposed rule does not define ''synthetic ABS,'' and we are not providing specific guidance regarding whether any particular products are ''synthetic ABS.'' As stated above, we have described synthetic securitizations as securitizations that are designed to create exposure to an asset that is not transferred to or otherwise part of an asset pool, such as through a CDS or a total return swap. Should we define ''synthetic ABS'' to incorporate that description or otherwise define such term as a fixed-income or other security that references any type of financial asset and allows the holder of the security to receive payments that depend primarily on the value or performance of the referenced assets? Are there particular products (1) where additional clarity is necessary as to whether such products are ''synthetic ABS'' or (2) that the rule should expressly state are not ''synthetic ABS''? Please identify any such products and explain why additional clarification is needed. Furthermore, is additional clarification needed regarding what is or is not a hybrid cash and synthetic asset-backed security?

5. Should proposed Rule 192(b) contain an additional exception from the prohibition on material conflicts of interest for certain synthetic balance sheet CLOs, as suggested by commenters to the 2011 proposed rule,[46] that would permit a securitization participant that is a lender to hedge a portfolio of its originated loans and extensions of credit by purchasing a CDS contract from the special purpose entity that issues a synthetic ABS? If so, please explain what types of synthetic balance sheet CLOs should not be covered by the rule, and what conditions should have to be satisfied in order to ensure that such CLOs would be used solely as a risk mitigation tool rather than a speculative investment. Please also explain how such an exception would be consistent with Section 27B.

6. As stated above, municipal securitizations that are Exchange Act ABS would fall within the definition of asset-backed security for purposes of the re-proposed rule. Should we clarify in rule text or through guidance the types of municipal securitizations that would be covered by the re-proposed rule? If so, please identify those types of municipal securitizations that you believe require clarification and explain why. Are there types of municipal securitizations that should be exempt from the re-proposed rule? If so, please explain why they should be exempt, including whether the opportunity exists for securitization participants to engage in the type of conduct the re-proposed rule is designed to prohibit with respect to such municipal securitizations.

7. Are there types of government-guaranteed securities that should be exempt from the re-proposed rule? Please explain why they should be exempt, including whether the opportunity exists for securitization participants to engage in the type of conduct that the re-proposed rule is designed to prohibit with respect to such securities.

B. Scope: Securitization Participants

Consistent with Section 27B(a), the prohibition in the re-proposed rule would apply to transactions entered into by certain key participants involved in the creation and sale of an ABS, namely an underwriter, placement agent, initial purchaser, or sponsor, each of which would be a ''securitization participant'' as defined in proposed Rule 192(c). The functions performed by such persons are essential to the design, creation, marketing, and/or sale of an ABS. The re-proposed rule focuses on transactions that could give such persons the incentive to market or structure ABS and/or construct underlying asset pools in a way that would position them to benefit from the actual, anticipated, or potential adverse performance of the relevant ABS or its underlying asset pool. Also, consistent with Section 27B(a) and to help prevent potential evasion, the prohibition in the re-proposed rule would apply to the transactions entered into by the affiliates and subsidiaries of any such person. Subject to certain exceptions discussed below, each of the foregoing entities would be captured by the definition of ''securitization participant'' in the re-proposed rule.

The Commission did not propose definitions of the terms ''underwriter,'' ''placement agent,'' ''initial purchaser,'' and ''sponsor'' in the 2011 proposed rule, and we received comment to the 2011 proposed rule that we should refrain from providing definitions for certain persons.[47] However, certain other commenters to the 2011 proposed rule expressed support for defining these terms to specify the persons

[41] *See, e.g.,* comment letter from The International Association of Credit Portfolio Managers (Feb. 6, 2012) (''IACPM 1 Letter'') at 2.

[42] *See, e.g.,* comment letter from Orchard Global Asset Management (June 28, 2012) (''Orchard Letter'').

[43] *See, e.g.,* comment letter from Deutsche Bank AG (Feb. 9. 2012) (''Deutsche Bank Letter'') at 1–8; comment letter from The International Association of Credit Portfolio Managers (June 28, 2012) (''IACPM 2 Letter'') at 1–4; and comment letter from PGGM Investments (June 20, 2012) (''PGGM Letter'') at 1–3.

[44] *See* SIFMA Letter at 18–21.

[45] *See* Section II.B.2.

[46] *See, e.g.,* IACPM 1 Letter at 2; Orchard Letter.

[47] *See, e.g.,* comment letter from Akshat Tewary, Esq. (Dec. 2, 2011) (''Tewary Letter 1'') at 4.

covered by the rule.[48] In order to facilitate compliance, as discussed below, we are proposing definitions for the terms ''underwriter,'' ''placement agent,'' ''initial purchaser,'' and ''sponsor'' that, with a few exceptions, are generally based on existing definitions and are designed to reflect the functions of such market participants in ABS transactions and not merely their formal labels.

Request for Comment

8. Should we modify the proposed definition of the term ''securitization participant,'' and if so, how? Are any modifications necessary or advisable to mitigate any unintended consequences?

9. As discussed above in Section II.A., municipal securitizations that are Exchange Act ABS would fall within the definition of asset-backed security for purposes of the re-proposed rule. Therefore, parties related to a municipal securitization that are ''securitization participants'' would be subject to the re-proposed rule. For example, under the re-proposed rule a ''municipal advisor'' under 17 CFR 240.15Ba1–1(d)(1) could be a ''securitization participant'' under the re-proposed rule based on the functions that it performs in connection with a municipal securitization. Should certain parties related to a municipal securitization be excluded from the scope of the re-proposed rule? If so, how would those exclusions be consistent with Section 27B? Are there any special considerations related to municipal advisors that should be considered in applying the re-proposed rule?

1. Placement Agent, Underwriter, and Initial Purchaser

Proposed Rule 192(c) would define a ''placement agent'' or ''underwriter'' as a person who has agreed with an issuer or selling security holder to:

- Purchase securities from the issuer or selling security holder for distribution;
- Engage in a distribution for or on behalf of such issuer or selling security holder; or
- Manage or supervise a distribution for or on behalf of such issuer or selling security holder.

The terms ''placement agent'' and ''underwriter'' would have the same definition in the re-proposed rule because the functional roles of the persons who act as a placement agent or an underwriter are the same. These definitional prongs are focused on the functional role of a person in connection with a distribution of securities and should cover the activities of a placement agent or underwriter that has agreed with an issuer or selling security holder to facilitate an offering of securities.[49] These definitional prongs are also used for purposes of the definition of the term ''underwriter'' under 17 CFR 255 (''Volcker Rule'') [50] and 17 CFR 242.100 through 105 (''Regulation M''); [51] however, the Volcker Rule's definition of ''underwriter'' includes an additional prong that is intended to capture selling group members that may not have an agreement with the issuer or selling security holder.[52] The definition that we are proposing for purposes of the re-proposed rule would be limited to persons that have agreed with an issuer or a selling security holder to perform such functions, and selling group members who have no agreement with an issuer or selling security holder to engage in such functions would not be a ''placement agent'' or ''underwriter'' for purposes of the re-proposed rule. Although selling group members may help facilitate a successful distribution of securities to a wider variety of purchasers, such as regional purchasers that the underwriter or placement agent may not be able to access as easily, selling group members do not have a direct relationship with the issuer or selling security holder and are therefore unlikely to have the same ability to influence the design of the relevant ABS.

Proposed Rule 192(c) would define ''distribution'' as used in the proposed definitions of ''underwriter'' or ''placement agent'' to mean:

- An offering of securities, whether or not subject to registration under the Securities Act, that is distinguished from ordinary trading transactions by the presence of special selling efforts and selling methods; or
- An offering of securities made pursuant to an effective registration statement under the Securities Act.

This proposed definition is the same as the definition of ''distribution'' under the Volcker Rule, which is focused on the presence of special selling efforts and selling methods. We believe that focusing on special selling efforts and selling methods would help to distinguish an offering of ABS from secondary trading and helps to target the re-proposed rule to persons engaged in selling an ABS offering to investors once such ABS is created. Activities generally indicative of special selling efforts and selling methods include, but are not limited to, greater than normal sales compensation arrangements, delivering a sales document (such as a prospectus), and conducting road shows.[53] A primary offering of an ABS made pursuant to an effective registration statement under the Securities Act would also be captured under the proposed definition of ''distribution'' because, in the context of Section 27B, such an offering would be a primary issuance by an issuer immediately following the creation of the relevant ABS, which would be clearly distinguishable from an ordinary secondary trading transaction and, therefore, an identification of special selling efforts or selling method would be unnecessary in this context.

Proposed Rule 192(c) would define ''initial purchaser'' in a manner consistent with the Commission's prior use of that term in the context of ABS.[54] Specifically, the re-proposed rule would define the term ''initial purchaser'' as ''a person who has agreed with an issuer to purchase a security from the issuer for resale to other purchasers in transactions that are not required to be registered under the Securities Act in reliance upon Rule 144A or that are otherwise not required to be registered because they do not involve any public

[48] *See, e.g.,* SIFMA Letter at 10–11; Merkley-Levin Letter at 3.

[49] We also believe that the prongs included in the proposed definition would mitigate concerns raised by a commenter on the 2011 proposed rule about the potential overinclusiveness of the definition of ''underwriter'' in Section 2(a)(11) of the Securities Act, which could potentially include entities that do not have an agreement with the issuer or the selling security holder and have no ability to influence the design of the relevant ABS. *See* SIFMA Letter at 10–11. The definition of underwriter for purposes of the re-proposed rule would have no impact on the definition, responsibility, or liability of an underwriter under Section 2(a)(11).

[50] 17 CFR 255.4(a)(4). The re-proposed rule would have no impact on the definition of ''underwriter'' in the Volcker Rule.

[51] 17 CFR 242.100(b). The re-proposed rule would have no impact on the definition of ''underwriter'' in Regulation M.

[52] 17 CFR 255.4(a)(4).

[53] *See Review of Anti-manipulation Regulation of Securities Offerings,* Release No. 34–33924 (Apr. 19, 1994) [59 FR 21681 (Apr. 26, 1994)] at 21685; *see also Trading Practices Concerning Securities Offerings,* Release No. 34–37094 (Apr. 11, 1996) [61 FR 17108 (Apr. 18, 1996)], *Anti-manipulation Rules Concerning Securities Offerings,* Release No. 34–38067 (Dec. 20, 1996) [62 FR 520 (Jan. 3, 1997)], and *Securities Offering Reform,* Release No. 33–8591 (July 19, 2005) [70 FR 44722 (Aug. 3, 2005)].

[54] While not defined in rules adopted by the Commission, the Commission has used the term when describing the distribution of an asset-backed security. *See, e.g., Asset-Backed Securities,* Release No. 33–9117 (Apr. 7, 2010) [75 FR 23328 (May 3, 2010)] at 23332 (stating that CDOs are typically sold by the issuer in a private placement to one or more initial purchaser or purchasers in reliance upon the Section 4(2) private offering exemption in the Securities Act, which is available only to the issuer, followed by resales of the securities to ''qualified institutional buyers'' in reliance upon Rule 144A); *id.* at 23393 (stating that the initial purchaser is typically a registered broker-dealer). The definition of ''initial purchaser'' in the re-proposed rule would have no impact on the application of Rule 144A.

offering.'' This definition is also consistent with industry use of the term ''initial purchaser'' in the context of private placement transactions to mean a person (typically a broker-dealer) who, pursuant to an agreement with the issuer, performs the function of acquiring securities from an issuer in a private placement and reselling those securities to qualified institutional buyers in reliance on Rule 144A or to purchasers in sales that otherwise do not involve any public offering.[55] Proposing to define the term ''initial purchaser'' in a manner consistent with the Commission's prior use of that term in the context of ABS and also the common industry understanding of the term should ease compliance with the re-proposed rule because market participants are familiar with that usage of the term and should already have mechanisms in place to determine when the proposed definition is met.

The proposed definitions of the terms ''underwriter,'' ''placement agent,'' and ''initial purchaser'' in the re-proposed rule would identify persons by their function in connection with a securitization as suggested by certain commenters to the 2011 proposed rule.[56] We believe that function-based definitions would encompass those persons who have a key role in the creation or sale of an ABS transaction, which would help prevent evasion by persons seeking to avoid the re-proposed rule's prohibitions by using a different title to refer to themselves, even though they perform the function described in the definition. These function-based definitions should address evasion concerns raised by certain commenters.[57]

The proposed definitions of the terms ''underwriter,'' ''placement agent,'' and ''initial purchaser'' do not exclude an underwriter, placement agent, or initial purchaser that was not directly involved in structuring an ABS transaction or selecting the assets underlying the ABS, as requested by a commenter to the 2011 proposed rule.[58] As discussed above, the proposed definitions of those terms in the re-proposed rule are functional definitions that are based on such a person entering into an agreement with the relevant ABS issuer to perform specific functions. Such specific functions are essential to the successful issuance of the relevant ABS and, even if, for example, the relevant ''sponsor'' is the person most directly involved in the selection of assets, the relevant underwriter, placement agent, or initial purchaser would also be in a position to influence the structure of the relevant ABS given its role in the transaction. Therefore, we do not believe that including the requested exclusion would be appropriate.

Request for Comment

10. Are the proposed definitions of the terms ''initial purchaser,'' ''placement agent,'' and ''underwriter'' overinclusive or underinclusive, and why? If you believe that any of the proposed definitions are overinclusive or underinclusive, please provide an alternative definition and explain why you believe it is appropriate.

11. Should we modify the proposed definition of the terms ''placement agent'' and ''underwriter,'' and if so, how should the proposed definition be modified and why? Specifically, is it appropriate to use the same definition for such terms? If not, please explain why and suggest revisions. Should we modify the proposed definition to provide for functions in addition to the functions specified in the proposed definition?

12. As discussed above, the proposed definition of the terms ''placement agent'' and ''underwriter'' would be limited to persons that have agreed with an issuer or a selling security holder to perform the functions detailed in the proposed definition. Should the proposed definition be expanded to include selling group members who have no such agreement with an issuer or selling security holder? Why or why not?

13. Should the proposed definition of the term ''distribution'' be modified? If so, please explain why and provide an alternative definition. In particular, should ''the presence of special selling efforts and selling methods'' be included in the proposed definition? Additionally, should the magnitude of the offering be considered as part of the proposed definition?[59] Why or why not? If so, please describe the factors that should be considered when determining the magnitude of an offering (*e.g.,* the aggregate principal or notional amount of ABS to be sold, either in absolute terms or relative to the aggregate outstanding principal or notional amount of ABS issued by the issuer of the ABS and/or the normal trading volume of the ABS).

14. Should we modify the proposed definition of the term ''initial purchaser,'' and if so, how should the proposed definition be modified and why?

2. Sponsor

Proposed Rule 192(c) would, subject to certain exceptions,[60] define the term ''sponsor'' as:

- Any person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the entity that issues the asset-backed security; or
- Any person:
  - With a contractual right to direct or cause the direction of the structure, design, or assembly of an asset-backed security or the composition of the pool of assets underlying the asset-backed security; or
  - That directs or causes the direction of the structure, design, or assembly of an asset-backed security or the composition of the pool of assets underlying the asset-backed security.

Thus, a person who organizes and initiates an ABS transaction, or who directs or causes the direction of the structure, design, or assembly of an ABS or the composition of the pool of assets underlying the ABS (or who has the contractual right to do so), would, subject to the exceptions described below, be a sponsor for purposes of the re-proposed rule. This would include, for example, a portfolio selection agent for a CDO transaction, a collateral manager for a CLO transaction with the contractual right to direct asset purchases or sales on behalf of the CLO, or a hedge fund manager or other private fund manager who directs the structure of the ABS or the composition of the pool of assets underlying the ABS as described in the definition. Whether other parties to a securitization transaction, such as servicers, would

[55] *See* comment letter from The Investment Company Institute (Feb. 13, 2012) (''ICI Letter'') at 3; SIFMA Letter at 11. These commenters suggested that the definition incorporate a specific reference to the functions of an underwriter in connection with a Rule 144A transaction. As the proposed definition refers to a person agreeing to acquire a security from an issuer in a private placement for purposes of resales pursuant to Rule 144A, this proposed definition is appropriate and should capture the common industry understanding of ''underwriting'' a Rule 144A transaction.

[56] *See, e.g.,* Better Markets Letter at 3; Merkley-Levin Letter at 3–4.

[57] *See, e.g.,* Better Markets Letter at 3–4.

[58] *See* SIFMA Letter at 10.

[59] The definition of ''distribution'' in Regulation M considers the magnitude of the offering, in addition to the presence of special selling efforts and selling methods. *See* 17 CFR 242.100(b).

[60] As discussed below in Section II.B.2.b., the proposed definition of ''sponsor'' excludes a person that performs only administrative, legal, due diligence, custodial, or ministerial acts related to the structure, design, or assembly of an asset-backed security or the composition of the pool of assets underlying the asset-backed security. As discussed below in Section II.B.2.c., the proposed definition of ''sponsor'' also excludes certain U.S. Federal government entities and the Enterprises, subject to certain conditions.

meet the re-proposed rule's definition of ''sponsor'' is a determination that would be based upon the specific facts and circumstances of the ABS transaction, including whether such a party would qualify for the exclusion in paragraph (ii)(C) of the proposed definition of ''sponsor'' for a person that performs only administrative, legal, due diligence, custodial, or ministerial acts related to the structure, design, or assembly of the ABS or the composition of the pool of assets underlying the ABS, as discussed below in Section II.B.2.b.

Similar to the other proposed definitions discussed above, the proposed definition of the term ''sponsor'' is a functional definition that would apply regardless of the title bestowed upon the person (*e.g.,* an ''issuer'' of a municipal securitization would be a ''sponsor'' if its activities meet the re-proposed rule's definition).[61]

a. Sponsor in Regulation AB

Paragraph (i) of the proposed definition of ''sponsor'' in proposed Rule 192(c), which is derived from the definition of the term ''sponsor'' in Regulation AB,[62] includes any person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the entity that issues the asset-backed security. However, the definition in the re-proposed rule is not limited to the Regulation AB definition.[63] The Regulation AB definition was adopted to define who a sponsor is for purposes of the Regulation AB registration and reporting regime, and accordingly, that definition was intended to identify the party or one of the parties that is responsible for complying with the offering and reporting requirements of Regulation AB.[64] Moreover, the Regulation AB definition of ''sponsor'' was adopted for the limited purpose and scope applicable only to those ABS eligible for registration under Regulation AB, and would not be appropriate to cover the full range of ABS that would be covered by the re-proposed rule, including those that are unregistered.[65] Accordingly, the proposed definition of ''sponsor'' in the re-proposed rule would include, but would not be limited to, a sponsor as defined in Regulation AB. As discussed below, we are proposing a definition of ''sponsor'' that would apply more broadly to also cover, subject to certain exceptions, any person that directs or causes the direction of the structure, design, or assembly of an ABS or the composition of the pool of assets underlying the ABS or has the contractual right to do so. This is because such a person is in a unique position to structure the ABS and/or construct the underlying asset pool or reference pool in a way that would position the person to benefit from the actual, anticipated, or potential adverse performance of the relevant ABS or its underlying asset pool if such person were to enter into a conflicted transaction.

b. Contractual Rights Sponsor and Directing Sponsor

Consistent with our concerns about the potential underinclusiveness of the Regulation AB definition of ''sponsor'' for purposes of the re-proposed rule, paragraph (ii) of the proposed definition of ''sponsor'' in proposed Rule 192(c) would apply more broadly to also cover, subject to certain exceptions, any person that directs or causes the direction of the structure, design, or assembly of an ABS or the composition of the pool of assets underlying the ABS or has the contractual right to do so.

First, paragraph (ii)(A) of the proposed definition of ''sponsor'' would include, subject to certain exceptions, any person with a contractual right to direct or cause the direction of the structure, design, or assembly of an ABS or the composition of the pool of assets underlying the ABS (a ''contractual rights sponsor'').[66] The definition of sponsor in the re-proposed rule refers to a contractual right to direct or cause the direction of ''the structure, design, or assembly of an asset-backed security or the composition of the pool of assets underlying the asset-backed security'' because we believe that the structure of the ABS and the composition of the underlying asset pool are the factors that will most impact the performance of the ABS. Additionally, a person with the contractual right to direct or cause the direction of these aspects of an ABS that enters into a conflicted transaction would have the incentive and ability to engage in the conduct that is prohibited by Section 27B. For example, participating in asset selection for an ABS provides the opportunity for a person to benefit through a bet against the ABS or the underlying assets by selecting assets that such person believes will perform poorly.[67] Therefore, the definition that we are proposing would cover various parties with a significant role in asset selection for an ABS transaction, whether before or after the initial issuance of the relevant ABS, such as a portfolio selection agent for a CDO transaction, a collateral manager for a CLO transaction with the contractual right to direct asset purchases or sales on behalf of the CLO, or a hedge fund manager or other private fund manager with substantial involvement in the selection of the assets underlying an ABS (other than in connection with its acquisition of a long position in the relevant ABS).

The re-proposed rule does not provide that an actual exercise of contractual rights would be necessary for purposes of the proposed definition of ''sponsor.'' Our understanding of general industry practices based on our oversight of ABS markets is that there are a relatively small number of parties in a given ABS transaction with such contractual rights,

[61] *See* Section II.A. for discussion of the proposed definition of ''asset-backed security'' and its application to municipal securitizations.

[62] 17 CFR 229.1101(l). Under the Regulation AB definition, a sponsor is the person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuing entity.

[63] Some commenters to the 2011 proposed rule supported adopting the Regulation AB definition of the term ''sponsor.'' *See* SIFMA Letter at 11 (suggesting that the term ''sponsor'' be defined as ''a person who organizes and initiates an ABS transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuer.''); *see also* ASF Letter at 22–23 n.36 (supporting the Regulation AB definition of sponsor and stating that ''[w]e do not believe the definition of 'sponsor' should cover servicers, custodians or collateral managers, since those who merely service or manage the assets underlying an ABS, by definition, do not play a role in structuring an ABS and are not, therefore, in a position to design the ABS to default or fail''); comment letter from American Bar Association (Feb. 13, 2012) (''ABA Letter'') at 4 (supporting the Regulation AB definition of the term ''sponsor'').

[64] *See* 2004 Regulation AB Adopting Release.

[65] Not all ABS are eligible for the specialized registration and reporting regime under Regulation AB. For example, because synthetic securitizations are primarily based on the performance of assets or indices not included in the ABS, synthetic securitizations are not eligible for the Regulation AB registration and reporting regime. *See* 2004 Regulation AB Adopting Release at 1513–14 (stating that in instances where ABS are not eligible, additional or different disclosures and/or registration and reporting treatment may be more appropriate and stating that synthetic securitizations do not meet the Regulation AB definition of ABS). Also as discussed in Section II.A., the definition of ABS for purposes of the re-proposed rule is broader than the definition of ABS in Regulation AB. For example, the re-proposed rule's definition of ABS includes synthetic ABS as required by Section 27B, whereas Regulation AB's definition of ABS does not.

[66] This approach is consistent with a commenter's suggestion in response to the 2011 proposed rule to define the term ''sponsor'' broadly for purposes of Section 27B in order to ensure that the prohibition would apply to a broad range of persons with ''significant influence in the structure, composition, and management of an ABS.'' *See* Merkley-Levin Letter at 3–4.

[67] *See* Section II.D. for a discussion of what would be a ''conflicted transaction'' under the re-proposed rule.

and that in most instances a party with such contractual rights (*e.g.,* a portfolio selection agent or collateral manager) would in fact exercise (and often has a contractual duty to exercise) those contractual rights with respect to the ABS. Accordingly, we believe it is appropriate for the proposed definition of ''sponsor'' to capture contractual rights sponsors without requiring a factual determination of whether a contractual rights sponsor has exercised its contractual right to direct or cause the direction of the structure, design, or assembly of an ABS or the composition of the pool of assets underlying the ABS.

We understand that there may be instances where a person that does not have a contractual right to do so may nevertheless direct or cause the direction of the structure, design, or assembly of an ABS or the composition of the pool of assets underlying the ABS. For example, in connection with certain well-known examples of synthetic CDOs that were issued in the lead up to the financial crisis of 2007–2009, hedge funds that desired to take short positions in synthetic CDO securities (*i.e.,* so that the hedge fund could benefit if the synthetic CDO securities performed adversely) would direct or cause the direction of the composition of the portfolio assets in ways that would increase the likelihood of realizing an ultimate gain on their short position.[68] Paragraph (ii)(B) of the proposed definition of ''sponsor'' would therefore also include any person that directs or causes the direction of the structure, design, or assembly of an ABS or the composition of the pool of assets underlying the ABS even if that person does not have a contractual right to do so (a ''directing sponsor''). A determination that a person meets the definition of sponsor for this reason would be based upon the specific facts and circumstances.

As stated above, participating in asset selection for an ABS provides the opportunity for a person to benefit through a bet against the ABS or the underlying assets by selecting assets that such person believes will perform poorly. Therefore, the definition that we are proposing would cover a person, such as a private fund manager, who selects all or a portion of the assets underlying the ABS by directing the relevant person with the contractual right to do so and, based on its ability to select assets that are expected to perform poorly, enters into a transaction to short the ABS. The facts and circumstances regarding the actions of such a person would be distinguishable from that of an ABS investor that is acquiring a long position in the relevant ABS. An ABS investor that is acquiring a long position in the relevant ABS would be expected to provide input with respect to the structure of the ABS investment or the underlying pool of assets for the purpose of maximizing the expected value of its ABS investment. For example, investors in certain ABS markets may have stipulations regarding general characteristics of the composition of the underlying pool of an ABS that must be satisfied in order for that investor to agree to acquire the relevant securities, including to ensure that the ABS investment would comply with its investment guidelines. Therefore, an ABS investor that is interested in acquiring a long position in an ABS would not be considered to direct the composition of assets merely because such investor expresses its preferences regarding the assets that would collateralize its ABS investment. Paragraph (ii)(B) of the proposed definition of ''sponsor'' is not intended to capture such investors as a ''sponsor'' and is intended to capture only those persons—such as the hedge fund managers in the examples referred to above—that direct or cause the direction of the structure, design, or assembly of an ABS or the composition of the pool of assets underlying the ABS other than in connection with their acquisition of a long position in the ABS.

The proposed definition of ''sponsor'' is a functional definition that would apply regardless of the title bestowed upon such person. Accordingly, a person would be a sponsor for purposes of the re-proposed rule if such person organized and initiated the ABS transaction or directed or had the contractual right to direct the structure, design, or assembly of the ABS or the composition of the pool of assets underlying the ABS, regardless of whether the person is referred to as the sponsor of the ABS or by some other title (*e.g.,* issuer, depositor, originator, or collateral manager),[69] and even if the person does not have a named role in the ABS transaction and is not a party to any of the transaction agreements. This is consistent with a commenter's suggestion in response to the 2011 proposed rule to define the term ''sponsor'' broadly for purposes of Section 27B in order to ensure that the prohibition would apply to a broad range of securitization participants, including collateral managers and other parties with significant influence in the structure, composition, and management of an ABS.[70]

To avoid having the scope of the proposed definition of ''sponsor'' extend beyond those persons with the incentive and ability to engage in the conduct that is prohibited by Section 27B, paragraph (ii)(C) of the proposed definition of ''sponsor'' would exclude a person that performs only administrative, legal, due diligence, custodial, or ministerial acts related to the structure, design, or assembly of the ABS or the composition of the pool of assets underlying the ABS. Whether a person performs only such functions is a determination that would be based upon the specific facts and circumstances of an ABS transaction. For example, we believe that the activities customarily performed by accountants, attorneys, and credit rating agencies with respect to the creation and sale of an ABS, and the activities customarily performed by trustees, custodians, paying agents, calculation agents, and other contractual service providers relating to the ongoing management and administration of the entity that issues the ABS, are the sorts of activities that would typically fall within the exclusion from the definition of the proposed definition of the term ''sponsor.'' This exclusion should address the concerns of a commenter that the persons defined to be subject to the prohibition of the re-proposed rule should not inadvertently include trustees, servicers, law firms, accountants, and diligence providers.[71] This exclusion should also mitigate concerns about the potential overinclusiveness of a definition of the term ''sponsor,'' including concerns raised by certain commenters on the 2011 proposed rule about a definition that is broader than the Regulation AB definition.[72] While we received comment to the 2011 proposed rule that the definition of ''sponsor'' should include a catch-all to cover ''any other person that makes a material contribution to the design, composition, assembly, sale, or management of an asset-backed security,'' [73] we believe that such a catch-all provision would be overly broad as it could potentially include trustees, attorneys, or others that, for the reasons discussed above, should not be treated as ''sponsors'' under the re-proposed rule.

[68] *See* Senate Financial Crisis Report.

[69] For example, if a person is designated an ''issuer'' of a transaction, the person could also be a ''sponsor'' if the person performs the functions specified in the proposed definition.

[70] *See* Merkley-Levin Letter at 3–4.

[71] *See* SIFMA Letter at 9.

[72] *See* ASF Letter at 23 n.36; and ABA Letter at 4–5.

[73] *See, e.g.,* Better Markets Letter at 3; Merkley-Levin Letter at 3–4.

c. Federal Government Entities and Certain Other Entities Backed by the Federal Government Would Not Be Defined To Be a Sponsor of Fully Insured or Fully Guaranteed ABS

Paragraph (iii)(A) of the proposed definition of ''sponsor'' in proposed Rule 192(c) would provide that the United States or an agency of the United States would not be a ''sponsor'' for purposes of the re-proposed rule with respect to an ABS that is fully insured or fully guaranteed as to the timely payment of principal and interest [74] by the United States. Additionally, under paragraph (iii)(B) of the proposed definition of ''sponsor,'' Fannie Mae or Freddie Mac operating under the conservatorship or receivership of FHFA with capital support from the United States [75] would not be a ''sponsor'' for purposes of the re-proposed rule with respect to an ABS that is fully insured or fully guaranteed as to the timely payment of principal and interest by such entity.[76]

As discussed below, with respect to the types of fully insured or fully guaranteed securities of which the United States, an agency of the United States, or the Enterprises might otherwise be a sponsor absent these proposed exclusions, it is the United States that is exposed to the credit risk of the underlying assets. Therefore, if these entities were to enter into the types of conflicted transactions that this rule is intended to address, investors would ultimately not be exposed to credit risks stemming from such transactions.

Each of these exclusions would apply only to the entities specified in the relevant exclusion, and any other securitization participants involved with an ABS issued or guaranteed by such entity (*e.g.,* an underwriter or a non-governmental sponsor) would be subject to the re-proposed rule. Additionally, each of these exclusions is subject to certain conditions. If those conditions are not satisfied with respect to certain ABS (*e.g.,* an ABS is not fully insured or fully guaranteed by the relevant entity), then any securitization participant with respect to such ABS would still be subject to the prohibition of the re-proposed rule.

i. United States Government and Agencies

With respect to an ABS that is fully insured or fully guaranteed as to the timely payment of principal and interest by the United States, the United States or an agency of the United States would not be a ''sponsor'' under paragraph (iii)(A) of the proposed definition of ''sponsor'' in proposed Rule 192(c). These ABS would include mortgage-backed securities (''MBS'') guaranteed by the Government National Mortgage Association (''Ginnie Mae''), a wholly owned U.S. Government corporation that guarantees investors the timely payment of principal and interest on MBS backed by Federally insured or guaranteed loans, including mortgage loans insured by the Federal Housing Administration or guaranteed by the Department of Veterans Affairs. As a result of the proposed exception in paragraph (iii)(A) of the proposed definition of ''sponsor,'' Ginnie Mae would not be a ''sponsor'' with respect to its guaranteed ABS. Ginnie Mae's guarantee is backed by the full faith and credit of the United States. Given that Ginnie Mae sets certain guidelines and serves as guarantor for the MBS that it guarantees,[77] Ginnie Mae would, absent the proposed exception, be a sponsor of the ABS that it guarantees for purposes of the re-proposed rule.

As guarantor, the United States is exposed to the full credit risk related to the underlying assets. In turn, investors in ABS that are fully backed by the United States government rely on the support provided by the full faith and credit of the United States and not on the creditworthiness of the obligors on the underlying assets, and therefore are not exposed to the credit risk of the underlying assets. As a result, investors in such ABS are not exposed to the risk that was present in certain ABS transactions prior to the financial crisis of 2007–2009 where investors suffered credit-based losses due to the poor performance of the relevant asset pool while key securitization parties entered into transactions to profit from such poor performance.

ii. Enterprises

Similar to the reasons for excepting the United States government and agencies thereof, under paragraph (iii)(B) of the proposed definition of ''sponsor'' in proposed Rule 192(c), Fannie Mae and Freddie Mac, in each case, for so long as the applicable Enterprise is operating under conservatorship or receivership [78] of FHFA with capital support from the United States,[79] would not be defined as a ''sponsor'' for purposes of the re-proposed rule with respect to an ABS that is fully insured or fully guaranteed as to the timely payment of principal and interest by such Enterprise.

The Enterprises act as mortgage loan seller, master servicer, and, at times, trustee for collateralized mortgage obligations and other MBS. The Enterprises select and manage the assets in the asset pools underlying the securities and set the selection criteria and servicing guidelines for the securities. The Enterprises serve as guarantors for MBS, and, as guarantors, they are required to make principal and interest payments on the securities regardless of credit losses on the underlying mortgages.

Because some of these activities fall within the proposed definition of ''sponsor,'' Fannie Mae or Freddie Mac (or a successor limited-life regulated entity) would, absent an exception, be the sponsor of the ABS that it issues for purposes of the re-proposed rule. However, because such entities would be excluded from the definition of ''sponsor'' under, and subject to the conditions of, paragraph (iii) of the proposed definition of ''sponsor,'' neither Enterprise would be subject to the rule's prohibition with respect to the relevant Enterprise-guaranteed ABS. We believe that this is appropriate where Fannie Mae and Freddie Mac operate with capital support from the United States and fully guarantee the timely payment of principal and interest on their guaranteed ABS. This is because Fannie Mae and Freddie Mac are exposed to the entire credit risk of the mortgages that collateralize such ABS instead of investors, and an Enterprise's

[74] The re-proposed rule does not define what ''fully insured or fully guaranteed as to the timely payment of principal and interest'' means in this context as we believe that concept is commonly understood by market participants with respect to the relevant security.

[75] This would also include any limited-life regulated entity succeeding to the charter of either Fannie Mae or Freddie Mac pursuant to section 1367(i) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4617(i)), provided that such entity is operating with capital support from the United States.

[76] One commenter to the 2011 proposal stated that not excluding Enterprise or Ginnie Mae ABS from the scope of the rule would have significant economic and market impacts. *See* SIFMA Letter at 18–21.

[77] *See, e.g.,* 24 CFR 320 and the Ginnie Mae MBS Guide, available at *https://www.ginniemae.gov/issuers/program_guidelines/Pages/mbs_guide.aspx.*

[78] Under the Federal Housing Enterprises Safety and Soundness Act of 1992, FHFA may be appointed as the conservator or receiver for an Enterprise. Although Fannie Mae and Freddie Mac have been operating under the conservatorship of FHFA since September 6, 2008, the re-proposed rule includes the reference to ''receivership'' in order to align with the statutory authority of FHFA under the Federal Housing Enterprises Safety and Soundness Act of 1992.

[79] This would also include any limited-life regulated entity succeeding to the charter of either Enterprise pursuant to the authority of FHFA as conservator or receiver in respect of such Enterprise under the Federal Housing Enterprises Safety and Soundness Act of 1992, provided that such successor entity is operating with capital support from the United States.

guarantee would protect investors fully against the risk of credit losses on the underlying assets, at least for so long as the Enterprise remains in conservatorship with capital support from the United States as discussed below.

Both Fannie Mae and Freddie Mac have been operating under the conservatorship of FHFA since September 6, 2008. Concurrently with being placed in conservatorship under Section 1367 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, each Enterprise entered into a Senior Preferred Stock Purchase Agreement (''PSPA'') with the United States Department of the Treasury (''Treasury''). Under each PSPA, Treasury provided capital support to the Enterprises through the purchase of senior preferred stock of each Enterprise.[80] While the Enterprises are in conservatorship, due to the unique nature of the authority and oversight of FHFA over their operations as a result of such status, the Enterprises are not expected to act in a manner that would result in conflicted transactions that would benefit private parties, and, thus, are not expected to engage in the adverse selection of assets for their ABS. Moreover, because of the capital support provided by Treasury under the PSPAs, each Enterprise's guarantee fully protects investors against the risk of credit losses on the underlying assets consistent with the goals and intent of Section 27B. Accordingly, we are proposing to exclude the Enterprises from the definition of ''sponsor'' with respect to Enterprise-guaranteed ABS while the Enterprises are in conservatorship or receivership with capital support from the United States. We recognize the ongoing activity related to reform of the Enterprises and, if appropriate, we may revisit and modify the proposed exception if and when the future of the Enterprises and of the statutory and regulatory framework post-conservatorship for the Enterprises becomes clearer.[81]

One commenter to the 2011 proposed rule also suggested an exception for the Enterprises' security-based credit risk transfer (''CRT'') transactions to allow for efficient mitigation of the Enterprises' retained credit risk associated with their holdings of residential and commercial mortgages and MBS.[82] A security-based CRT transaction typically involves the issuance of unguaranteed ABS by a special purpose trust where the performance of such ABS is linked to the performance of a reference pool of mortgage loans that collateralize Enterprise guaranteed-MBS.[83] As a part of a security-based CRT transaction structure, the relevant Enterprise enters into an agreement with the special purpose trust pursuant to which the trust has a contractual obligation to pay the Enterprise upon the occurrence of certain adverse events with respect to the referenced mortgage loans.[84]

The proposed exclusion of the Enterprises, subject to certain conditions, from the definition of ''sponsor'' with respect to Enterprise-guaranteed ABS should address concerns that, absent such an exception, an Enterprise might be prohibited from engaging in a security-based CRT transaction, which could be a ''conflicted transaction'' under the re-proposed rule with respect to an Enterprise's guaranteed ABS.[85] Again, the investors in ABS fully insured or fully guaranteed by an Enterprise would not be subject to credit risk so long as an Enterprise's guarantee is backed by the full faith and credit of the United States. As such, we do not believe that such investors bear significant risk of conflicted transactions. Accordingly, under the re-proposed rule, the relevant Enterprise, subject to the conditions discussed above, would not be defined as a ''sponsor'' of its Enterprise-guaranteed ABS and would, therefore, not be a ''securitization participant'' under the re-proposed rule with respect to its Enterprise-guaranteed ABS.

We note, however, that because a CRT security issued in a security-based CRT transaction is not guaranteed by the relevant Enterprise, investors in a CRT security would bear credit risk. Furthermore, because the CRT security is not fully insured or fully guaranteed by an Enterprise, the proposed exclusion from the definition of ''sponsor'' for the Enterprises with respect to Enterprise-guaranteed ABS would not apply to a CRT security itself. Therefore, the Enterprises would be ''sponsors'' of CRT securities for purposes of the re-proposed rule and would be prohibited from engaging in conflicted transactions that would be prohibited by the re-proposed rule with respect to investors in such CRT securities.

Request for Comment

15. Is the proposed definition of the term ''sponsor'' overinclusive or underinclusive? Please explain why or why not.

16. We seek comment on the concept in the definition of the term ''sponsor'' of a person directing or causing the direction of the structure, design, or assembly of an ABS or the composition of the pool of assets underlying the ABS. Is this concept, in the context of a person that does not have a contractual right to exercise such direction, overinclusive or underinclusive, and why? In particular, is the reference to ''causes the direction of'' necessary in order to capture direction given through a third party, or is the reference unnecessary because of the inclusion of the anti-circumvention provision in proposed Rule 192(d)? Why or why not? Are there additional indicia that should be included or referenced for purposes of the facts and circumstances that would be relevant to this determination? What parties that have a role in a securitization could fall within the proposed definition of ''sponsor'' because they direct or cause the direction of the structure, design, or assembly of an ABS or the composition of the pool of assets underlying an ABS? Should all of these parties be included? Should other parties be included in the definition of ''sponsor''? Which of these parties would not be a sponsor because of the exclusion in paragraph (ii)(C) of the proposed definition of ''sponsor'' for a person that performs only administrative, legal, due diligence, custodial, or ministerial acts related to the structure, design, or assembly of the ABS or the composition of the pool of assets underlying the ABS? The proposed definition of the term ''sponsor'' includes, but is not limited to, a sponsor as defined in Regulation AB. If the rule were limited to the Regulation AB definition of ''sponsor,'' would that make the rule underinclusive? Would it be clear how to determine which party or parties would be a sponsor when applying the Regulation AB definition of ''sponsor'' to the wider population of ABS that are not subject to Regulation AB, but are

[80] For a discussion of Enterprise operations under conservatorship or receivership with capital support from the United States, see RR Adopting Release at 77649.

[81] The RR Adopting Release similarly states that the application of the credit risk retention rules to the Enterprises will be revisited and, if appropriate, modified after the future of the Enterprises and of the statutory and regulatory framework for the Enterprises becomes clearer. *See id.* at 77650.

[82] *See* comment letter from Fannie Mae and Freddie Mac (Dec. 21, 2015) (''Fannie Mae/Freddie Mac Letter'') at 3–8.

[83] *See, e.g.,* the relevant legal documentation and other related information about Freddie Mac's single-family transactions, available at *https://capitalmarkets.freddiemac.com/crt/securities/deal-documents.*

[84] *See id.*

[85] *See* Section II.D. for a discussion of what would be a ''conflicted transaction'' for purposes of the re-proposed rule.

subject to the prohibitions of Section 27B? [86]

17. We seek comment on an alternative definition of the term ''sponsor'' where paragraph (ii) of the proposed definition of ''sponsor'' would include a contractual rights sponsor described in paragraph (ii)(A) of the proposed definition of ''sponsor'' but would not include a directing sponsor described in paragraph (ii)(B) of the proposed definition of ''sponsor.'' Would this alternative definition better address concerns of commenters on the 2011 proposed rule about potential overinclusiveness of the definition of the term ''sponsor'' by covering only persons with a contractual relationship with the entity that issues the ABS (or with one or more of the other securitization participants)? Would this alternative definition be underinclusive because it would not cover all the parties that could direct or cause the direction of the structure, design, or assembly of an ABS or the composition of the pool of assets underlying the ABS, such as a hedge fund manager or other private fund manager that would have an opportunity to benefit from a bet against the performance of the ABS or the underlying assets? If paragraph (ii) of the definition of ''sponsor'' were limited to a contractual rights sponsor, even if it might not cover the full range of potentially culpable parties, would it nonetheless prevent most conflicted transactions from occurring because of its interaction with other provisions of the rule? Further, should the definition of the term ''sponsor'' be limited to refer to only a contractual rights sponsor that has actually exercised its relevant contractual rights?

18. We seek comment on an alternative definition of the term ''sponsor'' that would include an additional catch-all prong that would include ''any other person that makes a material contribution to the design, composition, assembly, sale, or management of an asset-backed security'' as suggested by certain commenters to the 2011 proposed rule.[87] Would this catch-all better capture all parties that could engage in conduct prohibited by Section 27B? What parties that have a role in a securitization would be captured by this catch-all that would not otherwise be subject to the re-proposed rule? Should such parties, if any, be subject to the re-proposed rule's prohibition on material conflicts of interest? Please explain why or why not. Would such a catch-all be overinclusive, or would it unduly burden parties that would not have the incentive or ability to engage in conduct prohibited by Section 27B? Please also explain whether and how such a catch-all would be consistent with Section 27B.

19. Is the exclusion in paragraph (ii)(C) of the proposed definition of ''sponsor'' for a person that performs only administrative, legal, due diligence, custodial, or ministerial acts related to the structure, design, or assembly of the ABS or the composition of the pool of assets overinclusive or underinclusive, and why? Are there additional administrative activities and functions in the context of ABS that should be addressed? Is it clear whether servicers or other contractual service providers with ongoing managerial or administrative roles with respect to the securitization, but limited discretion over the structure, design, or assembly of the ABS or the composition of the pool of assets underlying the ABS, would qualify for the proposed exclusion? Please explain why or why not. Should the exclusion be modified to provide more detail on the types of activities that can be provided by a party while continuing to qualify for the exclusion from the proposed definition of ''sponsor''? If so, please explain how the exclusion should be modified, including which types of activities the exclusion should reference.

20. Should we modify the proposed exception from the definition of ''sponsor'' for the United States or an agency of the United States with respect to an ABS that is fully insured or fully guaranteed by the United States? If so, describe any suggested modifications or deletions to the exception and explain why they would be necessary and how they would be consistent with Section 27B.

21. Should we modify the proposed exception from the definition of ''sponsor'' for the United States or an agency of the United States to apply not only with respect to an ABS that is fully insured or fully guaranteed by the United States but also an ABS that is not fully insured or fully guaranteed by the United States? If so, describe any suggested modifications or deletions to the exception and explain why they would be necessary and how they would be consistent with Section 27B.

22. The proposed exceptions from the definition of ''sponsor'' in paragraph (iii) of the proposed definition of ''sponsor'' are premised on the fact that the United States, and not investors in such ABS, is exposed to the credit risk of the underlying assets because of the credit support provided by the United States. Are there other types of non-credit-related risks, such as interest rate risk or prepayment risk, that we should also address in the context of such fully insured or fully guaranteed ABS transactions for purposes of the prohibition, and if so, how should these proposed exceptions be modified to address such risks?

23. Should we modify the proposed exception from the definition of ''sponsor'' in paragraph (iii)(B) of the proposed definition of ''sponsor'' for the Enterprises with respect to an ABS that is fully insured or fully guaranteed by the relevant entity? Please describe any suggested modifications or deletions to the exception and explain why they would be necessary and how they would be consistent with Section 27B.

24. The proposed exception from the definition of ''sponsor'' for the Enterprises in paragraph (iii)(B) of the proposed definition of ''sponsor'' would apply only for so long as the applicable Enterprise is operating under conservatorship or receivership of FHFA with capital support from the United States. Should it apply beyond that time period? If so, why, and how would that be consistent with Section 27B?

25. If so, then investors in Enterprise-guaranteed ABS would be relying solely on the Enterprise guarantee due to the lack of the capital support from the United States. If the exception were to extend beyond conservatorship, then are there any ways that the rule could address the credit risk related to the Enterprise guarantee and the conflicts that could arise from securitization participants engaging in conflicted transactions? Should the exception for the Enterprises be subject to any other conditions?

26. In addition to or in lieu of the proposed exceptions from the definition of ''sponsor'' in paragraph (iii) of the proposed definition of ''sponsor'' discussed above, should there be an exception for ABS that is fully insured or fully guaranteed by, or collateralized solely by obligations issued, fully insured, or fully guaranteed by, the United States or an agency of the United States? If so, should it be an exception to the definition of ''asset-backed security,'' or should it be an exception to the re-proposed rule's prohibition? Please explain why any such exception would be necessary and what conditions, if any, should apply to the application of that exception. How would such an exception be consistent with Section 27B?

27. In addition to or in lieu of the proposed exceptions from the definition of ''sponsor'' in paragraph (iii) of the

[86] *See* discussion in Section II.A.

[87] *See, e.g.,* Better Markets Letter at 3; Merkley-Levin Letter at 3–4.

proposed definition of ''sponsor'' discussed above, should there be an exception to the definition of ''asset-backed security'' for an ABS that is fully insured or fully guaranteed as to the timely payment of principal and interest by the Enterprises while operating under the conservatorship or receivership of FHFA with capital support from the United States? If so, please explain why such an exception would be necessary, how such an exception would be consistent with Section 27B, and if any conditions should apply to the application of such an exception.

28. Are there any other types of government entities, including municipal entities, that should be exempt from the re-proposed rule? Please explain why they should be exempt and how such an exemption would be consistent with Section 27B. If the relevant ABS are not fully insured or fully guaranteed by a government or government-controlled entity, then please explain why securitization participants that would be covered by the re-proposed rule should be exempt, including whether the opportunity exists to engage in the type of conduct prohibited by the re-proposed rule.

3. Affiliates and Subsidiaries

Consistent with Section 27B(a), the proposed definition of ''securitization participant'' in proposed Rule 192(c) would extend to affiliates and subsidiaries of an underwriter, placement agent, initial purchaser, or sponsor of an ABS. Including affiliates and subsidiaries in the re-proposed rule would help to prevent affiliates and subsidiaries from being used to evade the rule's prohibitions and would also be consistent with Section 27B.

Proposed Rule 192 is being proposed under the Securities Act, and the rule refers to the definitions of the terms ''affiliate'' and ''subsidiary'' under 17 CFR 230.405 (''Securities Act Rule 405''). Under Securities Act Rule 405, an ''affiliate'' of a specified person is a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified, and a ''subsidiary'' of a specified person means an affiliate controlled by such person directly, or indirectly through one or more intermediaries.[88] Also, under Securities Act Rule 405, the term ''control'' is defined to mean the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.[89]

We believe that these definitions are commonly understood by market participants and would help to prevent evasion of the re-proposed rule. The re-proposed rule is designed to prevent securitization participants from entering into transactions that are bets against the ABS that they create or sell to investors, and it would be inconsistent with the intent of the re-proposed rule if the prohibition did not extend to cover a transaction structure where a securitization participant directs, either directly or through one or more intermediaries, an affiliate or subsidiary to enter into such a bet against the relevant ABS. We believe that, to cover the various ways in which an affiliate or subsidiary relationship may be effectuated, the re-proposed rule should cover such a scenario whether the securitization participant's ability to direct the management and policies of the relevant entity are through the ownership of voting securities, by contract, or otherwise.

The inclusion of affiliates and subsidiaries in the re-proposed rule means that persons in addition to underwriters, placement agents, initial purchasers, or sponsors of an ABS would be securitization participants for purposes of the re-proposed rule if they are an affiliate or subsidiary of an underwriter, placement agent, initial purchaser, or sponsor of an ABS. For example, a servicer that is a sponsor's affiliate would fall within the scope of the re-proposed rule even if the servicer's role in connection with the securitization would not meet the re-proposed rule's definition of the term ''sponsor.'' [90]

We received comments to the 2011 proposed rule that including affiliates and subsidiaries would be overinclusive and that it would impose an unduly burdensome impact on certain persons.[91] Certain commenters to the 2011 proposed rule suggested that the use of information barriers would mitigate the re-proposed rule's potential overinclusion of affiliates and subsidiaries of securitization participants.[92] One commenter to the 2011 proposed rule specifically supported the use of an information barriers regime with respect to investment companies and investment advisers that are affiliates or subsidiaries of securitization participants.[93] However, other commenters opposed the use of information barriers to manage material conflicts of interest in connection with the 2011 proposed rule for reasons such as perceived permeability, limited utility, and difficulties associated with monitoring and enforcing information barriers in addition to their weakening impact on the prohibition set forth in Section 27B.[94]

Information barriers, in the form of written, reasonably designed policies and procedures, have been recognized in others areas of the Federal securities laws and the rules thereunder. For example, brokers and dealers have used information barriers to manage the potential misuse of material non-public information to adhere to Section 15(g) of the Exchange Act.[95] Also, Regulation M contains an exception for affiliated purchasers if, among other requirements, the affiliate maintains and enforces written policies and procedures reasonably designed to prevent the flow of information to or from the affiliate that might result in a violation of Regulation M.[96]

The re-proposed rule does not include the use of information barriers as an exception for affiliates and subsidiaries because we are concerned about the potential to use an affiliate or subsidiary to evade the re-proposed rule's prohibition. However, we seek comment below on whether an exception utilizing information barriers to exclude affiliates and subsidiaries could be implemented in a way that would be consistent with Section 27B. Responses to such questions would provide further insight

[88] 17 CFR 230.405.

[89] *Id.*

[90] We understand that servicers are often affiliated with the sponsor of an ABS. *See, e.g.,* 2004 Regulation AB Adopting Release at 1511 (stating that because the issuing entity is designed to be a passive entity, one or more ''servicers,'' often affiliated with the sponsor, are generally necessary to collect payments from obligors of the pool assets, to carry out the other important functions involved in administering the assets, and to calculate and pay the amounts net of fees due to the investors that hold the ABS to the trustee, which actually makes the payments to investors).

[91] *See, e.g.,* ABA Letter at 11–12; SIFMA Letter at 12–15.

[92] *See, e.g.,* ABA Letter at 11–12; ASF Letter at 10–11; comment letter from The Financial Services Roundtable (Feb. 13, 2012) (''Roundtable Letter'') at 10; SIFMA Letter at 14–15.

[93] *See, e.g.,* ICI Letter at 5–7.

[94] *See* Barnard Letter at 2 (stating that, although information barriers and disclosure may be useful to mitigate conflicts of interest, short transactions should be absolutely prohibited); Better Markets Letter at 9 n.23 (stating that history had proved that information barriers are not reliable and are difficult for regulators to monitor and enforce); comment letter from Public Citizen (Feb. 13, 2012) (''Public Citizen Letter'') at 1, 4–5 (stating that information barriers invite abuse and present major enforcement problems); Tewary Letter 1 at 13–14 (stating that academic studies have found that, even where information barriers are erected, regulators are routinely unaware of when such barriers have been breached).

[95] 17 U.S.C. 78*o*(g).

[96] 17 CFR 242.100–105; 17 CFR 242.100(b).

on commenters' views on the 2011 proposed rule that supported the use of information barriers, including whether such an approach would be appropriate with respect to investment companies and investment advisers that are affiliates or subsidiaries of certain securitization participants.[97]

An information barriers exception could contain conditions that must be met to qualify for such exception, which would help ensure that the relevant affiliates or subsidiaries of a securitization participant would not engage in transactions that would involve or result in a material conflict of interest. For example, an information barrier-based exception could contain a condition requiring that an underwriter, placement agent, initial purchaser, or sponsor of an ABS establish, implement, maintain, enforce, and document written policies and procedures to prevent the flow of information to and from such underwriter, placement agent, initial purchaser, or sponsor and its affiliates and subsidiaries that might result in a violation of the re-proposed rule. Such written policies and procedures could aid the underwriter, initial purchaser, placement agent, and sponsor in monitoring and enforcing the applicable information barriers. For example, the policies and procedures could include a physical separation of personnel which could help to restrict information flow, for example, between a securitization participant and its affiliates and subsidiaries, and could promote a barrier between activities related to securitization and other activities that are unrelated to the creation and distribution of ABS. Additionally, policies and procedures could restrict the activities of an underwriter, placement agent, initial purchaser, or sponsor in the context of an ABS transaction to only those activities necessary for it to act in such capacity, such that the securitization participant would be further limited in its ability to engage in activity that Section 27B is designed to prevent.

A second condition to an information barriers exception could be to require that an underwriter, placement agent, initial purchaser, or sponsor of an ABS establish, implement, maintain, enforce, and document a written internal control structure governing the implementation and adherence to the policies and procedures required under the information barriers exception. An internal control condition would aid the underwriter, initial purchaser, placement agent, and sponsor in monitoring, identifying, and remediating non-compliance with the applicable information barriers. For example, an internal control structure would help identify whether policies and procedures would need to be modified so that they achieve their intended purpose.

A third condition could be that the securitization participant obtains an annual, independent assessment of the operation of the policies and procedures and internal control structure required under the information barriers exception. This condition would also aid the underwriter, initial purchaser, placement agent, and sponsor in monitoring, identifying, and remediating non-compliance with the applicable information barriers that are not identified by the internal control structure.

A fourth condition could be that the affiliate or subsidiary has no officers (or persons performing similar functions) or employees (other than clerical, ministerial, or support personnel) in common with the underwriter, initial purchaser, placement agent, or sponsor and was not involved in the creation, distribution, origination of the assets, or otherwise providing services with respect to the related ABS. For example, originators and servicers that are affiliates or subsidiaries of an underwriter, placement agent, initial purchaser, or sponsor would not meet the elements of this condition. This condition would recognize that it would be nearly impossible to have an effective information barrier to prevent the flow of information if the affiliates or subsidiary shared common officers or employees, was involved in the creation, distribution, or origination of the assets, or is otherwise providing services related to the ABS.

A fifth condition could be that the information barriers exception would not be available if, in the case of any specific securitization, the underwriter, initial purchaser, placement agent, or sponsor knows or reasonably should know that, notwithstanding meeting the conditions described above, the transaction would involve or result in a material conflict of interest. We seek commenters' views on an information barriers exception with the conditions described above. We also seek comment on other or different conditions below.

Request for Comment

29. Is it appropriate for the Securities Act Rule 405 definitions of the terms ''affiliate,'' ''subsidiary,'' and ''control'' to apply for purposes of the re-proposed rule? If not, please explain why and provide alternative definitions of these terms that should be used.

30. If a securitization participant that is an investment adviser ''controls'' a fund that it manages for purposes of the re-proposed rule, then such fund would be an ''affiliate'' or ''subsidiary'' of such investment adviser and subject to the re-proposed rule. Is this appropriate? If not, please explain why, provide alternative definitions of the relevant terms that should be used, and explain how the modifications would be consistent with Section 27B.

31. The proposed definitions of the terms ''affiliate'' and ''subsidiary'' could include a securitization participant's non-U.S. affiliates and subsidiaries. Would the inclusion of affiliates and subsidiaries within the scope of the re-proposed rule result in the rule having an unnecessary and highly burdensome global reach, as suggested by one commenter to the 2011 proposed rule?[98] Why or why not?

32. As discussed above, information barriers are used as tools to manage conflicts of interest in other areas of the Federal securities laws and the rules thereunder.[99] We seek comment on whether information barriers could be designed to effectively mitigate prohibited conflicts of interest and provide adequate protection in this context, whether the use of such barriers would effectively implement Section 27B, and whether internal information barriers are vulnerable to breach. If the re-proposed rule were to include the use of information barriers, should there be an exception for an affiliate or subsidiary of an underwriter, placement agent, initial purchaser, or sponsor of an ABS if each of the following conditions is satisfied: (1) the underwriter, placement agent, initial purchaser, or sponsor of the ABS establishes, implements, maintains, enforces, and documents written policies and procedures to prevent the flow of information to and from the affiliate or subsidiary that might result in a violation of the re-proposed rule; (2) the underwriter, placement agent, initial purchaser, or sponsor of the ABS establishes, implements, maintains, enforces, and documents a written internal control structure governing the implementation of, and adherence to, the written policies and procedures; (3) the underwriter, placement agent, initial purchaser, or sponsor of the ABS obtains an annual, independent assessment of the operation of such policies and procedures and internal control structure; (4) the affiliate or subsidiary has no officers (or persons performing similar functions) or

[97] *See, e.g.,* ICI Letter at 5–7.

[98] *See* SIFMA Letter at 15.

[99] *See* Section II.B.3.

employees (other than clerical, ministerial, or support personnel) in common with the underwriter, placement agent, initial purchaser, or sponsor of the ABS, and was not involved in the creation or distribution of, or otherwise involved in providing services with respect to, the related ABS; and (5) a person may not rely on the exception if, in the case of any specific securitization, the person knows or reasonably should know that notwithstanding satisfying the conditions, a transaction would involve or result in a material conflict of interest? How would this exception be consistent with Section 27B?

33. Please identify any additional conditions that would be appropriate for a potential information barriers exception to include in order to help maintain strong conflict of interest protection while permitting normal course business activities for certain affiliates and subsidiaries, and how those conditions would be consistent with Section 27B.

34. Should any of the conditions described in question 32 be modified if the final rule were to include an information barriers exception? For example, should condition (1) be modified to specify that policies and procedures such as physical separation of personnel and functions and limitations on the types of permissible activities of an underwriter, initial purchaser, placement agent, or sponsor (and its affiliates and subsidiaries) could satisfy this condition? Should condition (1) be modified to specify that the policies and procedures must take into consideration the nature of the entity's business? Should any of the conditions be deleted? If so, explain why, including why the removal of any such conditions would be consistent with Section 27B if the final rule were to include an information barriers exception.

35. Should the potential information barriers exception described in question 32 include a condition that the offering document for the ABS must disclose the types of transactions that the affiliate or subsidiary could engage in as part of its normal, ordinary course of business? How could any such disclosure condition be structured so that the resulting disclosure would not contain vague boilerplate language? How could such disclosure be provided to investors if the transactions occur after the offering but within the timeframe of the prohibition? How would any such disclosure conditions be consistent with Section 27B?

36. Should the potential information barriers exception described in question 32 provide an exception for specific types of businesses that are unrelated to the creation and distribution of ABS such that only affiliates and subsidiaries engaged in those specific businesses would be eligible for the exception? If yes, please explain and provide a list of specific businesses unrelated to the creation and distribution of ABS that should be listed in any such exception (for example, mutual fund asset-management, investment advisers acting on behalf of clients, foreign trading desks facilitating customer trades). Also, please explain how any such exceptions would be consistent with Section 27B. If no, please explain.

37. Should the potential information barriers exception described in question 32 provide an exception if the affiliate or subsidiary already would be subject to existing rules and regulation that provide for conflict management or restricting information flow as the requirements of such rules and regulations could help to achieve the policy objectives of the re-proposed rule? Please list specific rules and regulations that provide for managing conflicts of interest or restricting information flow at the affiliate or subsidiary as a condition to qualifying for such exception.

38. Should the re-proposed rule include an information barriers exception as described by one commenter to the 2011 proposed rule?[100] How would such an exception be consistent with Section 27B? Should any conditions that were suggested by that commenter be added to the information barriers exception described in question 32? In lieu of condition (3) in question 32, should a potential information barriers exception instead require periodic internal audits of compliance with policies and procedures? If so, how often should that assessment be? For example, should it be monthly, annually, or quarterly and why? Is there a particular actor within an organization that should perform the internal audit? If so, who would that be and why?

C. Timeframe of Prohibition

We are proposing in Rule 192(a)(1) that the prohibition on conflicted transactions would commence on the date on which a person has reached, or has taken substantial steps to reach, an agreement[101] that such person will become a securitization participant (''commencement point'') and would end one year after the date of the first closing of the sale of the relevant ABS. This end point for the covered timeframe is set forth in the statutory language of Section 27B, and the re-proposed rule incorporates that statutory language. The prohibition in the 2011 proposed rule would have applied at *any time* for a period ending on the date that is one year after the date of the first closing of the sale of the ABS.

The re-proposed rule's approach to the commencement point is designed to reduce the circumstances in which a person could engage in prohibited conduct prior to the issuance of the relevant ABS. We preliminarily believe that the point at which a securitization participant has reached, or has taken substantial steps to reach, an agreement that such person will become a securitization participant is the appropriate commencement point for the prohibition in the re-proposed rule because that is the point at which a person may be incentivized and/or can act on an incentive to engage in the misconduct that Section 27B is designed to prevent.

Whether a person has taken substantial steps to reach an agreement to become a securitization participant would be a facts and circumstances determination based on the actions of such person in furtherance of becoming a securitization participant. For example, a person who has engaged in substantial negotiations over the terms of an engagement letter or other agreement to become an underwriter, placement agent, initial purchaser, or sponsor of an ABS would be subject to the prohibition in the re-proposed rule by virtue of having taken substantial steps to reach an agreement to become a securitization participant. The re-proposed rule does not define ''agreement'' or ''substantial steps to reach . . . an agreement'' in the context of the commencement point. However, we seek comment below on indicia of whether a person has reached an agreement to become a securitization participant, or taken substantial steps to reach such an agreement, and whether such indicia should be specified in the rule.

Proposed Rule 192(a)(1) prohibits a securitization participant from engaging in any transaction that would involve or result in any material conflict of interest

[100] *See* SIFMA Letter at 15 (describing a safe harbor that would permit a financial institution to design its own information barriers).

[101] For purposes of the re-proposed rule, an ''agreement'' need not constitute an executed written agreement, such as an engagement letter. Oral agreements and facts and circumstances constituting an agreement, even absent an executed engagement letter, can be an agreement for purposes of the rule. We expect that market participants would know and understand when an agreement has been reached.

between the securitization participant and an investor in the relevant ABS. In order for the prohibition in proposed Rule 192(a)(1) to apply to a potentially conflicted transaction, an ABS must have been created and sold to one or more investors; in the absence of the creation and sale of an ABS, there would be no investors in an ABS with respect to which a potentially conflicted transaction could involve or result in a material conflict of interest. Additionally, the prohibition in proposed Rule 192(a)(1) applies only to a securitization participant (*i.e.,* an underwriter, placement agent, initial purchaser, or sponsor of an ABS or any affiliate or subsidiary of any such person). Therefore, under the re-proposed rule, the prohibition on material conflicts of interest would not apply to a person that never reaches an agreement to become an underwriter, placement agent, initial purchaser, or sponsor of an ABS, even if such person were to take substantial steps to reach such an agreement.[102] However, once a person has become a securitization participant and an ABS has been created and sold, the re-proposed rule's prohibition would apply to such person commencing on the date on which such person reached, or took substantial steps to reach, an agreement to become a securitization participant. As a practical matter, this means that if a person were to enter into a potentially conflicted transaction prior to becoming a securitization participant, *e.g.,* while engaged in negotiations to become a securitization participant, the person could avoid violating the re-proposed rule by withdrawing from the transaction prior to becoming a securitization participant. However, if the person were to become a securitization participant with respect to an ABS after having engaged in a potentially conflicted transaction, the person would be in violation of the re-proposed rule by virtue of being a securitization participant that had engaged in a conflicted transaction during the period specified in proposed Rule 192(a)(1). We preliminarily believe that this approach to the commencement point would help prevent conduct that the re-proposed rule is designed to prohibit that occurs prior to a person having reached an agreement to become a securitization participant.

Certain commenters to the 2011 proposed rule supported specific dates as the commencement point (*e.g.,* the date of the first marketing or offering materials for the ABS,[103] the pricing date for the ABS,[104] or the point in time when an issuer engages those involved in structuring and marketing the ABS [105]). We also received comment that supported leaving the commencement point unspecified because, for example, specific commencement points may be underinclusive.[106] We believe that a commencement point that begins on the date of the first marketing or offering materials for the ABS, the pricing date for the ABS, or the point in time when an issuer engages those involved in structuring and marketing the ABS could be underinclusive because a securitization participant could engage in the misconduct that Section 27B is designed to prevent just prior to such commencement points and the rule would, as a result, not cover misconduct prior to those dates. Therefore, we believe that the commencement point should begin at an early point in time when a securitization participant may first have the opportunity to engage in the misconduct that Section 27B is designed to prevent.

Request for Comment

39. We seek commenters' views regarding the approach to the covered timeframe in the re-proposed rule. Should we modify the proposed covered timeframe in the re-proposed rule, and if so, how and why?

40. In particular, we seek comment on the proposed commencement point of the re-proposed rule's prohibition on material conflicts of interest. Is it appropriate for the re-proposed rule's prohibition to commence at the point at which a person has reached, or has taken substantial steps to reach, an agreement that such person will become a securitization participant, and why? Are there modifications to the commencement point that might be necessary or advisable to mitigate any unintended consequences? Should the rule specify when a person has reached an agreement to become a securitization participant? For example, should the rule specify that ''agreement'' refers to a formal, written agreement to become a securitization participant, or should it instead specify that ''agreement'' refers to an agreement in principle as to the major terms of the arrangement by which such person will become a securitization participant, and why? Should the rule identify specific activities that would constitute ''substantial steps'' to becoming an underwriter, placement agent, initial purchaser, or sponsor of an ABS? Why or why not? Please provide comment on specific activities that you believe constitute ''substantial steps'' to becoming an underwriter, placement agent, initial purchaser, or sponsor of an ABS, and whether any or all of such activities should be specified in the rule.

41. We seek comment on whether we should specify additional factors that would indicate when a person has reached an agreement to become a securitization participant. Should an ''agreement'' arise only through an executed engagement letter or the oral equivalent of an executed engagement letter, or should the facts and circumstances of the situation dictate when an agreement has been reached?

42. We seek comment on the implications of the commencement point of the re-proposed rule's prohibition on affiliates and subsidiaries of a person seeking to become an underwriter, placement agent, initial purchaser, or sponsor of an ABS. How would an affiliate or a subsidiary of such a person know that the person had taken substantial steps to reach an agreement to become a securitization participant, such that a conflicted transaction entered into by the affiliate or subsidiary would be prohibited by the re-proposed rule if the person seeking to become a securitization participant were to ultimately reach an agreement to become a securitization participant? Are there existing information barriers in place within certain regulated firms that would prevent the person seeking to become a securitization participant from informing its affiliates and subsidiaries that it had taken substantial steps to reach an agreement to become a securitization participant? For these or other reasons, should the re-proposed rule be modified to prohibit conflicted transactions by affiliates or subsidiaries of a person seeking to become an underwriter, placement agent, initial purchaser, or sponsor of an ABS only after such person has reached an agreement to become a securitization participant, and why? If so, please explain how the re-proposed rule should be modified, and how such

[102] We note, however, that if such person were to direct or cause the direction of the structure, design, or assembly of an ABS or the composition of the pool of assets underlying the ABS, such person would be a directing sponsor under paragraph (ii)(B) of the proposed definition of ''sponsor'' (which, by extension, means that such person would be subject to the re-proposed rule's prohibition) even if such person had no contractual right to do so. *See* Section II.B.2.

[103] *See* ASF Letter at 24; SIFMA Letter at 23.

[104] *See* SIFMA Letter at 23.

[105] *See* ASF Letter at 24.

[106] *See* AFR Letter at 7; Barnard Letter at 3; Better Markets Letter at 5; Merkley-Levin Letter at 6.

modifications would be consistent with Section 27B.

43. How should the rule treat a person that never reaches an agreement to become an underwriter, placement agent, initial purchaser, or sponsor of an ABS, despite having taken substantial steps to reach such an agreement? As discussed above, the re-proposed rule's prohibition generally would not apply to a person that does not reach an agreement to become an underwriter, placement agent, initial purchaser, or sponsor of an ABS, even if such person were to take substantial steps to reach such an agreement. However, once a person has become a securitization participant, the rule's prohibition would apply to such person commencing on the date on which such person reached, or took substantial steps to reach, an agreement to become a securitization participant. Would this approach be underinclusive because it would not cover parties that might have had a significant role in determining the structure, design, or assembly of an ABS or the composition of the pool of assets underlying the ABS? Why or why not? Are any such concerns about potential underinclusiveness adequately mitigated by the anti-circumvention provision in proposed Rule 192(d)?

D. Prohibition

Section 27B(a) provides that an underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of any such entity, of an ABS, including a synthetic ABS, shall not, at any time for a period ending on the date that is one year after the date of the first closing of the sale of the asset-backed security, engage in any transaction that would involve or result in any material conflict of interest with respect to any investor in a transaction arising out of such activity.[107]

1. Prohibited Conduct

Consistent with Section 27B(a), the prohibition in proposed Rule 192(a)(1) provides that a securitization participant shall not, for a period commencing on the date on which a person has reached, or has taken substantial steps to reach, an agreement that such person will become a securitization participant with respect to an asset-backed security and ending on the date that is one year after the date of the first closing of the sale of such asset-backed security, directly or indirectly engage in any transaction that would involve or result in any material conflict of interest between the securitization participant and an investor in such asset-backed security. As set forth in proposed Rule 192(a)(2), engaging in any transaction would involve or result in any material conflict of interest between a securitization participant and an investor if such transaction is a ''conflicted transaction'' as defined in proposed Rule 192(a)(3). This formulation is designed to effectuate Section 27B by prohibiting a securitization participant from entering into a conflicted transaction that is, in effect, a bet against the ABS that such securitization participant created and/or sold to investors. We believe that this prohibition in the re-proposed rule, along with the proposed definitions of ''conflicted transaction'' discussed below,[108] would provide strong investor protection against such misconduct, while also providing an explicit standard for determining which types of transactions would be prohibited by the re-proposed rule in order to address concerns expressed by commenters to the 2011 proposed rule about not unnecessarily prohibiting or restricting activities routinely undertaken in connection with the securitization process, as well as routine transactions in the types of financial assets underlying covered securitizations.

The prohibition in the re-proposed rule applies to a ''conflicted transaction'' entered into by a securitization participant. This is defined under proposed Rule 192(a)(3) to include two main components. One component is whether the transaction is:

- A short sale of the relevant ABS;
- The purchase of a CDS or other credit derivative pursuant to which the securitization participant would be entitled to receive payments upon the occurrence of a specified adverse event with respect to the relevant asset-backed security; or
- The purchase or sale of any financial instrument (other than the relevant asset-backed security) or entry into a transaction through which the securitization participant would benefit from the actual, anticipated, or potential:
  - Adverse performance of the asset pool supporting or referenced by the relevant ABS;
  - Loss of principal, monetary default, or early amortization event on the relevant ABS; or
  - Decline in the market value of the relevant ABS.

The other component relates to materiality—*i.e.,* whether there is a substantial likelihood that a reasonable investor would consider the relevant transaction important to the investor's investment decision, including a decision whether to retain the ABS.

Paragraphs (i) and (ii) of the proposed definition of ''conflicted transaction'' in proposed Rule 192(a)(3) would capture transactions that constitute direct bets against the relevant ABS itself. In the case of proposed Rule 192(a)(3)(i), such a direct bet against an ABS would be a short sale where the securitization participant sells an ABS that it does not own (or that it will borrow for purposes of delivery). In such a situation, if the price of the ABS declines, then the short selling securitization participant could buy the ABS at the lower price to cover its short and make a profit. However, it is not relevant for purposes of the re-proposed rule whether the securitization participant makes a profit on the short sale. It is sufficient that the securitization participant sells the ABS short. In the case of proposed Rule 192(a)(3)(ii), a direct bet against an ABS would be entering into a credit derivative that references such ABS and entitles the securitization participant to receive a payment upon the occurrence of an adverse event with respect to the ABS such as a failure to pay, restructuring or any other adverse event that would trigger a payment on the derivative contract. It would be irrelevant for the purpose of proposed Rule 192(a)(3)(ii) whether the credit derivative is in the form of a CDS or other credit derivative product because the focus is on the economic substance of the credit derivative as a bet against the relevant ABS without regard to the specific contractual form or structure of the derivative. Proposed Rule 192(a)(3)(ii) would also capture any credit derivative entered into by the securitization participant with the special purpose entity issuer of a synthetic CDO where that credit derivative would entitle the securitization participant to receive payments upon the occurrence of a specified adverse event with respect to an ABS that is referenced by such credit derivative and with respect to which the relevant person is a securitization participant under the re-proposed rule.

Clause (iii) of the proposed definition of ''conflicted transaction'' would capture the purchase or sale of any other financial instrument or entry into a transaction the terms of which are substantially the economic equivalent of a direct bet against the relevant ABS. Specifically, proposed Rule 192(a)(3)(iii) would capture the purchase or sale of any financial instrument (other than the relevant ABS) or entry into a transaction

[107] 15 U.S.C. 77z–2a(a).

[108] The proposed definitions of ''conflicted transaction'' and ''material conflict of interest'' would apply solely for purposes of the re-proposed rule. *See* proposed Rule 192(a)(2) and (3).

through which the securitization participant would benefit from certain actual, anticipated, or potential adverse events with respect to the relevant ABS or its underlying asset pool. The events specified in items (A) through (C) of proposed Rule 192(a)(3)(iii) would capture the various situations pursuant to which an ABS or its underlying asset pool could perform adversely, which would include the actual, anticipated, or potential:

- Adverse performance of the asset pool supporting or referenced by the relevant ABS;
- Loss of principal, monetary default, or early amortization event on the relevant ABS; or
- Decline in the market value of the relevant ABS.

Each of these events would be adverse to investors in the ABS as it would negatively impact the distributions on the relevant ABS and/or its market value. Given that, for example, a security-based swap or other contractual agreement could be structured to reference only one of such events occurring, the proposed definition would capture any such event being referenced as a payment trigger.

The financial instruments captured under proposed Rule 192(a)(3)(iii) would, for example, include entering into the short-side of a derivative (with the special purpose entity issuer of a synthetic CDO or otherwise) that references the performance of the pool of assets underlying the ABS with respect to which the person is a securitization participant under the re-proposed rule and pursuant to which the securitization participant would benefit if the referenced asset pool performs adversely. This is intended to address comments to the 2011 proposed rule in support of a definition of the term ''transaction'' that would include not only a short sale of the relevant ABS or the purchase of CDS protection on the relevant ABS, but would also include the purchase or sale of products that are linked to, or otherwise create an opportunity to benefit from the actual, anticipated, or potential adverse performance of, the pool of assets underlying the relevant ABS.[109] Furthermore, given the potential ability of market participants to craft novel financial structures that can replicate the economic mechanics of the types of transactions described in proposed Rule 192(a)(3)(i) and (ii) without triggering those prongs, proposed Rule 192(a)(3)(iii) should help alleviate the risk of any attempted evasion of the rule that is premised on the form of the transaction rather than its substance. For example, a security-based swap, such as a total return swap, that, in economic substance, creates an opportunity to benefit from the adverse performance of the relevant ABS or the pool of assets underlying the relevant ABS would be captured by proposed Rule 192(a)(3)(iii) regardless of whether the securitization participant attempts to structure such security-based swap in a way to avoid triggering proposed Rule 192(a)(3)(ii).

In addition to the purchase or sale of such financial instruments, proposed Rule 192(a)(3)(iii) would also capture the ''entry into a transaction'' through which the securitization participant would benefit from certain actual, anticipated, or potential adverse events with respect to the relevant ABS or its underlying asset pool. This should similarly help alleviate the risk of any attempted evasion of the rule that is premised on the form of the transaction rather than its substance. For example, in certain synthetic ABS structures, the relevant agreement that the securitization participant enters into with the special purpose entity that issues the synthetic ABS may in some circumstances not be documented in the form of a swap; however, the terms of such agreement are structured to replicate the terms of a swap pursuant to which the special purpose entity that issues the synthetic ABS is obligated to make a payment to the securitization participant upon the occurrence of certain adverse events in respect of the ABS for which the person is a securitization participant under the re-proposed rule. Proposed Rule 192(a)(iii) would capture such an agreement based on the economic substance of the transaction.

We received comment to the 2011 proposed rule that the scope of prohibited transactions should be limited to transactions other than those that are an integral part of the creation and sale of the relevant ABS.[110] We are not including such a standard in the re-proposed rule. Under the re-proposed rule, entering into an agreement to serve as a securitization participant with respect to an ABS would not itself be a ''conflicted transaction.'' However, any transaction that the securitization participant enters into with respect to the creation or sale of such ABS (*e.g.,* a transaction whereby a securitization participant takes the short position in connection with the creation of a synthetic ABS) would need to be analyzed to determine if it would be a ''conflicted transaction'' under the re-proposed rule. Proposed Rule 192(a)(3)(iii) would not capture the purchase or sale of the ABS with respect to which the person is a securitization participant under the re-proposed rule. The short sale of the relevant ABS would be separately covered under proposed Rule 192(a)(3)(i), and the sale of ABS to investors by an underwriter, placement agent, or initial purchaser would not be captured as a conflicted transaction. Also, the re-proposed rule is not intended to disincentivize a securitization participant from retaining portions of an ABS that it creates or sells.

Under proposed Rule 192(a)(3)(iii), it would not be necessary for the securitization participant to actually benefit from a conflicted transaction. Rather, it would be sufficient that the transaction creates an opportunity for the securitization participant to benefit, for example, from a decline in the market value of the ABS. The relevant transaction would be a ''conflicted transaction'' even absent such a decline in market value.

We received comments both in opposition to and in support of including the modifier ''directly or indirectly'' as used in the relevant interpretation in the 2011 proposed rule[111] when describing benefits accruing to the securitization participant. One commenter stated that, given that the rule applies to affiliates and subsidiaries and that there are many inherent conflicts of interest in securitizations, it is difficult to determine many circumstances where there are indirect benefits and that, if indirect benefits are to be addressed, they should be limited to those that are known or reasonably foreseeable.[112] Another commenter stated that securitization participants have no way to ascertain the scope or meaning of benefiting indirectly from a specified short transaction.[113] However, another commenter stated that securitization participants should not be allowed to perform indirectly what they are barred from doing directly.[114] For example, a

[109] *See, e.g.,* Merkley-Levin Letter at 8 (expressing support for approach that would capture a securitization participant directly or indirectly benefiting from the adverse performance of the relevant asset pool).

[110] *See* ASF Letter at 17 (stating that the statutory reference to engaging in ''any transaction'' was intended to mean a transaction other than the ABS transaction itself, and accordingly, that the rule should not prohibit a firm from taking the short position in connection with the creation of a synthetic ABS).

[111] *See* 2011 Proposing Release at 60330.

[112] ABA Letter at 5–6.

[113] SIFMA Letter at 28.

[114] Tewary Letter 1 at 7.

transaction structure could route CDS payments to the securitization participant through a variety of different legal entities that are structured to not be affiliates or subsidiaries of the securitization participant or could attempt to recharacterize such payments in a way so as to obscure the ultimate economics of a conflicted transaction. Such a transaction structure would still be captured by proposed Rule 192(a)(3)(iii) because the securitization participant is receiving a benefit that can be traced back to the actual, anticipated or potential adverse performance of the relevant ABS or its underlying asset pool. Accordingly, we have not included the modifier ''directly or indirectly'' in proposed Rule 192(a)(3)(iii) when describing benefits accruing to the securitization participant. We believe such reference to be unnecessary because any transaction under which a securitization participant would receive a benefit that can be traced back to the actual, anticipated, or potential adverse performance of the relevant ABS or its underlying asset pool would already be captured by proposed Rule 192(a)(3)(iii). Moreover, we believe that the anti-circumvention language in proposed Rule 192(d) would help to address concerns about attempts to evade the re-proposed rule's prohibition if a securitization participant were to route payments through multiple transactions or recharacterize payments so as to obscure the economics of a conflicted transaction.

In a change from the 2011 proposed rule, the re-proposed rule would not define a conflicted transaction to include the scenario in which a securitization participant would benefit directly or indirectly (*e.g.,* from fees or other forms of remuneration, or the promise of future business, fees, or other forms of remuneration) as a result of allowing a third party, directly or indirectly, to structure the relevant ABS or select assets underlying the ABS in a way that facilitates or creates an opportunity for that third party to benefit from a short transaction.[115] Instead, we are taking a different approach to address possible conflicts by proposing to define the term ''sponsor'' in a manner such that the re-proposed rule's prohibition on engaging in conflicted transactions would apply directly to most of the parties whose conduct would have been covered by the 2011 proposed rule. The definition of the term ''sponsor'' is discussed in Section II.B.2. above.

Certain commenters to the 2011 proposed rule requested clarification regarding how prohibited activity would be distinguished from activity undertaken independently of, and not in connection with, a securitization.[116] Other commenters expressed concerns about unnecessarily prohibiting or restricting activities routinely undertaken in connection with the securitization process.[117] The re-proposed rule would address these concerns by providing additional specificity about the scope of transactions that would be covered by the rule through the proposed definition of the term ''conflicted transaction.'' Because the proposed definition of ''conflicted transaction'' is limited in scope to transactions that are effectively a bet against the relevant ABS or its underlying pool of assets, the re-proposed rule would not apply to transactions that are wholly independent of, and not in connection to, the relevant securitization. Moreover, as discussed above, those persons that only perform activities that are administrative, legal, due diligence, custodial, or ministerial in nature with respect to an ABS would be excluded from the definition of ''sponsor.'' [118]

Consistent with Section 27B's prohibition of conflicts of interest that are ''material,'' the definition of ''conflicted transaction'' in proposed Rule 192(a)(3) requires that there is a substantial likelihood that a reasonable investor would consider the relevant transaction important to the investor's investment decision whether to acquire the asset-backed security. This is similar to the discussion in the release for the 2011 proposed rule,[119] which relied on the ''reasonable investor'' standard of materiality articulated in *Basic* v. *Levinson.*[120]

The use of this standard would not in this context imply that a transaction otherwise prohibited under the re-proposed rule would be permitted if there were adequate disclosure made by the securitization participant to the relevant investor. The prohibition would apply to transactions that are bets against the relevant ABS whether or not such transactions are disclosed to investors in the ABS. While certain commenters to the 2011 proposed rule supported the use of disclosure to manage material conflicts of interest,[121] other commenters opposed the use of disclosure to manage material conflicts of interest.[122] One commenter to the 2011 proposed rule stated that disclosure alone could not cure material conflicts of interest with respect to synthetic ABS but that disclosure would be sufficient to manage material conflicts of interest in connection with non-synthetic ABS.[123] We have not included an exception to the re-proposed rule based on disclosure of potential material conflicts of interest because we believe that such disclosure would be insufficient in this context as the re-proposed rule is designed to prevent the sale of ABS that are tainted by material conflicts of interest by prohibiting a securitization participant from entering into a conflicted transaction with respect to ABS that it creates or sells to investors. If the re-proposed rule were to include a disclosure-based exception, then securitization participants would still be allowed to enter into a transaction that constitutes a bet against the same ABS that they are creating or selling to investors so long as such conflicted transaction is disclosed. Even if disclosure of a conflicted transaction would reduce the likelihood that an investor would invest in a tainted ABS, the incentive for a securitization participant to enter into the conflicted transaction would not be wholly

[115] *See* 2011 Proposing Release at 60331 (explaining that a third party might directly or indirectly select assets underlying an ABS through its relationship with a securitization participant and that such third party, rather than the securitization participant, may attempt to enter into a short transaction of the type that the securitization participant would be prohibited from entering into itself under the 2011 proposed rule).

[116] *See, e.g.,* comment letter from Commercial Real Estate Financial Council (Feb. 13, 2012) (''CRE Letter'') at 4–5; SIFMA Letter at 6, 25; ASF Letter at 8–10.

[117] *See, e.g.,* ASF Letter at 4–6; comment letter from Association for Financial Markets in Europe, Asia Securities Industry & Financial Markets Association, and International Capital Market Association (Feb. 13, 2012) (''AFME/ASIFMA/ICMA Letter'') at 6; CRE Letter at 4–5; SIFMA Letter at 8, 18–21; comment letter from Northwest Farm Credit Services, FLCA (Feb. 10, 2012) (''Northwest Letter'') at 4; comment letter from Fannie Mae (Jan. 17, 2012) (''Fannie Mae Letter'') at 2–8.

[118] *See* Section II.B.2.

[119] *See* 2011 Proposing Release at 60331 (citing to *Basic* v. *Levinson* and stating that, in considering whether there is a substantial likelihood that a reasonable investor would consider the conflict important to their investment decision, it is not possible to designate in advance certain facts or occurrences as determinative in every instance).

[120] *See Basic* v. *Levinson,* 485 U.S. 224, 231–32 (1988) (citing *TSC Industries, Inc.* v. *Northway, Inc.,* 426 U.S. 438, 449 (1976)).

[121] *See, e.g.,* ABA Letter at 6–8.

[122] *See, e.g.,* AFR Letter at 8; Barnard Letter at 2; Better Markets Letter at 8–9; Public Citizen Letter at 2–3; Tewary Letter 1 at 15; Merkley-Levin Letter at 21. Certain of these commenters, however, felt that if providing disclosure were nevertheless permitted to manage conflicts, the disclosure should satisfy strict requirements, including that it should: be in written form; be delivered to investors a specific time period prior to investment; contain particular information; require investor acknowledgment of receipt of such disclosure and consent to the conflict; and be prominent, clear, and comprehensive.

[123] *See* AII Letter at 3–4.

eliminated. Furthermore, a disclosure-based exception to the re-proposed rule would fail to align with Section 27B given that the proposed prohibition would apply for one year after the date of the first closing of the sale of the relevant ABS.

Similarly, the use of the reasonable investor standard would not imply that a transaction otherwise prohibited by the re-proposed rule would be permitted if an investor selected or approved the assets underlying the ABS. Although certain commenters to the 2011 proposed rule suggested that the rule should not prohibit conflicts of interest between a securitization participant and an investor in an ABS if the investor was involved in selecting the underlying assets or approving the underlying portfolio,[124] we do not believe that investor consent would provide adequate protection against misconduct. Even if an investor in an ABS is given accurate information about the pool of assets underlying the ABS, and consents to the asset pool on the basis of such information, a securitization participant could nonetheless structure the ABS or construct the underlying asset pool in a way that would position the securitization participant to benefit from the adverse performance of the assets underlying the ABS. Additionally, we are concerned that an exclusion on the basis of investor consent could cause some securitization participants to pressure investors to provide written consent to the portfolio of underlying assets as a condition to participating in an ABS offering, which would undermine the effectiveness and purpose of such disclosure and the meaningfulness of the investor's consent. For these reasons, we are not including such an exclusion in the re-proposed rule.

Also, although certain commenters to the 2011 proposed rule supported limiting the scope of material conflicts of interest to ABS transactions that are intentionally designed to fail,[125] other commenters to the 2011 proposed rule were opposed to an intentionally designed-to-fail approach to determine what constitutes a material conflict of interest.[126]

[124] *See* Morgan Stanley Letter at 13, 15–17; SIFMA Letter at 24.

[125] *See* ASF Letter at 11; Fannie Mae Letter at 1–2; SIFMA Letter at 27–28. For example, an ABS transaction in which one or more securitization participants structure the ABS transaction or select the underlying assets with the intent or expectation that the ABS securities will default or decline in value would be intentionally designed to fail.

[126] *See* AFR Letter at 5; Better Markets Letter at 7; Merkley-Levin Letter at 9–10.

Under the re-proposed rule, a securitization participant would be prohibited from designing an ABS to intentionally fail and then entering into a conflicted transaction in order to profit from the adverse performance of the ABS; however, the re-proposed rule would not apply only to ABS that are intentionally designed to fail. We are not proposing an intentionally designed-to-fail test to determine what constitutes a material conflict of interest because we believe that such a test could lead to attempts to evade the rule. Moreover, the need to prove intent could make enforcement of the rule more difficult, thereby potentially weakening investor protection. We believe that the proposed definition of ''material conflict of interest'' in the re-proposed rule is consistent with Section 27B, which is not limited only to ABS that are intentionally designed to fail.

As discussed below, both the proposed risk-mitigating hedging activities exception and the proposed bona fide market-making activities exception to the re-proposed rule include a requirement that a securitization participant have certain documented policies and procedures in place related to its compliance with the requirements of the relevant exception. However, the re-proposed rule does not include a more generalized requirement that a securitization participant would be required to have documented policies and procedures in place that are reasonably designed to prevent the securitization participant from violating the re-proposed rule's prohibition with respect to conflicted transactions regardless of whether the securitization participant is relying on an exception from the re-proposed rule. This is because, unlike the exceptions that would include specific requirements that would need to be satisfied in order for securitization participants to meet such exceptions, the prohibition in the re-proposed rule is a general prohibition on entering into conflicted transactions that cannot be waived on the basis of certain documented policies and procedures. We seek comment below on whether such a requirement should be included in the re-proposed rule.

Request for Comment

44. Are there any changes we should make to clarify the application of proposed Rule 192(a)? If so, what changes should we make and why? Should we revise the approach to defining the unlawful activity that is subject to the prohibition under the re-proposed rule? If you believe that the approach should be different, please provide an alternative approach and explain why such approach would be preferable and how it would be consistent with the prohibition on material conflicts of interest in Section 27B.

45. Does the re-proposed definition of ''material conflicts of interest'' accurately capture the material conflicts of interest that Section 27B is designed to address? If you believe that there is a definition that better identifies the material conflicts of interest that Section 27B is designed to address, please provide a revised definition and an explanation for the revisions. For example, would it clarify the application of proposed Rule 192(a) if the qualification about the transaction being important to a reasonable investor's investment decision were included in the definition of ''material conflict of interest'' in proposed Rule 192(a)(2) rather than, or in addition to, in the definition of ''conflicted transaction'' in proposed Rule 192(a)(3)?

46. Proposed Rule 192(a)(1) refers to ''directly or indirectly'' engaging in a transaction involving or resulting in a material conflict of interest. Is the reference to ''directly or indirectly'' necessary in order to capture multi-step transactions or conflicted transactions entered into by a securitization participant through a third party? Is the reference to ''directly or indirectly'' unnecessary because any such attempts to ''indirectly'' engage in a conflicted transaction would be covered by the anti-circumvention provision in proposed Rule 192(d)? In your responses to each of these questions, please explain why or why not.

47. Is there activity that securitization participants currently engage in with respect to ABS that would fall within the definition of ''conflicted transaction''? If so, please provide a detailed explanation of such activity, the securitization participants involved with respect thereto, and the frequency as to which such activity is engaged in by such securitization participants. Please describe how that activity is or is not consistent with Section 27B.

48. Is there any activity that you believe would fall within the scope of the proposed definition of ''conflicted transaction'' but is not the type of transaction that Section 27B is intended to prohibit? Please provide a detailed description of how the rule could define this activity and those transactions, and the conditions that should attach to any such exemption in order to protect investors from the misconduct that is targeted by Section 27B.

49. Is there any activity that you believe would not fall within the scope of the proposed definition of ''conflicted

transaction'' but that is the type of transaction that Section 27B is intended to prohibit? If so, please explain why and provide a detailed description of such activity or transactions.

50. Is it appropriate for proposed Rule 192(a)(3)(ii) to cover the purchase of a credit default swap or any other credit derivative pursuant to which the securitization participant would be entitled to receive payments upon the occurrence of specified credit events in respect of the relevant ABS? Should proposed Rule 192(a)(3)(ii) also apply to the purchase of any security-based swap pursuant to which the securitization participant would be entitled to receive payments upon the occurrence of a decline in price of the relevant ABS? Would such an approach be overinclusive or otherwise result in significant overlap with the coverage of proposed Rule 192(a)(3)(iii)?

51. Are there any special considerations regarding the use of total return swaps that should be addressed in the context of the proposed definition of ''conflicted transaction''?

52. Please discuss the impact of the proposed definition of ''conflicted transaction'' on entities with multiple affiliates or subsidiaries, particularly with respect to how a securitization participant would benefit from certain actual, anticipated, or potential adverse events with respect to the relevant ABS or its underlying asset pool under proposed Rule 192(a)(3)(iii). Is the proposed definition of ''conflicted transaction'' as applied to entities with multiple affiliates or subsidiaries appropriate? If not, please explain why and provide a description of any additional qualifying language or alternative that would be more appropriate and consistent with Section 27B.

53. The re-proposed rule does not include a disclosure-based or investor approval-based exception for managing material conflicts of interest. If you believe that the re-proposed rule should allow securitization participants to manage potential conflicts of interest using disclosure or through obtaining investor approvals, then please explain how disclosure or investor approval of such potential conflicts of interest would adequately protect investors against the risks associated with such conflicts of interest, particularly in light of the concerns expressed in this re-proposal. How could a disclosure exception be structured so that the resulting disclosure would not contain vague boilerplate language? Should the rule also require that a securitization participant disclose that it entered into a transaction that would be a conflicted transaction? How could this disclosure be provided to investors if the securitization participants engage in transactions that occur after the offering but within the timeframe of the prohibition? Please also explain how disclosure or investor approval would be consistent with Section 27B.

54. The re-proposed rule would not be limited to only capturing designed-to-fail transactions and therefore would not include a designed-to-fail standard for what constitutes a material conflict of interest. If you believe that a designed-to-fail standard should be the relevant standard instead of the one that is included in the re-proposed rule, then please explain how such standard would adequately protect investors against the risks associated with such conflicts of interest, particularly in light of the concerns expressed in the re-proposal. Please also explain how such a standard would be consistent with Section 27B.

55. As discussed above, the re-proposed rule does not expressly prohibit actions of third parties in the proposed definition of the term ''material conflict of interest'' and takes a different approach to address possible conflicts than the approach described in the interpretations included in the 2011 Proposing Release by defining the term ''sponsor'' in a manner that we believe would directly capture most of the parties whose conduct would have been covered by the 2011 proposed rule.[127] If you believe that, instead of the proposed approach, we should revise the definition of the term ''material conflict of interest'' to cover the actions of a third party consistent with the 2011 proposed rule, please tell us what activities should or should not be within the scope of ''allowing a third party, directly or indirectly, to influence the structure, design, or assembly of the relevant asset-backed security or the composition of the pool of assets underlying the relevant asset-backed security in a way that facilitates or creates an opportunity for that third party to benefit from a conflicted transaction'' as described in the release for the 2011 proposed rule and why. Also tell us whether this alternative would directly capture the conduct of parties that the re-proposed rule intends to cover. If you support such a revised definition, please explain whether and how it is consistent with Section 27B.

56. Are there any unintended effects on securitizations from the proposed definitions of the terms ''material conflicts of interest'' and ''conflicted transaction''? If so, please provide alternative definitions designed to minimize such effects, and explain how those alternative definitions would be consistent with Section 27B.

57. Under the re-proposed rule, the issuance of a synthetic ABS where a securitization participant enters into the short side of the transaction with the issuing entity of the synthetic ABS would be a ''conflicted transaction'' because the securitization participant would be entitled to payment if the referenced assets, and thus the ABS, perform poorly. Is this the appropriate result? Please explain why or why not. Are there examples of synthetic ABS where a securitization participant taking the short position in the referenced assets would not necessarily benefit from the adverse performance of the underlying asset pool, the loss of principal, monetary default, or early amortization event, or decline in the market value of the relevant ABS? If so, should the definition of ''conflicted transaction'' exclude the issuance of such synthetic ABS? If so, please explain how such exclusion would be consistent with Section 27B.

58. Are there transactions that would be ''conflicted transactions'' under the re-proposed rule that occur with respect to municipal ABS? If so, please describe those transactions, the relevant persons that are parties thereto, and the frequency as to which they are entered into by such persons.

59. Should the re-proposed rule include a requirement that a securitization participant have documented policies and procedures in place that are reasonably designed to prevent the securitization participant from violating the re-proposed rule's prohibition with respect to conflicted transactions? What should the consequences be for a securitization participant that did not follow such procedures? Would such a requirement provide effective protection for investors? Should such a requirement be in addition to or in lieu of the proposed compliance program requirements discussed below with respect to the risk-mitigating hedging activities exception and the bona fide market-making activities exception?

60. If a general compliance program requirement as described in question 59 were to be included in the re-proposed rule, are there any types of securitization participants that should be exempted from such requirement? For example, should government entities (including municipal entities) and/or smaller securitization participants be exempt from such

[127] *See* 2011 Proposing Release at 60331 (describing Item 1(B) of the material conflict of interest test).

requirement, or should the specific requirements or conditions of such requirement vary based on the type of entity? Alternatively, should the implementation of such requirement as applied to government entities and/or smaller securitization participants be delayed in order to give such entities more time to comply with the requirement? In your responses, please explain how ''smaller securitization participant'' should be defined for purposes of any such exemption or delayed implementation.

61. We seek comment on whether the re-proposed rule should include a safe harbor whereby a person that meets the proposed definition of ''securitization participant'' but nonetheless has no involvement in the structure, design, or assembly of an ABS or the composition of the pool of assets underlying the ABS would be exempt from the re-proposed rule's prohibition on material conflicts of interest. Would such a safe harbor address concerns that the re-proposed rule might unduly burden parties that would not have the incentive or ability to engage in conduct prohibited by Section 27B? Would it weaken the conflicts of interest protection of the re-proposed rule, and if so, how? Are there specific conditions that could be included in the safe harbor in order to address any such concerns? If so, please identify any such conditions. Please also explain whether and how such a safe harbor would be consistent with Section 27B.

62. We seek comment on whether the re-proposed rule should include a safe harbor whereby a securitization participant could rely on the judgment of a governance specialist as to whether a transaction would be a ''conflicted transaction'' for purposes of the re-proposed rule, in the manner suggested by one commenter to the 2011 proposed rule.[128] Would such a safe harbor minimize any market disruption that might result from any potential ambiguity about whether a transaction would be a ''conflicted transaction''? Would it undermine the effectiveness of the re-proposed rule by permitting reliance on the judgment of a third-party to determine compliance with the rule? How could we help ensure the independence of a third-party specialist that receives compensation directly or indirectly from securitization participants to pass judgment on whether a transaction is a ''conflicted transaction''? Is this a workable framework to reduce conflicts of interest? Please explain why or why not. If you believe the re-proposed rule should include such a safe harbor, please address the benefits of the safe harbor and identify any conditions that should be included in the safe harbor *(e.g.,* a limitation on the types of entities that could serve as a governance specialist, any minimum qualifications for an entity to qualify to serve in such capacity, and/or a condition that the conclusion reached by the governance specialist be reasonable in light of the facts and circumstances of the transaction). Please provide an estimate of the anticipated costs associated with retaining the services of a governance specialist for this purpose. Please also explain whether and how such a safe harbor would be consistent with Section 27B.

2. Anti-Circumvention

We received comment on the 2011 proposed rule that the rule should address potential evasion of the rule's prohibition on material conflicts of interest, and commenters noted a variety of ways in which a securitization participant might attempt to evade the re-proposed rule's prohibition.[129] We agree with such commenters that potential evasion of the re-proposed rule could weaken the re-proposed rule's conflict of interest protection. Accordingly, we are proposing Rule 192(d), which provides that, if a securitization participant engages in a transaction that circumvents the prohibition in proposed Rule 192(a)(1), the transaction will be deemed to violate proposed Rule 192(a)(1). For example, proposed Rule 192(a)(3) defines ''conflicted transaction'' as three specific categories of transactions because they are common types of transactions that a person might utilize in order to ''bet'' against the performance of a financial asset. We believe that the re-proposed rule's prohibition should be premised on the substance of the transaction rather than on its form, label, or written documentation. Proposed Rule 192(d) would address a securitization participant circumventing the re-proposed rule's prohibition on material conflicts of interest by structuring one or more transactions to fall outside of the prohibition (including its permitted exceptions) while nonetheless engaging in a transaction that is economically equivalent to a type of transaction specified in the proposed definition of ''conflicted transaction.''

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63. We seek commenters' views regarding the anti-circumvention provision in proposed Rule 192(d). Is it appropriate for the re-proposed rule to prohibit transactions that circumvent the prohibition in proposed Rule 192(a)(1) by deeming such transactions to violate proposed Rule 192(a)(1)? Why or why not?

64. Should proposed Rule 192(d) be modified such that a transaction circumventing the re-proposed rule's prohibition will only be deemed to violate proposed Rule 192(a)(1) if the securitization participant knows or has reason to know that the transaction is undertaken for the purpose of circumventing the re-proposed rule's prohibition? Please explain why or why not.

65. Should proposed Rule 192(d) be modified in order to address other ways in which a person might attempt to evade the prohibition in the re-proposed rule, including with regard to the proposed exceptions for risk-mitigating hedging activities, liquidity commitments, or bona fide market-making activities? If so, how should proposed Rule 192(d) be modified and why?

66. Would proposed Rule 192(d) be overinclusive or otherwise result in potential uncertainty as to the coverage of the re-proposed rule's prohibition, and if so, how should proposed Rule 192(d) be modified to address such concerns? Are there examples of transactions that proposed Rule 192(d) would prohibit but should not? Please explain how any such modifications to proposed Rule 192(d) would be consistent with Section 27B.

67. We seek comment on whether the relationship between proposed Rule 192(d) and the proposed exceptions for risk-mitigating hedging activities, liquidity commitments, and bona fide market-making activities should be clarified. If so, please explain what clarifications are necessary, and why.

68. We seek comment on an alternative anti-circumvention provision that would instead provide that, if a securitization participant engages in a transaction or a series of related transactions as part of a plan or scheme

[128] *See* comment letter from Pentalpha Surveillance LLC (Sept. 1, 2021) (''Pentalpha Letter'') at 2.

[129] *See, e.g.,* Better Markets Letter at 3–5 (stating that the re-proposed rule should include functional definitions and descriptions to prevent evasion of the rule through labeling or the creation of novel financial instruments or novel categories of securitization participants that appear to fall outside the purview of the rule but in reality and substance should be subject to the restrictions in Section 27B); Morgan Stanley Letter at 4 (stating that anti-evasion principles could be applied where counterparties enter into security based swap transactions solely to avoid application of the prohibition); Tewary Letter 1 at 7 (stating that the Commission would not want to enable securitization participants to perform indirectly what they are barred from doing directly).

to evade the prohibition in proposed Rule 192(a)(1), such transaction or series of related transactions will be deemed to violate proposed Rule 192(a)(1). Would this alternative anti-circumvention provision address any concerns about potential overinclusiveness of proposed Rule 192(d), including the absence of a knowledge qualifier?

E. Exception for Risk-Mitigating Hedging Activities

Section 27B(c) provides that the prohibition in Section 27B(a) does not apply to risk-mitigating hedging activities in connection with positions or holdings arising out of the underwriting, placement, initial purchase, or sponsorship of an ABS, provided that such activities are designed to reduce the specific risks to the underwriter, placement agent, initial purchaser, or sponsor associated with positions or holdings arising out of such underwriting, placement, initial purchase, or sponsorship.[130] Consistent with Section 27B(c)(1), we are proposing that the prohibition not apply when a securitization participant engages, subject to certain conditions, in risk-mitigating hedging activities in connection with its securitization activities. The proposed risk-mitigating hedging activities exception would be conditioned on the securitization participant satisfying all three proposed conditions included in proposed Rule 192(b)(1)(ii), as discussed below.

Risk-mitigating hedging activities of a securitization participant permitted under the proposed exception would include hedging conducted in connection with and related to individual or aggregated positions, contracts, or other holdings of the securitization participant arising out of its securitization activities, including the origination or acquisition of assets that it securitizes.[131] Given that the accumulation of assets prior to the issuance of an ABS is a fundamental component of assembling an ABS prior to its sale, the proposed risk-mitigating hedging activities exception would allow for a securitization participant to not only hedge retained ABS positions (in compliance, as applicable, with Regulation RR) but also hedge exposures arising out of the assets that are originated or acquired by the securitization participant in connection with warehousing assets in advance of an ABS issuance. The proposed risk-mitigating hedging activities exception would also allow for the relevant hedging activity related to a securitization participant's securitization activity to be done on an aggregated basis and would not require that the exempt hedging be conducted on a trade-by-trade basis. Given the nature of the ABS market and the types of assets that collateralize ABS (such as receivables or mortgages), it may not be possible for a securitization participant to enter into a hedge with respect to an ABS or any of its underlying assets on an individualized basis. Therefore, we believe that this approach to the risk-mitigating hedge exception should allow securitization participants sufficient flexibility to design their securitization-related hedging activities in a way that is not unduly complicated or cost prohibitive.

In order to distinguish permitted risk-mitigating hedging activity under the re-proposed exception from prohibited conflicted transactions that would constitute a bet against the relevant ABS, we are proposing certain conditions that would have to be satisfied in order for the risk-mitigating hedging activity exception to apply. We believe that this proposed approach is consistent with views of certain commenters to the 2011 proposed rule that recommended a narrow risk-mitigating hedging activities exception that is designed to reduce specific risks and that includes robust conditions.[132] Each of these conditions is discussed in detail below.

Under the re-proposed exception, the initial issuance of an ABS, such as a synthetic ABS, would not be risk-mitigating hedging activity.[133] Although we received comment that securitization participants should be permitted to enter into a synthetic ABS transaction pursuant to the risk-mitigating hedging activities exception because such transaction is the economic equivalent of a bilateral CDS transaction where the counterparty to the CDS is not an ABS issuer,[134] the re-proposed rule prohibits a securitization participant from creating and/or selling a new synthetic ABS to hedge a position or holding. In these synthetic ABS transactions, a securitization participant is typically a party to a CDS contract with the issuing entity of the ABS. We are concerned that such activity would weaken the conflicts of interest protection of the re-proposed rule by allowing a securitization participant to engage in a transaction (the CDS contract(s) with the issuer) where cash paid by ABS investors to acquire the newly created synthetic ABS would fund the relevant CDS contract(s) and be available to make a payment to the securitization participant upon the occurrence of an adverse event. This type of transaction was the focus of Congressional scrutiny in connection with the financial crisis of 2007–2009.[135] Moreover, the securitization participant would perform a central role in creating, structuring, and/or marketing the relevant synthetic ABS that is being issued and, in connection with such role, would likely obtain additional benefits such as arranger or manager compensation. These factors would go beyond engaging in risk-mitigating hedging activity that is designed to reduce specific risks to the securitization participant in connection with positions or holdings arising out of its securitization activities and could raise conflicts of interest with investors in the new synthetic ABS that we believe Section 27B is intended to prohibit.

1. Specific Risk Identification and Calibration Requirements

We are proposing in Rule 192(b)(1)(ii)(A) that the first condition of the exception be that, at inception of the hedging activity and at the time of any adjustments to the hedging activity, the risk-mitigating hedging activity of the securitization participant is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks arising in connection with and related to identified positions, contracts, or other holdings of the securitization participant arising out of its securitization activities, based upon the facts and circumstances of the identified underlying and hedging positions, contracts, or other holdings and the risks and liquidity thereof. This condition would be the essential requirement of the proposed exception that the relevant hedging activity is risk-mitigating. Various activities of a securitization participant, such as acquiring a portfolio of assets in anticipation of issuing an ABS or retaining a portion of an ABS issuance with respect to which it is a securitization participant, expose the securitization participant to the risk that such positions could decline in value. Permissible risk-mitigating hedging

[130] 15 U.S.C. 77z–2a(c)(1).

[131] This standard would not broaden, limit, or otherwise modify the requirements applicable to a securitization participant pursuant to Regulation RR.

[132] *See* Barnard Letter at 2; Better Markets Letter at 9–12; Merkley-Levin Letter at 16–18; Tewary Letter 1 at 10.

[133] As discussed above in Section II.D., the proposed definition of the term ''conflicted transaction'' does not exclude the issuance of synthetic ABS.

[134] *See* ASF Letter at 25–26; comment letter from Cadwalader, Wickersham & Taft LLP (Feb. 13, 2012) (''Cadwalader Letter'') at 2–6; SIFMA Letter at 22–23.

[135] *See* Senate Financial Crisis Report.

activity, under the re-proposed rule, would be required to be designed to reduce or significantly mitigate such risks [136] and could not ''overhedge'' such risks in a way that would result in a net short exposure to the relevant ABS. This proposed condition is designed to preclude a securitization participant from engaging in speculative activity that is designed to gain exposure to incremental risk by, for example, entering into a CDS contract referencing a retained exposure where the notional amount of the CDS exceeds the amount of the relevant exposure intended to be hedged. Such a transaction would provide the securitization participant with an opportunity to profit from a decline in the value of the relevant retained exposure rather than simply to reduce its risk to it. Therefore, although the relevant risks arising from a securitization participant's securitization activity would be permitted to be hedged on an aggregated basis to address more than one exposure arising from such activity, such risks would need to be specific and identifiable at the outset of the hedging activity. The proposed requirement that the risks must be specific and identifiable means that a securitization participant would not be permitted to rely on the proposed risk-mitigating hedging activities exception if it were to enter into a CDS contract referencing a retained ABS interest for the purpose of hedging generalized risks that it believes to exist based on non-position specific modeling or other considerations. In order to make a determination of whether the hedge is designed so as not to ''overhedge'' positions related to a securitization participant's securitization activities, the hedge would need to be tied to specific exposures that exist and are specifically identifiable. Otherwise, it would be impractical or impossible to make that determination, and the proposed exception should not apply. Whether a risk is ''specific'' and ''identifiable'' depends on the facts and circumstances of the positions, contracts, or other holdings of the securitization participant, and these terms are not defined in the re-proposed rule. However, we seek comment below on indicia of whether a risk is specific and identifiable, and whether such indicia should be specified in the rule.

We recognize that the risks of the relevant exposures are dynamic and may change over time and that new risks may emerge in a way that would make the hedging activity that was designed at inception less effective. The prohibition of the re-proposed rule only applies for a limited timeframe,[137] and this proposed condition does not restrict making adjustments to a hedge over time. However, in order to prevent evasion, the requirements of this proposed condition would apply not only at the inception of the hedging activity but also whenever such hedging activity is subsequently adjusted during the time period in which the prohibition applies.[138] Therefore, any changed or new risks that are being hedged would need to be specifically identified, and the adjusted hedging activity would need to be tied to them.

Similarly, we are proposing in Rule 192(b)(1)(ii)(B) that the second condition of the exception be that the risk-mitigating hedging activity would be required to be subject, as appropriate, to ongoing recalibration by the securitization participant to ensure that such hedging activity satisfies the requirements applicable to the first condition of the exception and does not facilitate or create an opportunity to benefit from a conflicted transaction other than through risk-reduction. For example, if a securitization participant enters into a hedge that would be permitted under the exception and subsequent to that hedge, the risk exposure is reduced, under the proposed condition, the securitization participant would be required to ensure that it is not ''overhedged'' so that the position would not constitute a bet against the relevant ABS, which could require the securitization participant to adjust or recalibrate its hedge. We believe that this condition would help minimize the ability of a securitization participant to engage in hedging activity that could create material conflicts of interest with investors in the relevant ABS. The second condition does not specify an exact frequency as to which a securitization participant would be required to recalibrate its hedge; however, we seek comment regarding this below.

In addition, both the first and second conditions described above are consistent with comments to the 2011 proposed rule recommending we clarify that speculative or profit-making activity would be inconsistent with activity that should be eligible to qualify for the risk-mitigating hedging activities exception,[139] that risk-mitigating hedging activities should not result in exposure to incremental risk,[140] and that the risk-mitigating hedging activities exception should not permit profiting from a decline in the value of the ABS.[141]

The first and second proposed conditions also set forth a principle-based approach that should not unduly disrupt normal course hedging activities that do not present material conflicts of interest with ABS investors and therefore should reduce the compliance burden of the proposed exception. For example, we received comment to the 2011 proposed rule that a securitization participant may not be able to create a hedge that exactly offsets any exposure arising from a specific risk.[142] The re-proposed exception would not require that a risk-mitigating hedge have an exact negative correlation with the exposure being hedged, as that might create an unattainable standard for securitization participants seeking to rely on the risk-mitigating hedging activities exception. Instead, the proposed first and second conditions to the exception are premised on the relevant hedging activity being designed to reduce the specific risks to the securitization participant associated with its positions or holdings and not facilitating or creating an opportunity to benefit from a conflicted transaction other than through such risk-reduction.

On the other hand, we did receive a comment to the 2011 proposed rule that there should be exact negative correlation between the risk being hedged and the corresponding hedge position rather than rough negative correlation, and if exact negative correlation were impossible, the commenter recommended that the rule require that a securitization participant provide an explanation, certified by the chief executive officer and chief compliance officer of the securitization participant, of the reasons for why exact negative correlation was impossible.[143] We did not add an exact negative correlation standard to the re-proposed risk-mitigating hedging activities exception out of concern that such a standard could be unattainable in many circumstances given the potential complexity of positions, market conditions at the time of the hedge transaction, availability of hedging products, costs of hedging, and other

[136] For example, such risks would include the market risk of the price decline of warehoused assets or the interest rate risk arising between the interest rate accruing on a retained ABS position and any financing used to acquire it.

[137] *See* Section II.C. for a discussion of the time period during which the prohibition applies.

[138] *Id.*

[139] *See* Tewary Letter 1 at 10.

[140] *See* AFR Letter at 9.

[141] *See* Merkley-Levin Letter at 17.

[142] *See* AII Letter at 2.

[143] *See* Better Markets Letter at 11.

circumstances at the time of the transaction that would make a hedge with exact negative correlation impractical or unworkable. For example, a securitization participant may not be able to hedge its exposure on an individualized basis and may have to enter into an index-based hedging transaction. However, the presence of negative correlation would generally indicate that the hedging activity reduced the risks it was designed to address, and the first and second conditions to the proposed risk-mitigating hedging activities exception would serve to promote risk-mitigating hedging activity where there is negative correlation between the risk being hedged and the corresponding hedged position because the relevant risk would be required to be specifically identified and the risk-mitigating hedging activity could not facilitate or create an opportunity to benefit from a conflicted transaction other than through risk reduction. The first and second conditions to the proposed risk-mitigating hedging activities exception would also allow for consideration of the facts and circumstances of the particular exposure or exposures and the related hedging activity, including the type of position being hedged, market conditions, depth and liquidity of the market for the underlying and hedging positions, and type of risk being hedged.

We also did not include a condition in the proposed risk-mitigating hedging activities exception that no employee receive compensation arising from or related in any way to any income generated by any hedging activity as suggested by one commenter to the 2011 proposed rule [144] because both the first and second conditions would preclude income generating activity by requiring that the risk-mitigating hedging activity could not facilitate or create the opportunity to benefit from a conflicted transaction other than through risk-reduction.

The proposed risk-mitigating hedging activities exception would also not require that a hedge be entered into contemporaneously, *i.e.,* at the exact time that a risk is incurred or within a prescribed time period after a risk is incurred. Rather, both the first and second proposed conditions are premised on the relevant hedging activity, whenever it is entered into or adjusted, being designed to mitigate a specifically identified risk and not to function as a bet against the relevant ABS. We received a comment to the 2011 proposed rule stating that the duration of the hedge must not exceed the offering period, for instance by the closing of the underwriting book.[145] However, we believe that the more appropriate standard, which we are proposing, is that the hedging activity would cease to qualify for the re-proposed risk-mitigating hedging activities exception if it were no longer reducing a specific risk to the securitization participant in connection with the relevant ABS activity, for example if the securitization participant failed to unwind its risk-mitigating hedging activities after disposing of the position or holding being hedged. This is because the securitization participant would no longer be engaged in risk-mitigating hedging activities in connection with such position or holding.

We also received a comment to the 2011 proposed rule that a securitization participant should be permitted to hedge a retained investment in a cash ABS on a periodic basis (*e.g.,* hedging quarterly or semiannually) consistent with the securitization participant's hedging policy and not on an intermittent basis.[146] The proposed risk-mitigating hedging activities exception does not include any specific requirement regarding the timing of when the relevant hedging activity must begin. Instead, the first and second conditions are intended to help ensure that the permitted risk-mitigating hedging activity would be required to hedge specifically identified risks and not function as a bet against the relevant ABS. Therefore, whether periodic hedging of retained ABS interests would qualify for the proposed risk-mitigating hedging activities exception is a facts and circumstances determination, and we are not providing specific guidance as to whether hedging on any specific periodic basis (*e.g.,* monthly, quarterly, or semiannually) would be permissible. Although the intent of the re-proposed exception is not necessarily to require a securitization participant to change its existing schedule for hedging risks associated with its retained ABS interests, to the extent that periodic hedging on a delayed basis results in an ''overhedged'' position that constitutes a bet against the relevant ABS, then that hedging activity would not satisfy either of the first or second conditions applicable to the exception.

We also received a comment to the 2011 proposed rule asking for clarity that the risk-mitigating hedging activities exception would be available throughout the time period during which the rule is applicable.[147] The risk-mitigating hedging activities exception in the re-proposed rule would be available to a securitization participant throughout the time period during which the re-proposed rule would be applicable, commencing on the date on which a person has reached, or has taken substantial steps to reach, an agreement that such person will become a securitization participant with respect to an ABS and ending on the date that is one year after the date of the first closing of the sale of the ABS, if the conditions of the exception are satisfied.

2. Compliance Program Requirement

We are proposing in Rule 192(b)(1)(ii)(C) that the third condition to the exception be that the securitization participant has established, and implements, maintains, and enforces, an internal compliance program that is reasonably designed to ensure the securitization participant's compliance with the requirements applicable to the exception, including reasonably designed written policies and procedures regarding the risk-mitigating hedging activities that provide for the specific risk and risk-mitigating hedging activity to be identified, documented, and monitored. This proposed condition is designed to promote robust compliance efforts and to help ensure that activity that would qualify for the re-proposed exception is indeed risk-mitigating while also recognizing that securitization participants are positioned to determine the particulars of effective risk-mitigating hedging activities policies and procedures for their own business. We believe it is important that reasonably designed written policies and procedures provide for the specific risk and the risk-mitigating hedging activities to be identified, documented, and monitored to help facilitate the securitization participant's compliance with the conditions specified in proposed Rule 192(b)(1)(ii)(A) and (B), which require that the risk-mitigating hedging activity be tied to such risks at inception and over the time period that the prohibition of the re-proposed rule would apply. While we recognize that this documentation requirement may result in certain costs,[148] we believe that this requirement would promote compliance with the re-proposed rule. We also believe that it is important for this condition to apply to all securitization participants that seek to rely on this exception given that the

[144] *See* Better Markets Letter at 12.

[145] *See* AFR Letter at 9.

[146] *See* Cadwalader Letter at 6.

[147] *See* SIFMA Letter at 32.

[148] *See* Section IV.

focus of Section 27B is investor protection.

We received a comment to the 2011 proposed rule that any securitization participant relying on the proposed exception for risk-mitigating hedging activities should be required to affirmatively certify that it is undertaking such activity for the sole purpose of hedging a risk arising in connection with its securitization activities, and not for the purpose of generating speculative profits.[149] We did not include a certification requirement in the proposed exception, but we seek comment below on whether a certification requirement would be appropriate, and if so, what form such a certification should take and when it should be required to be made.

Request for Comment

69. Is the scope of the proposed risk-mitigating hedging activities exception appropriate, or is it overinclusive or underinclusive, and why? Please provide specific examples of any activity that should be included in or excluded from the scope of the exception and provide a justification as to why and how such inclusion or exclusion would be consistent with Section 27B.

70. Should any of the proposed conditions applicable to the risk-mitigating hedging activities exception be modified? If yes, please provide the suggested modification and explain how such modification is consistent with Section 27B.

71. Is the condition in proposed Rule 192(b)(1)(ii)(A) that risk-mitigating hedging activities must be designed to reduce or otherwise significantly mitigate one or more ''specific, identifiable risks'' arising in connection with and related to identified positions, contracts, or other holdings of the securitization participant appropriate? Please explain why or why not. Is there sufficient clarity as to what risks are ''specific'' and ''identifiable'' for purposes of this condition? If not, please identify any specific indicia that should be included or referenced for purposes of this determination.

72. Should the proposed condition regarding a securitization participant's ongoing recalibration of its hedging activities specify how frequently a securitization participant should do such recalibrating? Should the proposed condition specify certain thresholds or triggers for such recalibration? What are the implications for a securitization participant if its hedge counterparty refuses to adjust the hedge?

73. Is it appropriate that the proposed risk-mitigating hedging activities exception would allow for the relevant hedging activity to be conducted on an aggregated basis? Are there any particular evasion concerns that could arise with respect to this approach?

74. Should the proposed risk-mitigating hedging activities exception require that a risk-mitigating hedge have an exact negative correlation with the exposure being hedged? If so, and if exact negative correlation were impossible, should the exception require that a securitization participant relying on the exception provide a certification explaining why exact negative correlation was impossible? If so, what form should such a certification take, and why? For example, should the certification be required to be filed with, or otherwise furnished to, the Commission, or should it instead be required to be retained in the files of the securitization participant in accordance with its written policies and procedures? Should the exception require that such certification be made by the chief executive officer and chief compliance officer of the securitization participant as suggested by a commenter to the 2011 proposed rule,[150] or would it be more appropriate for the certification to be made by some other officer of the securitization participant that is more familiar with the transaction or transactions at issue and the securitization participant's risk-mitigating hedging activities generally (*e.g.,* the head of the relevant trading desk)? In your responses to each of these questions, please explain why or why not. Please also explain whether such a requirement would be attainable or practical for securitization participants, and how such a requirement would be consistent with Section 27B.

75. As discussed above, certain of the proposed conditions to the proposed risk-mitigating hedging activities exception are similar to those that are applicable to the equivalent exception to the Volcker Rule's proprietary trading prohibition.[151] What are the potential benefits and drawbacks to having conditions similar to the Volcker Rule prohibition? Should a securitization participant that is in compliance with the conditions applicable to the equivalent Volcker Rule exception be deemed to be presumptively in compliance with the proposed conditions applicable under the risk-mitigating hedging activities exception to the re-proposed rule? Are there entities that are not subject to the Volcker Rule's proprietary trading prohibition and/or the associated compliance requirements, including smaller securitization participants, that would seek to avail themselves of the risk-mitigating exception to the re-proposed rule and that would be meaningfully disadvantaged by this approach? If so, please explain why and suggest an alternative approach that would be consistent with Section 27B. If your suggested alternative approach includes different compliance requirements for different types of entities, please explain how any such entity types should be defined for purposes of your suggested alternative approach.

76. Should the proposed risk-mitigating hedging activities exception require a securitization participant relying on the exception to affirmatively certify that it is undertaking such activity for the purpose of hedging a risk arising in connection with its securitization activities and that it has complied with the relevant conditions in the re-proposed rule? If so, what form should such a certification take, and when should it be required to be made? For example, should the certification be required to be filed with, or otherwise furnished to, the Commission, or should it instead be required to be retained in the files of the securitization participant in accordance with its written policies and procedures? Should the certification requirement permit a securitization participant to make the required certification on a periodic basis with respect to all risk-mitigating hedging activity occurring during that period, and if so, how frequently should the certification be required to be made? Please explain whether and how such a certification requirement would be practical for securitization participants given that the proposed exception would permit hedging conducted in connection with and related to individual or aggregated positions, contracts, or other holdings of the securitization participant arising out of its securitization activities, including its origination or acquisition of assets in anticipation of securitization.

77. Should any additional conditions apply to the proposed risk-mitigating hedging activities exception? If yes, please provide a specific description of any such additional condition and how such additional condition would be consistent with Section 27B.

78. Are the proposed conditions of the risk-mitigating hedging activities exception adequate to address any potential misuse and evasion of the exception? What are the ways in which a securitization participant could

[149] *See* Better Markets Letter at 11.

[150] *See* Better Markets Letter at 11.

[151] *See* 17 CFR 255.5.

attempt to utilize the proposed exception in order to disguise speculative activity as risk-mitigating hedging? Are any such concerns about potential misuse or evasion of the exception adequately mitigated by the anti-circumvention provision in proposed Rule 192(d)? Should an explicit anti-abuse provision be added as a condition to the proposed exception requiring that ''the hedging activity must not be conducted or designed to evade the requirements'' of proposed Rule 192, or would such a provision be unnecessary because of the anti-circumvention language in proposed Rule 192(d)?

79. Is the proposed condition applicable to the risk-mitigating hedging activities exception regarding compliance and monitoring appropriate? Should such a condition include more or less stringent requirements? The proposed condition requires reasonably designed written policies and procedures regarding the risk-mitigating hedging activities that provide for the specific risk and risk-mitigating hedging activity to be identified, documented, and monitored. Is there sufficient clarity as to what risks are specific and identifiable at the outset of the risk-mitigating hedging activity? If not, please explain what further guidance or clarification would be helpful in this context. Please identify any additional conditions that should be required as part of the compliance program condition.

80. Should smaller securitization participants be exempt from certain elements of the compliance program condition, such that those elements of the condition would apply only to securitization participants with significant trading assets and liabilities similar to the equivalent exception to the Volcker Rule, or should all elements of the compliance program condition apply to all securitization participants in order to adequately protect ABS investors? Alternatively, should the implementation of the compliance program requirement applicable to smaller securitization participants be delayed in order to give such entities more time to comply with the requirement? Why or why not? In your responses, please explain how ''smaller securitization participant'' should be defined for purposes of any such exemption or delayed implementation.

81. Are there other potential positive or negative consequences of the proposed risk-mitigating hedging activities exception? How might the proposed risk-mitigating hedging activities exception impact affiliates or subsidiaries of a securitization participant? What investment strategies of affiliates or subsidiaries might be impacted, and how might they be impacted? In particular, how might the proposed exception impact the hedging strategies of affiliated private funds and/or their investment advisers?

F. Exception for Liquidity Commitments

Section 27B(c) provides that the prohibition in Section 27B(a) does not apply to purchases or sales of ABS made pursuant to and consistent with commitments of the underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of any such entity, to provide liquidity for the ABS.[152] Consistent with Section 27B(c)(2)(A), we are proposing in proposed Rule 192(b)(2) that the prohibition would not apply when a securitization participant engages in purchases or sales of ABS made pursuant to, and consistent with, commitments of the securitization participant to provide liquidity for the relevant ABS. We received comments in response to the 2011 proposed rule that the exception should permit commitments to provide liquidity through means other than purchases and sales of ABS.[153] We understand that commitments to provide liquidity may take a variety of forms in addition to purchases and sales of the ABS, such as commitments to promote full and timely interest payments to ABS investors or to provide financing to accommodate differences in the payment dates between the ABS and the underlying assets.[154] However, expanding the exception for liquidity commitments to accommodate such activities should not be necessary as the definition of ''conflicted transaction'' discussed above is already appropriately focused on transactions that constitute a bet against the relevant ABS and would not encompass activity such as an extension of credit by a securitization participant that functions to support the performance of the securitization rather than to benefit from its adverse performance. We received comments in response to the 2011 proposed rule that a broad application of the exception could give rise to abusive conduct if a vast range of activities would qualify for the exception.[155] Without taking a position on whether the specific transactions cited by these commenters would constitute ''conflicted transactions'' as defined in proposed Rule 192(c), we agree as a general matter that an overly broad application of the exception could give rise to abusive conduct. We are accordingly proposing to limit the exception to purchases and sales of the ABS made pursuant to, and consistent with, commitments of the securitization participant to provide liquidity for the ABS, consistent with the language of Section 27B(c)(2).

We also received a comment that the term ''commitment'' should be defined to mean a contractual obligation to provide liquidity.[156] Consistent with Section 27B, however, the re-proposed exception does not require that a liquidity commitment take the form of a contractual obligation. We seek further commenter input on this issue below.

Request for Comment

82. Is the proposed scope of the liquidity commitments exception appropriate, or is it overinclusive or underinclusive? Is further guidance or clarification necessary regarding the meaning of the term ''commitment'' or the scope of permissible liquidity commitments? Why or why not?

83. Should the proposed exception for liquidity commitments apply only to purchases and sales of the ABS made pursuant to, and consistent with, the commitments of the securitization participant to provide liquidity for the ABS, as proposed, or should the exception apply to activity other than purchases and sales of the ABS, such as a commitment to provide loans pursuant to a liquidity facility, and why?

84. In addition to the examples provided above, are there other activities that should be covered by the re-proposed exception for liquidity

[152] 15 U.S.C. 77z–2a(c)(2)(A).

[153] *See, e.g.,* ICI Letter at 7–9 (stating that the exception should encompass those liquidity arrangements that are typical in the marketplace for asset-backed commercial paper (''ABCP'') and that the rule should specify that liquidity may be provided through means other than just purchases and sales of ABS); ASF Letter at 26–27 (stating that various forms of liquidity commitments operate to support the relevant ABS and thus serve a valid and important market function that should be permitted by the rule).

[154] For example, a sponsor of ABCP may provide a liquidity facility if a tranche of $3 million of the ABCP matures on the 30th day of the month, yet only $2 million of the underlying receivables match that maturity. If there is an inability to repay the $1 million shortfall by issuing new commercial paper, the sponsor may provide a loan secured by the receivables to provide for the $1 million shortfall.

[155] *See* Better Markets Letter at 12–13 (stating that it is possible that loan transactions could be structured with terms the would significantly benefit the lending entity upon default or poor performance of the assets); Merkley-Levin Letter at 18–19 (referring to the example of a collateral put provider for a synthetic securitization refusing to acquire new CDS collateral); Tewary Letter 1 at 11–12 (referring to an example of a placement agent structuring a loan transaction in order to effectively be a short position with respect to the relevant ABS).

[156] *See* AFR Letter at 9.

commitments? If so, please describe those activities and explain how such activities would satisfy the requirements of the re-proposed exception.

85. Should the Commission require that a commitment be evidenced by a contractual obligation? Please discuss whether such contractual obligations are a current practice and if there are particular benefits or drawbacks to including such a requirement.

86. We received a comment to the 2011 proposed rule inquiring if ''dollar roll'' transactions in the Enterprise ABS market would qualify for the liquidity commitments exception.[157] Please explain if the Commission should specify in the re-proposed rule that dollar roll transactions in the MBS market or other similar transactions would be purchases or sales of ABS made pursuant to, and consistent with, commitments of the securitization participant to provide liquidity for the relevant ABS. Please address if such transactions are effected primarily for financing or operational reasons or if such transactions are effected for other purposes.

87. Could the proposed exception for liquidity commitments in the re-proposed rule result in any adverse consequences? If yes, please explain.

G. Exception for Bona Fide Market-Making Activities

Section 27B(c) provides that the prohibition in Section 27B(a) does not apply to purchases or sales of ABS made pursuant to and consistent with bona fide market-making in the ABS.[158] Consistent with Section 27B(c)(2)(B), we are proposing in Rule 192(b)(3) an exception for certain bona fide market-making activities conducted by a securitization participant that is licensed or registered to engage in such activities in accordance with applicable law and self-regulatory organization (''SRO'') rules. Subject to specified conditions, the proposed exception would apply to bona fide market-making activity, including market-making related hedging, of a securitization participant conducted in connection with and related to an ABS, the assets underlying such ABS, or financial instruments that reference such ABS or underlying assets. In order to distinguish permitted bona fide market-making activity from prohibited conflicted transactions, we are proposing to include five conditions that must be satisfied in order for a securitization participant to rely on the bona fide market-making activities exception. Each of these conditions is discussed in further detail below.[159]

The requirements of the proposed bona fide market-making activities exception draw from the concept of market-making in both the Volcker Rule, designed to ensure that banking entities may continue to function in less liquid and illiquid markets,[160] as well as 15 U.S.C. 78c(a)(38), which defines ''market maker'' for purposes of the Exchange Act.[161] In each context the parameters of what constitutes market-making are adapted to the characteristics of the financial instruments and markets involved. For example, under the Volcker Rule, which was adopted under the Bank Holding Company Act, the key elements of market-making in a security include that a banking entity ''routinely stands ready'' to purchase and sell, that it is ''willing and available to quote, purchase and sell, or otherwise enter into long and short positions for its own account,'' and that such quoting and trading activity be in ''commercially reasonable amounts and throughout market cycles, on a basis appropriate for the liquidity, maturity, and depth of the market.'' [162] Under the Exchange Act, a ''market maker'' is defined as ''any specialist permitted to act as a dealer, any dealer acting in the capacity of block positioner, and any dealer who, with respect to a security, holds himself out . . . as being willing to buy and sell such security for his own account on a regular or continuous basis.'' [163] For example, Regulation SHO's bona fide market-making exceptions, which apply only to equity securities, apply a ''regular and continuous basis'' requirement to the relatively more liquid market for short sales in order to ''facilitate customer orders in a fast moving market.'' [164] While drawing from both the Volcker Rule and Exchange Act definitions of market-making, the proposed bona fide market-making activities exception is intended to account for and accommodate the unique characteristics of ABS and the ABS market. Therefore, as discussed below, the proposed exception utilizes elements of Volcker Rule market-making given the limited liquidity and decreased reliance on quotation media in parts of the ABS market while adding novel characteristics to accommodate market-making in ABS and the transactions to which the exception can be applied.[165]

The prohibition in proposed Rule 192(a) would apply not only to short sales of the relevant ABS, but to a variety of conflicted transactions. For example, the prohibition would also

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[157] *See* Fannie Mae Letter at 5 (stating that, in a dollar roll transaction, an investor commits to sell a security at a specified price and to purchase a similar security at a lower price on a specified date in the future).

[158] 15 U.S.C. 77z–2a(c)(2)(B).

[159] We received a comment to the 2011 proposed rule seeking clarification as to whether eligibility for the bona fide market-making exceptions of 17 CFR 242.200 through 204 (''Regulation SHO'') would be relevant to the bona fide market-making activities exception for ABS securitizations. SIFMA Letter at 34–35. The proposed bona fide market-making activities exception for purposes of the re-proposed rule and the bona fide market-making exception of Regulation SHO are designed to address different circumstances with different purposes. Activity that might be bona fide market-making activities for purposes of the re-proposed rule may not be bona fide market-making for purposes of other rules, including Regulation SHO, and vice versa. For example, Regulation SHO's bona fide market-making exceptions are intended to be narrow exceptions to allow market makers to facilitate customer orders in a fast moving market without possible delays associated with complying with the Regulation SHO ''locate'' requirement. *See, e.g., Amendments to Regulation SHO,* Release No. 34–58775 (Oct. 14, 2008) [73 FR 61690 (Oct. 17, 2008)] (''2008 Regulation SHO Amendments'') at 61698; *Short Sales,* Release No. 34–50103 (Jul. 28, 2004) [69 FR 48008 (Aug. 6, 2004)] (''2004 Short Sales Release'') at 48015 n.67. For example, for purposes of the Regulation SHO exception, factors that indicate a market-maker is engaged in bona fide market-making include whether the market-maker incurs economic or market risk for a quotation with respect to a security. 2008 Regulation SHO Amendments at 61699. Thus, a market maker that continually executed short sales away from its posted quotes would generally be unable to rely on the bona-fide market making exceptions of Regulation SHO. *See* 2004 Short Sales Release at 48015 n.68. Further, broker-dealers that publish quotations but fill orders at different prices than those quoted would not be engaged in bona fide market-making for purposes of Regulation SHO. *See, e.g., Further Definition of ''As a Part of a Regular Business'' in the Definition of Dealer and Government Securities Dealer,* Release No. 34-94524 (Mar. 28, 2022) [87 FR 23054 (Apr. 18, 2022)] (''Dealer Release'') at 23068 n.157.

[160] *See Prohibitions and Restrictions on Proprietary Trading and Certain Interests In, and Relationships With, Hedge Funds and Private Equity Funds,* Release No. BHCA–1 (Dec. 10, 2013) [79 FR 5536 (Jan. 31, 2014)] (''Volcker Release'') at 5584.

[161] *See* Exchange Act Section 3(a)(38) (providing that ''The term 'market maker' means . . . any dealer who, with respect to a security, holds himself out . . . as being willing to buy and sell such security for his own account on a regular and continuous basis.''). *See also Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change Relating to Close-Out Requirements for Short Sales and an Interpretation on Prompt Receipt and Delivery of Securities,* Release No. 34–32632 (July 14, 1993) [58 FR 39072 (July 21, 1993)] at 39074 (stating that ''a bona fide market maker is a broker-dealer that deals on a regular basis with other broker-dealers, actively buying and selling the subject security'').

[162] 17 CFR 255.4(b)(2)(i).

[163] 15 U.S.C. 78c(a)(38).

[164] *See* 2004 Short Sales Release at 48015 n.67.

[165] Activity that would be bona fide market-making activity under the proposed exception may not necessarily be market-making for purposes of other laws or regulations, including the Volcker Rule, other provisions of the Exchange Act, or the rules and regulations thereunder, such as Regulation SHO, or self-regulatory organization rules.

extend to transactions such as the purchase of a credit derivative with respect to the relevant ABS or the assets underlying the relevant ABS.[166] Therefore, limiting the proposed bona fide market-making activities exception to only purchases and sales of the relevant ABS could result in an inconsistency between the scope of the prohibition and the scope of the exception. Accordingly, the proposed exception would apply to market-making in not only the ABS that would be subject to the prohibition of the re-proposed rule but, as described in proposed Rule 192(b)(3)(i), also the assets underlying such ABS as well as financial instruments that reference such ABS or the assets underlying such ABS; this would capture CDS or other credit derivative products with payment terms that are tied to the performance of the ABS or its underlying assets. This should address the concern of a commenter that if the proposed prohibition is to be applied to restrict transactions not only in the relevant ABS but also transactions in the underlying assets or related derivative exposures, then the bona fide market-making activities exception should be applied in a similar manner.[167] Although we received a comment that the bona fide market-making activities exception should not apply to market-making in CDS positions that reference the relevant ABS,[168] bona fide market-making activities in CDS positions where the relevant securitization participant is responding to customer demand does not implicate the types of material conflicts of interest the re-proposed rule is designed to address because the securitization participant is making a market in such positions for its customers rather than betting against the relevant ABS for its own account.

Furthermore, the proposed bona fide market-making activities exception does not include a requirement to analyze the applicability of the exception on a trade-by-trade basis. Similar to the Volcker Rule, the proposed bona fide market-making activities exception is instead focused on the overall market-making related activities of a securitization participant in assets that would otherwise be conflicted transactions, with a condition that those activities are related to satisfying the reasonably expected near term demand of the securitization participant's customers. The proposed exception is also designed to give a securitization participant that is a market maker the flexibility to acquire positions that hedge a securitization participant's market-making inventory.

We received a comment to the 2011 proposed rule expressing concern that the 2011 proposed rule would prohibit hedging as part of permitted market-making, resulting in curtailed market-making and a reduction in market liquidity.[169] Under the re-proposed exception, hedging the risk of a price decline of market-making-related ABS positions and holdings while the market maker holds such ABS would qualify for the re-proposed exception without the additional complexity of separately needing to qualify for the risk-mitigating hedging activities exception in paragraph (b)(1), which is principally designed to address the hedging of retained exposures rather than market-making positions that are entered into in connection with customer demand. To facilitate monitoring and compliance, as discussed below in the context of the compliance program requirement, a securitization participant relying on the proposed exception for bona fide market-making activities would be required to have reasonably designed written policies and procedures that demonstrate a process for prompt mitigation of the risks of its positions and holdings. This approach is similar to that set forth in the Volcker Rule [170] and should allow securitization participants that are market makers to determine how best to manage the risks of their market-making activity without causing a reduction in liquidity, wider spreads, or increased trading costs for market makers and their customers.

We also received comment to the 2011 proposed rule in support of grounding the bona fide market-making activities exception in the secondary market and excluding a securitization participant's initial recommendations and sales of a new ABS from qualifying for the exception.[171] This is consistent with the re-proposed exception under which the initial issuance of an ABS would not be bona fide market-making activity, which would mean that a securitization participant would not be able to rely on the re-proposed exception for bona fide market-making activities in ABS for primary market activities, such as issuing a new synthetic ABS.[172] This also is consistent with the view of a commenter that the exception should not apply to taking a short position in a synthetic ABS that a securitization participant itself created.[173]

We also received comment that the bona fide market-making exception should permit a securitization participant to issue a synthetic securitization and purchase the CDS protection through such issuance.[174] We are concerned, however, that such activity would weaken the conflicts of interest protection of the re-proposed rule by allowing a securitization participant to engage in a transaction (the CDS contract(s) with the issuer) where cash paid by investors to acquire the newly created synthetic ABS would fund the relevant CDS contract(s) and be available to make a payment to the securitization participant upon the occurrence of an adverse event with respect to a cash ABS that it created or sold to other investors. Furthermore, the integral role played by a securitization participant in structuring and/or marketing the relevant ABS and the compensation associated with such new issuance activity would go beyond the scope of secondary market bona fide market-making activity and could raise material conflicts of interest with investors in the new synthetic ABS that would be the same as those raised by the synthetic CDO transactions that were the subject of Congressional scrutiny in connection with the financial crisis of 2007–2009.[175]

We also received comment to the 2011 proposed rule suggesting that the bona fide market-making activities exception could be strengthened to prevent misuse through an anti-abuse provision prohibiting use of the exception to circumvent the statutory

[166] Given the nature of the ABS market and that the scope of the prohibition of the re-proposed rule would prohibit transactions that include not only entering into a short sale of ABS but also entering into CDS on the relevant ABS or the asset underlying such ABS, we are proposing that the bona fide market-making activities exception extend to bona fide market-making activity in financial instruments, such as CDS on the relevant ABS, that are conflicted transactions under the re-proposed rule. However, under the re-proposed rule, if the ''conflicted transaction'' is a short sale of the relevant ABS, then, in order to rely on the proposed exception, such sale would need to constitute bona fide market-making activity in such ABS. Similarly, if the relevant ''conflicted transaction'' is a purchase and sale of a CDS, then, in order to rely on the exception, such purchase and sale would need to constitute bona fide market-making activity of the securitization participant in such CDS.

[167] Morgan Stanley Letter at 10.

[168] Tewary Letter at 12.

[169] *See* SIFMA Letter at 32.

[170] *See* Volcker Release at 5581 n.588.

[171] *See, e.g.,* Merkley-Levin Letter at 20.

[172] Furthermore, the activity would not qualify for the re-proposed exception because even if the securitization participant purchased the CDS protection (*i.e.,* a short position) purportedly as part of its market-making activity, the creation and sale of the new ABS is primary, not secondary, market activity.

[173] *See, e.g.,* Merkley-Levin Letter at 21.

[174] *See* Morgan Stanley Letter at 13.

[175] *See* Senate Financial Crisis Report.

prohibition.[176] The re-proposed rule does not include such an anti-abuse provision. Instead, the re-proposed rule sets forth certain conditions that would be required to be satisfied in order for the exception to apply, which is designed to permit only activity that is indeed bona fide market-making activity and not speculative activity disguised as market-making.

1. Requirement To Routinely Stand Ready To Purchase and Sell

We are proposing in Rule 192(b)(3)(ii)(A) that the first condition to the exception be that the securitization participant routinely stands ready to purchase and sell one or more types of the financial instruments set forth in proposed Rule 192(b)(3)(i) as a part of its market-making related activities in such financial instruments, and is willing and available to quote, purchase and sell, or otherwise enter into long and short positions in those types of financial instruments, in commercially reasonable amounts and throughout market cycles on a basis appropriate for the liquidity, maturity, and depth of the market for the relevant types of such financial instruments. However, similar to other rules,[177] the mere provision of liquidity would not necessarily be sufficient for a securitization participant to qualify for the proposed bona fide market-making activities exception.[178]

This ''routinely stands ready'' standard is based on the standard set forth in the Volcker Rule [179] and would help ensure that the relevant market-making activity is indeed bona fide while also taking into account the actual liquidity and depth of the relevant market for ABS and financial instruments related to ABS described in proposed Rule 192(b)(3)(i), which may be less liquid than, for example, listed equity securities. This ''routinely stands ready'' standard, as opposed to a more stringent standard such as ''continuously purchases and sells,'' [180] is designed to not have a chilling effect on a person's ability to act as a market maker in a less liquid market. We therefore preliminarily believe that the proposed ''routinely stands ready'' standard is appropriate for bona fide market-making activities in ABS and related financial instruments described in proposed Rule 192(b)(3)(i) because market makers in such illiquid markets likely do not trade continuously but trade only intermittently or at the request of customers. However, this proposed condition is also designed to help ensure that activity that would qualify for the exception in the re-proposed rule would not apply to a securitization participant only providing quotations that are wide of (in comparison to the bid-ask spread) one or both sides of the market relative to prevailing market conditions. In order to satisfy this condition, the securitization participant would need to have an established pattern of providing price quotations on either side of the market and a pattern of trading with customers on each side of the market. Furthermore, a securitization participant would need to be willing to facilitate customer needs in both upward and downward moving markets and not only when it is favorable for the securitization participant to do so in order for it to ''routinely stand ready'' to purchase and sell the relevant financial instruments throughout market cycles. This approach is consistent with certain comments received on the 2011 proposed rule that securitization participants must be willing to buy and sell throughout market cycles, including market cycles with adverse market conditions [181] and not simply take a position on one side of the market.[182] Also, in this context, ''commercially reasonable'' amounts would mean, similar to the equivalent concept in the Volcker Rule,[183] that the securitization participant would need to be willing to quote and trade in sizes requested by market participants in the relevant market. This would be indicative of the securitization participant's willingness and availability to provide intermediation services for its clients, customers, or counterparties that is consistent with bona fide market-making activities in such market.

2. Limited to Client, Customer, or Counterparty Demand Requirement

We are proposing in Rule 192(b)(3)(ii)(B) that the second condition to the exception be that the securitization participant's market-making related activities are designed not to exceed, on an ongoing basis, the reasonably expected near term demands of clients, customers, or counterparties, taking into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments. This proposed condition is the same as that included in the Volcker Rule, which is designed to identify activity that is characteristic of bona fide market-making activity and not speculative trading while still allowing subject entities to continue to make a market across less liquid asset classes.[184] This is similar to the purpose of the condition in the context of the re-proposed rule, which is to distinguish activity that is characteristic of bona fide market-making activities from a securitization participant entering into a conflicted transaction to bet against the relevant ABS for the benefit of its own account, while still allowing securitization participants to make a market in ABS and the related financial instruments described in paragraph (b)(3)(i), which may be relatively illiquid. In order to achieve these objectives, this would be a facts and circumstances determination that is focused on an analysis of the near term demand of customers while also recognizing that the liquidity, maturity, and depth of the relevant market may vary across asset types and classes. The recognition of these differences in the proposed conditions should avoid unduly impeding a market maker's ability to build or retain inventory in less liquid instruments. The facts and circumstances that would be relevant to determine compliance with this proposed condition would include, but not be limited to, historical levels of customer demands, current customer demand, and expectations of near term customer demand based on reasonably anticipated near term market conditions, including, in each case,

[176] *See* Merkley-Levin Letter at 21.

[177] *See, e.g.,* discussion at note 159.

[178] For example, because market makers typically provide liquidity on the opposite side of the market, if a security is experiencing significant downward price pressure, market makers engaged in bona fide market-making activities will tend to respond to market demand by buying not selling the security. *See, e.g., Amendments to Regulation SHO,* Release No. 34–61595 (Feb. 26, 2010) [75 FR 11232 (Mar. 10, 2010)] at 11273–4. *See also* 2008 Regulation SHO Amendments at 61699 (stating that a pattern of trading that includes both purchases and sales in roughly comparable amounts to provide liquidity to customers or other broker-dealers would generally be an indication that a market maker is engaged in bona-fide market-making activity).

[179] 17 CFR 255.4(b)(2)(i).

[180] For example, under Regulation SHO's bona fide market-making exceptions, the relevant broker-dealer should generally be holding itself out as standing ready and willing to buy and sell the relevant security by continuously posting widely disseminated quotes that are near or at the market, and must be at economic risk for such quotes. *See* 2008 Regulation SHO Amendments at 61690, 61699 (citing indicia including whether the market maker incurs any economic or market risk with respect to the securities (*e.g.,* by putting their own capital at risk to provide continuous two-sided quotes)); *see also* Dealer Release, *supra* note 159, at 23068 n.157 (stating that broker-dealers that do not publish continuous quotations, or publish quotations that do not subject the broker-dealer to such risk (*e.g.,* quotations that are not publicly accessible, are not near or at the market, or are skewed directionally towards one side of the market) would not be eligible for the bona fide market-maker exceptions under Regulation SHO).

[181] *See* Merkley-Levin Letter at 20; *see also* Better Markets Letter at 13.

[182] *See* Merkley-Levin Letter at 20.

[183] *See* Volcker Release at 5597.

[184] *See id.* at 5606.

inter-dealer demand. For example, a securitization participant facilitating a secondary market credit derivative transaction with respect to an ABS in response to a current customer demand would satisfy this proposed condition. However, if the securitization participant builds an inventory of CDS positions in the absence of current demand and without any reasonable basis to build that inventory expected on either historical demand or anticipated demand based on excepted near term market conditions, there would be no reasonably expected near term customer demand for those positions and that transaction would fail to satisfy this proposed condition. This condition to the re-proposed exception aligns with a comment received in response to the 2011 proposal stating that requiring activity to be client-driven can help avoid a securitization participant providing a cover for activity that is not client-driven but rather is a bet against an ABS, which is activity that would not be designed to meet reasonably expected near term demand. While we received comment that trading activity should be required to be ''reasonably substantial relative to the size of the market for the securities'' to qualify for a bona fide market-maker exception,[185] the re-proposed standard focusing on the relevant transactions being entered into based on the reasonably expected near term demand of the relevant market, and not solely on the size of the trade in relation to the size of the market, is a more appropriate standard for distinguishing between bona fide market-making activities and speculative trading. This is because it would be unclear what a trade being ''reasonably substantial relative to the size of the market for the securities'' would mean in the context of ABS markets where the relevant cumulative outstanding amount of securities for the relevant ABS type may exceed a trillion dollars.[186] Facilitating a trade in or related to a portion of an ABS tranche pursuant to a current client request should satisfy this condition even if the size of the trade is small relative to the overall outstanding principal amount of the relevant ABS issuance or the cumulative outstanding principal amount of the relevant ABS sponsored by the same person on an aggregated basis.

3. Compensation Requirement

We are proposing in Rule 192(b)(3)(ii)(C) that the third condition of the exception be that the compensation arrangements of the persons performing the market-making activity of the securitization participant are designed not to reward or incentivize conflicted transactions. It would be consistent with this proposed condition if the relevant compensation arrangement is designed to reward effective and timely intermediation and liquidity to customers. It would be inconsistent with this proposed condition if the relevant compensation arrangement is instead designed to reward speculation in, and appreciation of, the market value of market-making positions that the securitization participant enters into for the benefit of its own account. This approach is similar to that taken for purposes of the Volcker Rule.[187] We seek comment below on whether this condition should provide additional specificity regarding what it would mean for a compensation arrangement to be designed not to reward or incentivize conflicted transactions, including examples of acceptable and unacceptable compensation arrangements.

4. Registration Requirement

We are proposing in Rule 192(b)(3)(ii)(D) that the fourth condition of the exception be that the securitization participant would be required to be licensed or registered to engage in the relevant market-making activity, in accordance with applicable laws and SRO rules. This condition is designed to limit persons relying on the proposed exception for bona fide market-making activities to only those persons with the appropriate license or registration to engage in such activity in accordance with the requirements of applicable laws and SRO rules for such activity—unless the relevant person is exempt from registration or excluded from regulation with respect to such activity under applicable law and SRO rules.[188] Persons engaged in market-making activity in the securities markets in connection with ABS may be engaged in dealing activity, and so, absent an exception or exemption, are required to register as ''dealers'' pursuant to Section 15(a) of the Exchange Act, as ''government securities dealers'' pursuant to Section 15C of the Exchange Act, or as ''security-based swap dealers'' pursuant to Section 15F(a) of the Exchange Act.[189] A securitization participant that is a registered broker-dealer would satisfy the market-making exception's registration condition.[190] Similarly, a securitization participant licensed as a bank or registered as a security-based swap dealer in accordance with applicable law would also be eligible for the exception.

5. Compliance Program Requirement

We are proposing in Rule 192(b)(3)(ii)(E) that the fifth and final condition to the exception be that the securitization participant would be required to have established and must implement, maintain, and enforce an internal compliance program that is reasonably designed to ensure the securitization participant's compliance with the requirements of the bona fide market-making activities exception, including reasonably designed written policies and procedures that demonstrate a process for prompt mitigation of the risks of its positions and holdings. This proposed condition is designed to help ensure that the activities of a securitization participant relying on the bona fide market-making activities exception are indeed bona fide market-making activities, and not the type of transactions that would involve or result in a material conflict of interest between a securitization participant for an ABS and an investor in such ABS.

[185] *See* AFR Letter at 9.

[186] *See* Section III.

[187] *See* Volcker Release at 5619.

[188] For example, a person meeting the conditions of the *de minimis* exception in Exchange Act Rule 3a71–2 would not need to be a registered security-based swap dealer to act as a market maker in security-based swaps. *See* 17 CFR 240.3a71–2.

[189] *See, e.g., Definition of Terms in and Specific Exemption for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934,* Release No. 34–46745 (Oct. 30, 2002) [67 FR 67496 (Nov. 5, 2002)] at 67498–67500; *see also Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant,''* Release No. 34–66868 (Apr. 27, 2012) [77 FR 30596 (May 23, 2012)] at 30616–30619.

[190] Note, however, that the proposed bona fide market-making activities exception in the re-proposed rule is narrower than market-making activity that may require a person to register as a dealer. In other words, a securitization participant who does not meet all conditions of the re-proposed rule's bona fide market-making activities exception may still be required to register as a broker-dealer. *See id.; see also* 15 U.S.C. 78c(a)(38) (defining the term ''market maker'' to mean any specialist permitted to act as a *dealer,* any *dealer* acting in the capacity of block positioner, and any *dealer* who, with respect to a security, holds himself out (by entering quotations in an inter-dealer communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis). Further, definitions and the determination of eligibility for the bona fide market-making activities exception in the re-proposed rule are distinct from those available under other rules, such as Regulation SHO and recently proposed rules to include certain significant market participants as ''dealers'' or ''government securities dealers.'' *See, e.g.,* Dealer Release, *supra* note 159, at 23068 n.131 (distinguishing the determination of eligibility for the bona fide market-making exceptions of Regulation SHO from the determination of whether a person's trading activity indicates that such person is acting as a dealer or government securities dealer under the rule proposed in that Exchange Act Release).

This condition also recognizes that a securitization participant that is a market maker in ABS and related financial instruments described in paragraph (b)(3)(i) is well positioned to design its own individual internal compliance program to reflect the size, complexity, and activities of the securitization participant. In order to create uniformity and predictability for a securitization participant to determine whether it satisfies the first and second conditions of the proposed exception, a reasonably designed compliance program of the securitization participant should set forth the processes by which the relevant trading personnel would identify the financial instruments described in Rule 192(b)(3)(i) related to its securitization activities that the securitization participant may make a market in for its customers and the processes by which the securitization participant would determine the reasonably expected near term demand of customers for such products. The identification of such instruments and the processes for determining the reasonably expected near term demand of customers for such instruments in the compliance program would help prevent trading personnel at the relevant securitization participant from taking positions in conflicted transactions that are not positions that the securitization participant expects to make a market in for customers or that are in an amount that would exceed the reasonably expected near term demands of customers. Furthermore, in order to create uniformity and predictability for a securitization participant to determine whether it satisfies the first and second conditions of the proposed exception on an ongoing basis, a reasonably designed compliance program of the securitization participant should also establish internal controls and a system of ongoing monitoring and analysis that the securitization participant would utilize in order to effectively ensure the compliance of its trading personnel with its policies and procedures regarding permissible market-making under the re-proposed rule.

We also believe it is important that the reasonably designed written policies and procedures demonstrate a process for prompt mitigation of the risks of a securitization participant's positions and holdings that arise from market-making in ABS and the related financial instruments described in Rule 192(b)(3)(i), such as the risks of aged positions and holdings, because doing so would help to prevent a securitization participant from engaging in a transaction and maintaining a position that is adverse to the relevant ABS that remains open and exposed to potential gains for a prolonged period of time. The re-proposed rule does not define ''prompt'' mitigation in this context. While mitigating the risks of such positions and holdings would not be required to be contemporaneous with the acquisition of such positions or holdings, prompt mitigation would mean that the mitigation occur without delay that would facilitate or create an opportunity to benefit from a conflicted transaction remaining in the securitization participant's market-making inventory. We seek comment below on more precise indicia of ''prompt'' mitigation of such risks, and whether such indicia should be specified in the rule.

The proposed requirement that a process for such risk mitigation activity be included in a securitization participant's written policies and procedures would help ensure that activity is not speculative activity disguised as market-making by establishing the processes by which the relevant trading personnel would enter into, adjust, and unwind such hedging positions with respect to its market-making inventory. This approach is consistent with certain comments to the 2011 proposed rule supporting the inclusion of a compliance condition in the bona fide market-making activities exception [191] and including a written policies and procedures requirement.[192]

We received a comment to the 2011 proposed rule that any securitization participant relying on the proposed exception for bona fide market-making activities should be required to affirmatively certify that it is undertaking such activity for the sole purpose of market-making in connection with the securitization, and not for the purpose of generating speculative profits.[193] We did not include a certification requirement in the proposed exception, but we seek comment below on whether a certification requirement would be appropriate, and if so, what form such a certification should take and when it should be required to be made.

Request for Comment

88. Is the scope of the proposed bona fide market-making activities exception appropriate or is it overinclusive or underinclusive? Please provide specific examples of any activity that should be included in or excluded from the scope of the exception and provide a justification as to why and how that modification would not compromise investor protection. For example, is it appropriate for the proposed exception to apply to market-making in the financial instruments described in proposed Rule 192(b)(3)(i) or should the scope of financial instruments be narrowed or expanded? Does market-making in CDS in response to customer demands implicate the types of material conflicts of interest that the re-proposed rule is designed to address?

89. Should any of the proposed conditions applicable to the proposed bona fide market-making activities exception be modified? If yes, please provide the suggested modification and explain how such modification would be consistent with statutory authority and how that modification would not compromise investor protection. For example, should the bona fide market-making activities exception be modified to align more closely with market-making in the context of Regulation SHO? If so, please explain how the exception should be modified and why, and how doing so would not compromise investor protection. Should the bona fide market-making activities exception in the re-proposed rule include a condition that the securitization participant analyze the applicability of the exception on a trade-by-trade basis? Is the proposed condition that the securitization participant's market-making related activities are designed not to exceed, on an ongoing basis, the reasonably expected near term demands of clients, customers, or counterparties, taking into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments sufficient to prevent a securitization participant from providing a cover for activity that is not client driven but rather a bet against the relevant ABS? Should this condition include any additional requirements, such as the requirement that the securitization participant's market-making activities are driven by customer trading, customer liquidity needs, customer investment needs, or risk management by customers?

90. Is it appropriate to consider the liquidity, maturity, and depth of the market for the relevant financial instruments in determining whether a securitization participant routinely stands ready to purchase and sell such financial instruments for purposes of the proposed bona fide market-making activities exception? Would such considerations potentially allow a securitization participant to characterize only sporadic trading in illiquid financial instruments as market-making

[191] *See* Tewary Letter 1 at 12.

[192] *See* Better Markets Letter at 14.

[193] *See* Better Markets Letter at 11.

in an effort to evade the intent of the re-proposed rule? Are any such concerns about potential misuse or evasion of the exception adequately mitigated by the anti-circumvention provision in proposed Rule 192(d)? If you believe that there are unique characteristics of the ABS market that should be considered in the context of bona fide market-making activities in ABS and related financial instruments, such as lack of liquidity or increased settlement times compared to other asset classes, then please describe those in detail, provide supporting data, and explain if the proposed bona fide market-making activities exception, including the proposed conditions, is appropriate given such characteristics.

91. Should the compensation condition to the proposed bona fide market-making activities exception provide additional specificity regarding what it would mean for the compensation arrangements to be designed not to reward or incentivize conflicted transactions? If so, please explain what specific indicia or metrics would be appropriate for purposes of that determination and why, and please provide examples of acceptable and unacceptable compensation arrangements.

92. Are the proposed conditions of the bona fide market-making activities exception adequate to address any potential misuse and evasion of the exception? What are the ways in which a securitization participant could attempt to utilize the proposed exception in order to disguise speculative activity as bona fide market-making? Are any such concerns about potential misuse or evasion of the exception adequately mitigated by the anti-circumvention provision in proposed Rule 192(d)? Should an explicit anti-abuse provision be added as a condition to the proposed exception requiring that ''the market-making activity must not be conducted or designed to evade the requirements'' of proposed Rule 192, or would such a provision be unnecessary because of the anti-circumvention language in proposed Rule 192(d)?

93. As discussed above, certain of the conditions of the proposed bona fide market-making activities exception are similar to those that are applicable to the equivalent exception to the Volcker Rule's proprietary trading prohibition.[194] What are the potential benefits and drawbacks to this approach? If a securitization participant is subject to the Volcker Rule and would also be subject to the re-proposed rule, should a securitization participant that is in compliance with the conditions applicable to the equivalent Volcker Rule exception be deemed to be presumptively in compliance with the conditions applicable under the bona fide market-making activities exception to the re-proposed rule? Or are the purposes of the Volcker Rule and Section 27B sufficiently different that additional or different conditions are necessary for the re-proposed rule? Are there entities that are not subject to the Volcker Rule's proprietary trading prohibition and/or the associated compliance requirements, including small broker-dealers, that would seek to avail themselves of the proposed bona fide market-making activities exception to the re-proposed rule and that would be meaningfully disadvantaged by this approach? If so, please explain why and suggest an alternative approach that would be consistent with Section 27B. If your suggested alternative approach includes different compliance requirements for different types of entities, please explain how any such entity types should be defined for purposes of your suggested alternative approach.

94. Is the proposed condition applicable to the bona fide market-making activities exception regarding compliance and monitoring appropriate? Should such a condition include more or less stringent requirements? For example, should the condition require that a securitization participant have reasonably designed policies and procedures in place that specifically identify, document, and monitor the risks of its market-making positions and holdings (including an accounting of any positions or holdings that would constitute conflicted transactions under the re-proposed rule in the absence of the proposed exception for bona fide market-making activities) and the actions taken to demonstrably mitigate promptly those risks? Please identify any additional conditions that should be required as part of the compliance program condition. Is there sufficient clarity as to whether mitigation of the risks of market-making positions and holdings would be considered ''prompt'' as required by the proposed condition? If not, please explain what further guidance or clarification would be helpful in this context, including any specific indicia that should be included or referenced for purposes of this determination.

95. Should the proposed bona fide market-making activities exception require a securitization participant relying on the exception to affirmatively certify that it is undertaking such activity for the purpose of market-making in financial instruments permitted under the proposed exception and that it has complied with the relevant conditions in the re-proposed rule? If so, what form should such a certification take, and when should it be required to be made? For example, should the certification be required to be filed with, or otherwise furnished to, the Commission, or should it instead be required to be retained in the files of the securitization participant in accordance with its written policies and procedures? Should the certification requirement permit a securitization participant to make the required certification on a periodic basis with respect to all bona fide market-making activity occurring during that period, and if so, how frequently should the certification be required to be made? Please explain whether and how such a certification requirement would be practical for securitization participants.

96. Should smaller securitization participants be exempt from certain elements of the compliance program condition, such that those elements of the condition would apply only to securitization participants with significant trading assets and liabilities similar to the equivalent exception to the Volcker Rule, or should all elements of the compliance program condition apply to all securitization participants in order to adequately protect ABS investors? Alternatively, should the implementation of the compliance program requirement applicable to smaller securitization participants be delayed in order to give such entities more time to comply with the requirement? Why or why not? In your responses, please explain how ''smaller securitization participant'' should be defined for purposes of any such exemption or delayed implementation.

97. What are the positive or negative consequences of the bona fide market-making activities exception in the re-proposed rule?

H. General Request for Comment

We request and encourage any interested person to submit comments on any aspect of the re-proposed rule, other matters that might have an impact on the re-proposed rule, and any suggestions for additional changes. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and by alternatives to our re-proposal where appropriate.

[194] *See* 17 CFR 255.4(b).

III. Economic Analysis

A. Introduction

This re-proposed rule would implement the requirements of Section 27B,[195] as mandated under the Dodd-Frank Act. As discussed above, Section 621 of the Dodd-Frank Act added Section 27B to the Securities Act. Section 27B prohibits an underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of any such entity, of an ABS, including a synthetic ABS, from engaging in any transaction that would involve or result in certain material conflicts of interest.[196] Section 27B also includes exceptions from this prohibition for certain risk-mitigating hedging activities, bona fide market-making activities, and liquidity commitments.[197] The re-proposed rule also would exclude from the definition of ''sponsor'' the United States, agencies of the United States, and the Enterprises, in each case with respect to an ABS that is fully insured or fully guaranteed as to the timely payment of principal and interest by the relevant entity.[198]

As discussed above in Section I.B., Section 27B requires that the Commission issue rules for the purpose of implementing the prohibition in Section 27B, and Section 27B specifies the ABS transactions and securitization participants to be covered by the re-proposed rule, as well as the timeframe of the re-proposed rule's prohibition. We are sensitive to the economic impact, including the costs and benefits, imposed by its rules.[199] This section presents an analysis of the particular expected economic effects—including costs, benefits, and impact on efficiency, competition, and capital formation—that may result from the re-proposed rule, as well as possible alternatives to the re-proposed rule. Some of these effects, costs, and benefits would stem from statutory mandates, while others would be affected by the discretion exercised in implementing these mandates.

Where possible, we have sought to quantify the benefits, costs, and effects on efficiency, competition, and capital formation expected to result from the re-proposed rule. However, we are unable to reliably quantify many of the economic effects due to limitations on available data. Therefore, parts of the discussion below are qualitative in nature, although we try to describe, where possible, the direction of these effects. We further note that even in cases where we have some data regarding certain economic effects, the quantification of these effects is particularly challenging due to the number of assumptions that we need to make to forecast how the ABS issuance practice would change in response to the re-proposed rule, and how those responses would, in turn, affect the broader ABS market. For example, the re-proposed rule's effects would depend on how sponsors, borrowers, investors, and other parties to the ABS transactions (*e.g.,* originators, trustees, underwriters, and other parties that facilitate transactions between borrowers, issuers, and investors) adjust on a long-term basis to this new rule and the resulting evolving market conditions. The ways in which these parties could adjust, and the associated effects, are complex and interrelated. As a result, we are unable to predict some of them with specificity or are unable to quantify them at all. We are soliciting comment and requesting data to assist it with assessing and quantifying economic effects of the re-proposed rule.[200]

B. Economic Baseline

The baseline we use to analyze the economic effects of the re-proposed rule is the current set of rules, regulations, and market practices. To the extent that they are not consistent with current market practices, the proposed requirements would impose new costs. The proposed requirements would affect ABS market participants, including securitization participants and investors in ABS, and would indirectly affect loan originators, consumers, and businesses that seek access to credit. The costs and benefits of the proposed requirements depend largely on the current market practices specific to each securitization market. The economic significance or the magnitude of the effects of the proposed requirements also depend on the overall size of the securitization market and the extent to which the requirements could affect access to, and the cost of, capital. Below, we describe our current understanding of the securitization markets that would be affected by this re-proposed rule.

1. Overview of the Securitization Markets

The securitization markets are important for the U.S. economy and constitute a large fraction of the U.S. debt market.[201] Securitizations play an important role in the creation of credit by increasing the amount of capital available for the origination of loans and other receivables through the transfer of those assets—in exchange for new capital—to other market participants. The intended benefits of the securitization process include reduced cost of credit and expanded access to credit for borrowers, ability to match risk profiles of securities to investors' specific demands, and increased secondary market liquidity for loans and other receivables.[202]

Since the re-proposed rule would apply to any person from the point at which it has reached, or has taken substantial steps to reach, an agreement to become a securitization participant until one year after the date of the first closing of the sale of the ABS, to estimate the number of affected parties and the size of the affected ABS market, we use ABS issuance information rather than information on ABS amounts outstanding. For the purposes of establishing an economic baseline and to estimate affected market size, we use data covering the most recent full calendar year 2021 to avoid any seasonal effects on estimates (''baseline period'').[203]

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[195] 15 U.S.C. 77z–2a.

[196] *See* Section II.A.

[197] *See* Sections II.E. through II.G.

[198] *See* Section II.B.2.c.

[199] Section 2(b) of the Securities Act [15 U.S.C. 77b(b)] requires us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

[200] *See* Section III.G.

[201] *See, e.g.,* SEC Staff Report, U.S. Credit Markets Interconnectedness and the Effects of the COVID–19 Economic Shock (Oct. 2020), available at *https://www.sec.gov/files/US-Credit-Markets_COVID-19_Report.pdf.* Among other things, the report provides an overview of the various parts of the securitization markets and their connections to the broader U.S. financial markets. This is a report of the staff of the U.S. Securities and Exchange Commission, which represents the views of Commission staff, and is not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved the content of this report and, like all staff statements, it has no legal force or effect, does not alter or amend applicable law, and creates no new or additional obligations for any person.

[202] *See, e.g.,* Board of Governors of the Federal Reserve System, Report to the Congress on Risk Retention (Oct. 2010), available at *https://www.federalreserve.gov/boarddocs/rptcongress/securitization/riskretention.pdf,* and Financial Stability Oversight Council, Macroeconomic Effects of Risk Retention Requirements (Jan. 2011).

[203] The primary data source for our numeric estimates of issuance of private-label non-municipal ABS are the Green Street Asset-Backed Alert Database and the Green Street Commercial Mortgage Alert Database. The databases present the initial terms of all ABS, MBS, CMBS, and CLOs collateralized by assets of some kind, and synthetic CDOs, rated by at least one major credit rating agency, and placed anywhere in the world (however, only deals sold in the U.S. are included in our analysis). The databases identify the primary

Continued

We estimate that the baseline period annual issuance of private-label [204] non-municipal ABS in the U.S. was $814 billion in 1,441 individual ABS deals and the baseline period annual issuance of municipal ABS in the U.S. was $104 billion in 1,928 deals.[205] Out of private-label non-municipal ABS, 29 deals totaling $11.5 billion were risk transfer ABS deals; some or all of these risk transfer ABS deals could be synthetic ABS or hybrid cash and synthetic ABS deals.[206] During the baseline period, Ginnie Mae provided a government guarantee to $855 billion of newly issued MBS, and the Enterprises issued $2.65 trillion of Enterprise-guaranteed MBS [207] and 16 CRT securities deals worth $16.9 billion.[208] Currently, the Enterprises are in conservatorship with the U.S. Treasury and are regulated by the FHFA.[209]

2. Affected Parties

Parties potentially affected by the re-proposed rule include:

- Parties that have direct compliance obligations under the re-proposed rule with respect to the proposed prohibition, namely, underwriters, placement agents, initial purchasers, and sponsors, or any affiliates or subsidiaries of such entities (''securitization participants'' as defined above).
- U.S. agencies and the Enterprises with respect to certain types of ABS.[210]
- Other entities that provide services in the securitization process, including depositors, servicers and other service providers, as well as their domestic and foreign affiliates and subsidiaries.
- Counterparties that invest/deal in financial products, including derivatives, related to synthetic ABS (and hybrid cash and synthetic ABS). For example, dealers that trade CDS on the ABS to securitization participants.
- ABS investors, *e.g.,* pension funds, endowments, foundations, hedge funds, and mutual funds.
- Ultimate borrowers that rely on ABS markets for capital (*e.g.,* corporations, households) and participants in the markets where the borrowed capital is applied.
- Other market participants that could be affected by changes in securitization practices. For example, originators that retain residual interest in the reference asset pool or their creditors.

While one part of the proposed definition of the term ''sponsor'' is derived from the Regulation AB definition of sponsor, the definition in the re-proposed rule also includes any person that directs or causes the direction of the structure, design, or assembly of an ABS or the composition of the pool of assets underlying the ABS (a ''directing sponsor'') or that has the contractual right to do so (a ''contractual rights sponsor''). Whether a person is a directing sponsor would be based upon the specific facts and circumstances. This new definition of ''sponsor'' for purposes of the re-proposed rule has not been used before. Thus, the set of ABS sponsors would consist of three types of entities: those that organize and initiate an ABS transaction, those that are contractual rights sponsors, and those that are directing sponsors (for example, the latter two types might include Registered Investment Advisers (''RIAs'') that advise hedge funds, and that could also qualify as a sponsor under the re-proposed rule). We estimate that in the baseline period, there were 455 unique sponsors of the first type of private-label non-municipal ABS and there were 52 unique underwriters for such ABS deals; of these, we estimate that there were 14 unique sponsors and 16 unique underwriters of risk transfer ABS.[211] We also estimate that, in the baseline period, there were 179 unique issuers of Ginnie Mae-guaranteed MBS,[212] 52 unique mortgage securities approved dealers of Freddie Mac-guaranteed MBS,[213] and 9 unique underwriters of Enterprise CRT securitizations.[214] We estimate that there were 478 unique municipal entities that sponsored municipal ABS, 104 unique underwriters of municipal ABS, and 112 unique municipal advisors.[215] There is an overlap between these categories of sponsors and underwriters since some sponsors and underwriters might perform multiple functions and might be active in multiple market segments and, thus, the total number of potentially affected sponsors and underwriters is lower than the sum of the numbers above. As for contractual rights sponsors and directing sponsors, we note that the proposed definition of sponsor captures persons that direct or cause the direction of the structure of ABS or the composition of the underlying asset pool even if they do not have contractual rights in connection with the ABS. Under this proposed definition, we lack data related to the number of such sponsors, as the proposed definition expands the concept to certain securitization participants that currently are not counted as sponsors in any existing database to the best of our knowledge. We believe that the number of such sponsors is limited as explained below, but we do not have data to quantitatively determine the number of such sponsors.

3. Current Relevant Statutory Provisions, Regulations, and Practices

Current market practices may be generally consistent with the re-proposed rule requirements as a result of market participants' current compliance with the existing rules and reputational incentives described below.

As an initial matter, the general anti-fraud and anti-manipulation provisions of the Federal securities laws, including Section 17(a) of the Securities Act, Section 10(b) and Rule 10b–5 under the

participants in each transaction. The primary data source of our numeric estimates of issuance of municipal ABS is Mergent Municipal Bond Securities Database.

[204] Private-label ABS are ABS that are not sponsored or guaranteed by U.S. Government agencies or the Enterprises.

[205] Data drawn from the Green Street Asset-Backed Alert Database, the Green Street Commercial Mortgage Alert Database, and Mergent Municipal Bond Securities Database.

[206] Data drawn from the Green Street Asset-Backed Alert Database and the Green Street Commercial Mortgage Alert Database.

[207] *See* Laurie Goodman, *et al., Housing Finance: At a Glance Monthly Chartbook, September 2022,* Urban Institute (Sept. 29, 2022), at 30, available at *https://www.urban.org/research/publication/housing-finance-glance-monthly-chartbook-september-2022.*

[208] *See* The Green Street Asset-Backed Alert Database. Of the 16 CRT transactions in 2021, 13 were issued by Freddie Mac ($13.82 billion) and 3 were issued by Fannie Mae ($3.09 billion). Broadly, the Enterprise CRT programs transfer mortgage credit risk from the Enterprises to private investors. In doing so, CRT issuance lowers Enterprise capital requirements and increases their return on capital, while providing the Enterprises with market-based pricing information on Enterprise ABS credit risk. *See* Freddie Mac, CRTcast E4: CRT Then and Now, A Conversation with Don Layton (Nov. 17, 2021), available at *https://crt.freddiemac.com/_assets/pdfs/insights/crtcast-episode-4-transcript.pdf*; Jonathan B. Glowacki, *CRT 101: Everything you need to know about Freddie Mac and Fannie Mae Credit Risk Transfer,* Milliman (Oct. 11, 2021), available at *https://www.milliman.com/en/insight/crt-101-everything-you-need-to-know-about-freddie-mac-and-fannie-mae-credit-risk-transfer.*

[209] *See* discussion in Section II.B.2.c.ii.

[210] The proposed exception from the definition of ''sponsor'' with respect to those entities should lessen the impact of the re-proposed rule on these parties with respect to certain types of ABS, but these parties might still be otherwise affected.

[211] The Green Street Asset-Backed Alert Database.

[212] To arrive at the figure of 179 unique issuers, we compared the list of Ginnie Mae approved issuers (*see* Ginnie Mae Approved Issuers Directory, available at *https://www.ginniemae.gov/issuers/issuer_tools/Pages/issuers.aspx*) to the issuers that actually issued securities in the baseline period (*see* Ginnie Mae Single Family Loan Performance Data, available at *https://www.ginniemae.gov/investors/disclosures_and_reports/Pages/bulletins.aspx*).

[213] *See* Freddie Mac Mortgage Securities Approved Dealer Group, available at *https://capitalmarkets.freddiemac.com/mbs/products/dealer-groups.*

[214] The Green Street Asset-Backed Alert Database.

[215] Mergent Municipal Bond Securities Database.

Exchange Act, apply to ABS transactions.

There were several ABS deals exhibiting conflicts of interest targeted by the re-proposed rule that were generally originated in the pre-financial crisis years, 2005–2007. These deals harmed investors, exposed conflicts of interest of certain securitization participants, and received increased attention from Congress, the market, and regulators in the 2010s.[216] However, despite the increased scrutiny at that time, we do not have data on the extent of securitization participants' participation in ABS transactions that are tainted by material conflicts of interest following the financial crisis of 2007–2009.

Following the financial crisis of 2007–2009, the Commission adopted several rules that reinforce the alignment of economic incentives of securitization participants and investors and reduce information asymmetries. Regulation RR, adopted by the Commission in 2014 for the purpose of implementing Section 941 of the Dodd-Frank Act, generally requires certain ABS sponsors (as defined under Regulation RR) to retain not less than 5 percent of the credit risk of the assets collateralizing an ABS for a period from five to seven years, after the date of closing of the securitization transaction, as specified by the rule.[217] Credit risk retention aligns the economic interest of ABS sponsors and long investors in an ABS by requiring ABS sponsors to retain financial exposure to the same credit risks as ABS investors and, in this regard, differs from the re-proposed rule, which does not require securitization participants to retain any exposure to securitization risks. Generally, a sponsor of an ABS deal that is required to retain exposure to the credit risk of the deal is not expected to engage in the transactions prohibited by the re-proposed rule because Regulation RR prohibits them from hedging the interest that they retain and, otherwise, such transactions would generally perform against the economic interest of the party resulting from the retained exposure.

Compared to the re-proposed rule, Regulation RR is narrower in its scope: it restricts the conduct of only those securitization participants that are ''sponsors'' for purposes of Regulation RR, the definition of which is roughly analogous to paragraph (i) of the re-proposed rule's multi-part definition of ''sponsor.'' [218] However, the re-proposed rule would not be limited to such ''sponsors'' and would thus apply to various securitization participants that are not sponsors under Regulation RR and that are not required to retain credit risk under Regulation RR. Additionally, Regulation RR does not apply to several types of securitizations (*e.g.,* arbitrage or open-market CLO, synthetic ABS, or a security issued or guaranteed by any State, or by any political subdivision of a State, or by any public instrumentality of a State that is exempt from the registration requirements of the Securities Act by reason of Section 3(a)(2) of that Act) while the re-proposed rule applies to all types of ABS securitizations as discussed in Section II.A.

Further, SEC-registered ABS offerings must comply with the SEC's registration, disclosure, and reporting requirements. Commission disclosure requirements, including asset-level disclosures for some asset classes,[219] reduce asymmetric information about securitization participants and underlying assets in ABS and allow investors easy access to data and tools to review ABS deals, including to assess underlying asset quality. While disclosure in the SEC-registered ABS offerings creates incentives for securitization participants to avoid potential conflicts of interest because such conflicts would be visible to a large set of potential investors, these disclosure rules only apply to SEC-registered ABS offerings. The re-proposed rule would apply to both registered ABS and unregistered ABS (including synthetic ABS as well as hybrid cash and synthetic ABS) that are not subject to the Commission's disclosure requirements for registered offerings by prohibiting certain types of transactions involving registered ABS and unregistered ABS that involve or would result in a material conflict of interest. Furthermore, the re-proposed rule would apply to underwriters, placement agents, initial purchasers, and sponsors of an ABS, as well as to their affiliates and subsidiaries, such that it would prohibit misconduct by securitization participants that may or may not have disclosure liability under the Federal securities laws.

As noted above, current market practices may be generally consistent with the re-proposed rule requirements as a result of compliance with the existing rules described above. Additionally, securitization participants might be incentivized to avoid conflicted transactions in order to maintain their industry reputation and avoid reputational harm. A securitization participant that is known to regularly engage in ''conflicted transactions'' as defined in proposed Rule 192(a)(3) might lose its reputation among investors and its participation in ABS deals that a participant facilitates. Failure to disclose a person's substantial role in selecting assets underlying an ABS and that person engaging in conflicted transactions would make a securitization participant potentially subject to enforcement actions under the anti-fraud provisions of the securities laws.[220] On the other hand, disclosing conflicted transactions to investors would create negative reputation effects for securitization participants. Thus, as a baseline matter, securitization participants may be incentivized to avoid conflicts of interest and make assurances to ABS investors about the absence of such conflicts of interest, which might serve as a signal to some investors that securitization participants have investors' interest in mind while facilitating ABS transactions and might increase investor participation in such deals; however, it may be difficult for investors to assess the credibility of those assurances.

We preliminarily believe that this is the current market equilibrium due to market participants' obligation to comply with the existing rules and to reputational incentives. However, we do not have data on actual incidence of conflicted transactions, and it is possible that such transactions continue to occur.

C. Broad Economic Considerations

Securitizations are an important part of the financial system, facilitating capital formation and capital flows from investors to borrowers. However, they

[216] *See, e.g.,* Consent and Final Judgement as to Defendant J.P. Morgan Securities LLC in *SEC* v. *J.P. Morgan Securities LLC* (*f/k/a/J.P. Morgan Securities Inc.*), 11 CV 4206 (S.D.N.Y. 2011) Litigation Release No. 22008 (June 21, 2011), 2010 WL 6796637; Consent and Final Judgement as to Defendant Goldman, Sachs & Co. in *SEC* v. *Goldman, Sachs & Co. and Fabrice Tourre,* 10 CV 3229 (S.D.N.Y 2010) Litigation Release No. 21592 (July 15, 2010), 2010 WL 2799362 (July 15, 2010); Senate Financial Crisis Report, *supra* note 11.

[217] *See* RR Adopting Release, *supra* note 31.

[218] *See* Regulation RR, Subpart A.2., p. 77742, *supra* note 31.

[219] Asset-level requirements are specified in Item 1125 of Regulation AB, 17 CFR 229.1125.

[220] Further, an adviser to a hedge fund, as part of the adviser's fiduciary duty to the hedge fund, has a duty of loyalty that requires it to ''make full and fair disclosure to its clients of all material facts relating to the advisory relationship'' and ''eliminate, or at least expose, through full and fair disclosure all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested.'' *See Commission Interpretation Regarding Standard of Conduct for Investment Advisers,* Release No. IA–5248 (June 5, 2019) [84 FR 33669 (July 12, 2019)] at 33675.

can generate significant risks to the economy and ABS investors. Specifically, securitization markets are characterized by information asymmetries between securitization participants and investors in the ABS, who are the ultimate providers of credit, and such information asymmetries may give rise to two groups of adverse effects.

First, asymmetric information can reduce the willingness of less informed market participants [221] to transact in a given market. This is a secondary effect of ''adverse selection,'' the situation in which information asymmetry benefits some market participants (*i.e.,* securitization participants) to the detriment of others (*i.e.,* ABS investors).[222] Adverse selection has been thoroughly documented in the economic literature, and its deleterious effects on market liquidity and efficiency are well known in sectors such as banking [223] and insurance.[224] In securitization markets, adverse selection could possibly manifest itself through a reduction in the number of investors, because investors would be less informed about the quality of underlying assets than loan originators or securitization sponsors, a consequence that reduces liquidity and increases transaction costs.[225]

Second, asymmetric information may increase risk-taking by more informed counterparties if they do not bear the adverse consequences of such risks—an effect commonly known as ''moral hazard.'' [226] In the realm of securitizations, loan originators, securitization sponsors, and underwriters potentially create or increase risks in the underwriting or securitization process for which they do not bear the consequence, and about which the investor lacks information.[227]

Securitization participants have access to more information about the credit quality and other relevant borrower characteristics than the ultimate investors in the securitized assets. Securitization participants may also participate in the selection of assets for ABS. This information asymmetry can have adverse market effects to the extent that securitization participants seek to profit from their differential information. As observed above, prior to the financial crisis of 2007–2009, sponsors sold assets that they knew to be very risky, without conveying that information to ABS investors, and sometimes even while taking financial positions to benefit from adverse performance of underlying assets.

The patterns for adverse selection and misreporting low-quality assets were even more severe in CDOs and synthetic CDOs in the period prior to the financial crisis of 2007–2009.[228] One paper [229] finds evidence consistent with the tailoring of CDO structures for short bets and negative performance, and finds that the synthetic CDOs issued in 2005–2007 that were shorted in CDS contracts performed even worse in 2008–2010. This is consistent with incentives of underwriters to structure these securities so as to profit from short positions on such securities.

There are several possible ways, which can be complementary, to mitigate the effects of such information asymmetries in the securitization process. One way to partially offset information asymmetries is to require that sponsors retain some ''skin in the game,'' through which loan performance can affect sponsors' profits as much as—or more than—those of the ABS investors: that is accomplished by the credit risk retention mandated by Regulation RR.[230] To the extent the Regulation RR reduces adverse selection costs and moral hazard, many currently issued ABS are less likely to be instruments used in conflicted transactions. Another way to partially offset information asymmetries is to require securitization participants to have robust disclosures of information about ABS deals or individual assets. An additional approach to partially offset the effects of information asymmetries is to directly prohibit securitization participants from engaging in certain transactions through which they could benefit from that information asymmetry, which is what the re-proposed rule, as mandated under the Dodd-Frank Act, is designed to achieve.

The adverse selection problem may be especially severe when it is costly for investors to demand from securitization participants sufficient transparency about the assets or securitization structure to overcome informational differences between these securitization participants and investors or when it is costly for investors to process such information. In these cases, the securitization process can misalign incentives so that the welfare of some market participants is maximized at the expense of other market participants. Many of these risks are not adequately disclosed to investors in securitizations, an issue that is compounded as sponsors introduce increasingly complex structures like CDOs or synthetic ABS.

Thus, the re-proposal is designed to enhance investor protection and the integrity of the ABS markets by helping to constrain the ability of securitization participants to benefit from the information asymmetry and limiting their incentives to exploit the information asymmetry at the expense of ABS investors. In particular, securitization participants would further be precluded from benefitting from the actual, anticipated, or potential adverse performance of an ABS or assets underlying such ABS. And, the re-proposed rule would help prevent the sale of ABS that are tainted by the material conflicts of interest that Section 27B is designed to address, to the extent such sales currently occur, and would curb activity that is viewed as contributing to the financial crisis of 2007–2009. In this way, the re-proposal would help prevent conflicted transactions leading to the creation and sale of ABS that facilitate amplification of risk transfer from informed to uninformed parties and the spread of risks from low quality or riskier loans throughout the financial system.

Accordingly, the re-proposal might have economic effects on broader credit markets. ABS investors may be willing to pay more or accept a lower rate of return for bearing the credit risk, which

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[221] The term ''market participants'' used in this section encompasses all participants in the ABS markets, including ABS investors, and is a broader term than the proposed defined term ''securitization participant.''

[222] *See* George A. Akerlof, *The Market for 'Lemons': Quality Uncertainty and the Market Mechanism,* 84 The Quarterly J. of Econ. 488–500 (1970).

[223] *See* Joseph E. Stiglitz & Andrew Weiss, *Credit Rationing in Markets with Imperfect Information,* 71 The Am. Econ. Rev. 393–410 (1981).

[224] *See* Amy Finkelstein & James Poterba, *Adverse Selection in Insurance Markets: Policyholder Evidence from the U.K. Annuity Market,* 112 J. of Pol. Econ. 183–208 (2004).

[225] *See* Adam B. Ashcraft & Til Schuermann, *Understanding the Securitization of Subprime Mortgage Credit,* Fed. Reserve Bank of N.Y. Staff Report No. 318 (2008) (identifying at least seven different frictions in the residential mortgage securitization chain that can cause agency and adverse selection problems in a securitization transaction and explaining that given that there are many different parties in a securitization, each with differing economic interests and incentives, the overarching friction that creates all other problems at every step in the securitization process is asymmetric information).

[226] *See, e.g.,* Bengt Holmstrom, *Moral hazard and observability,* Bell Journal of Economics, pp. 74–91 (1979) and references therein.

[227] *See supra* note 225.

[228] *See, e.g.,* Senate Financial Crisis Report.

[229] *See* Oliver Faltin-Traeger and Christopher Mayer, *Lemons and CDOs: Why Did So Many Lenders Issue Poorly Performing CDOs?,* Columbia Business School Working Paper (2012) (analyzing the characteristics and performance of underlying assets going into CDOs and synthetic CDOs issued in 2005–2007 and comparing the ABS observed in a CDO with other ABS not observed in a CDO).

[230] *See* discussion of current market practices with respect to credit risk retention in Section III.B.3.

in turn could reduce borrowing costs for underlying borrowers. The direction and magnitude of this possible impact on borrowing rates would depend on the tradeoff between the costs of complying with the re-proposed rule and how market participants may reprice ABS due to enhanced investor protection benefits in the re-proposed rule.

The economic considerations above are significantly less applicable to ABS backed by the full faith and credit of the United States government. Even though investment in such fully insured or fully guaranteed ABS is not risk free, investors in such ABS are not exposed to the credit risk of individual underlying assets and, thus, are not subject to the adverse selection and moral hazard issues described above.[231] As a result, such ABS are less susceptible to the conflicts of interest that the re-proposed rule intends to limit. Similarly, while the Enterprises are in conservatorship, due to the unique nature of the authority and oversight of FHFA over their operations as a result of such status, they are less likely to act in a manner that would result in prohibited transactions for the benefit of private parties, and, thus, the adverse selection issues described above would be less likely to apply to them. In addition to Enterprise-guaranteed ABS, Enterprises issue CRT securities. For these Enterprise-issued CRT transactions, the Enterprises would be ''sponsors'' for purposes of the re-proposed rule and therefore would be prohibited from engaging in conflicted transactions with respect to investors in CRT securities (*e.g.,* a short sale of the relevant CRT security).

D. Costs and Benefits

Both overall costs and overall benefits of the re-proposed rule would depend on the extent to which the existing market practices are largely consistent with the re-proposed rule and the existing investor protection mechanisms via anti-fraud and anti-manipulation provisions of the securities laws. Costs and benefits are separately discussed in the next sections in more detail.[232]

1. Benefits

Investors in ABS economically benefit from the performance of ABS that is commensurate with the level of risk that investors are willing to take and, generally, they do not benefit from the adverse performance of ABS. The re-proposed rule would benefit investors by prohibiting securitization participants from engaging in certain transactions through which they would benefit from the actual, anticipated, or potential adverse performance of an ABS, or assets underlying such ABS, to the detriment of ABS investors. Additionally, the re-proposed rule would provide broad investor protection by prohibiting conflicted transactions and this protection could help alleviate investor concerns that the securities they purchase might be tainted by certain material conflicts of interest. It could also help reduce moral hazard and adverse selection costs in the ABS market, leading to better investor protection and lower cost of capital.[233]

The re-proposed rule could enhance market stability through reduced incentives to engage in conflicted transactions and other speculative activity in the ABS market. This effect could be especially pronounced for asset pools that are involved in re-securitizations or synthetic ABS because of their complexity and the relative difficulty of assessing information about underlying assets of such ABS. Enhanced market stability would reduce the variance of ABS prices in the primary market and volatility of ABS prices in the secondary market.

Lower adverse selection costs, higher expected liquidity, and lower expected volatility in ABS markets can lower the expected return required by ABS investors to invest in ABS and, in turn, that may lower credit costs in loan markets for households and corporations whose debts enter the reference asset pools underlying the asset-backed securitizations. For the reasons explained above, therefore, this re-proposal could lead to lower credit costs to the extent it would lower adverse selection costs, increase expected liquidity, and lower expected volatility.

We believe our proposed definitions of the terms ''underwriter,'' ''placement agent,'' ''initial purchaser,'' ''sponsor,'' ''material conflict of interest,'' and ''conflicted transaction'' in the re-proposed rule would capture with precision the types of securitization participants and types of conflicts of interest at which Section 27B is aimed, would reduce asymmetric information between securitization participants and investors, and, in turn, may reduce evasion and better protect investors. In particular, the proposed definition of ''sponsor'' captures both the contractual rights associated with sponsoring ABS and a person's function in connection with a securitization. The function prong in the proposed definition of sponsor relies on a determination of directing the structure of the ABS or the composition of its underlying asset pool rather than solely on contractual rights to exercise discretion over ABS. The proposed definition would reduce rule evasion executed through non-contractual control over the composition of the asset pool for ABS. All these effects would further reduce adverse selection costs in the ABS market and encourage investment in asset-backed securities to the extent that investors consider material conflicts of interest important in their investment decisions. Clearly defined terms also facilitate compliance with the rule and reduce compliance costs.

The re-proposed rule would commence application of the rule's prohibition when a person has reached, or has taken substantial steps to reach, an agreement to become a securitization participant. This approach in the re-proposed rule would help prevent evasive conduct that might happen before closing of a securitization and, thus, further enhance investor protection benefits of the re-proposed rule. Similarly, covering affiliates or subsidiaries of securitization participants under the proposed definition of ''securitization participant'' would help ensure that the benefits of the re-proposed rule are not nullified through evasive conduct executed via such affiliates or subsidiaries.

In addition, the re-proposed rule would specify the scope of conflicts of interest through the proposed definitions of the terms ''material conflict of interest'' and ''conflicted transaction.'' ''Material conflict of interest'' would be defined as any transaction that would involve or result in a material conflict of interest between a securitization participant of an ABS and an investor in such ABS if such a transaction is a conflicted transaction. The proposed definition of ''conflicted transaction'' would include explicit descriptions of specific types of conflicting transactions and would also include any financial instrument through which the securitization

[231] *See* discussion in Section II.B.2.c.i.

[232] As discussed above, some commenters on the 2011 proposed rule discussed the proposal's economic analysis. In light of the changes in the re-proposal, the economic analysis in this release addresses the costs and benefits of the re-proposal.

[233] Adverse selection in securitizations arises because securitization participants have information about the underlying asset selection process and the underlying asset quality that ABS investors do not have. Thus, the ABS offering price might exceed ABS private value known to securitization participants. ABS investors, therefore, might require a higher rate of return on ABS tranches to compensate them for the risk of buying lower valued assets, which is a cost of adverse selection. If the asymmetric information is reduced, the adverse selection costs might reduce as well. *See supra* note 225.

participant would benefit from the actual, anticipated, or potential adverse performance of an ABS or its underlying asset pool.[234] These aspects of the re-proposal would tailor the prohibition of the re-proposed rule to certain conflicts of interest. At the same time, however, the proposed anti-circumvention provision states that a transaction that circumvents the prohibition is a conflicted transaction even if the definitions do not address the form, label, or documentation of the transaction in question. In addition, the proposed definition of the term ''material conflict of interest'' looks to whether securitization participants who engage in an ABS would benefit from a ''conflicted transaction'' (as defined above) and whether a reasonable investor would consider the conflicted transaction important to the investor's investment decisions. These elements of the re-proposal may capture certain types of material conflicts of interest that give rise to adverse selection and moral hazard costs. The magnitude of economic benefits from a reduction of these costs may be dampened to the degree that market participants already avoid such material conflicts of interest.

The re-proposed rule provides exceptions for risk-mitigating hedging activities, liquidity commitments, and bona fide market-making activities, which are consistent with Section 27B. As discussed below, all of these exceptions taken together could improve market efficiency and facilitate investor protection without diluting the investor protection benefits of the re-proposed rule. The re-proposal's conditions for the availability of these exceptions would permit valuable risk-mitigating hedging, liquidity provision, and bona fide market-making, while reducing the severity of conflicts of interest between securitization participants and investors in ABS, thus enhancing investor protections. Defining the scope of these exceptions may also ease compliance with the rule, although benefits from specificity could be dampened by the proposed anti-circumvention provision which states that a transaction circumventing the proposed prohibition will be deemed a conflicted transaction. To the extent the proposed anti-circumvention provision prevents misuse of the exceptions, however, that provision would strengthen investor protections.

Risk-mitigating hedging activities permit a securitization participant to fine-tune the amount of credit risk taken or to limit some of the consequences of taking a risk. We believe that the proposed risk-mitigating hedging activities exception would promote the re-proposed rule's benefits of investor protection without prohibiting securitization participants' risk mitigation activities, unduly increasing securitization participants' costs of engaging in such activities, or increasing barriers to entry in ABS markets. Thus, the proposed exception may improve efficiency of ABS markets and help protect ABS investors. The re-proposed rule's conditions that risk-mitigating hedging activities do not facilitate or create an opportunity to benefit from a conflicted transaction, and that a securitization participant establishes an internal compliance program, enhance the benefits of the rule by assuring investors that risk-mitigating hedging activities of securitization participants would be less likely to create (intentionally or inadvertently) economic conflicts of interest with investors. Moreover, the policies and procedures in the proposed risk-mitigating hedging activities exception that provide for the identification, monitoring, and documentation of the risk and related hedging could be used by the Commission in its examination programs for regulated entities. Thus, the proposed risk-mitigating hedging activities exception would help ensure the investor protection benefits of the rule, while allowing risk-reducing actions of securitization participants.

The proposed exceptions for liquidity commitments and bona fide market-making activities may help prevent a loss of secondary liquidity and efficiency in the ABS market and, thus, benefit ABS investors. The re-proposed rule conditions for the availability of and limits on the liquidity commitments and bona fide market-making activities exceptions, as well as the requirement that a securitization participant establish an internal compliance program, may enhance the benefits of the re-proposal by assuring investors that such activities of securitization participants would be less likely to create (intentionally or inadvertently) economic conflicts of interest with investors.

The re-proposed rule also includes an exception from the proposed definition of ''sponsor'' for the United States, agencies of the United States, and, subject to certain conditions, the Enterprises, in each case with respect to an ABS that is fully insured or fully guaranteed by the relevant entity. While the Enterprises are in conservatorship with the U.S. Treasury and the Enterprises retain all credit risk associated with guaranteed ABS, market participants perceive Enterprise-guaranteed ABS as having almost no credit risk.[235] Also, as discussed above in Section II.B.2.c.ii., while the Enterprises are in conservatorship, due to the unique nature of the authority and oversight of FHFA over their operations as a result of such status, as well as the capital support provided by Treasury under the PSPAs, the Enterprises are not expected to act in a manner that would result in conflicted transactions that would benefit private parties, and, thus, are not expected to engage in the adverse selection of assets for their ABS. Thus, this exception from the proposed definition of ''sponsor'' would not adversely affect investors, would help ensure that U.S. mortgage borrowers do not face any additional mortgage borrowing costs, and, in the case of the Enterprises, would continue to allow the Enterprises to transfer credit risk to private investors to lower the Enterprises' capital requirements and increases the Enterprises' return on capital.

2. Costs

The re-proposed rule would create direct compliance costs for securitization participants, some of which are discussed in detail in Section IV.C. The compliance costs could come from the need to establish policies, procedures, and informational barriers to implement the re-proposed rule, as well as associated legal review.[236] The re-proposed rule could also create higher monitoring costs in order to avoid entering into covered transactions. To the extent that market participants have compliance systems that could be modified to help ensure compliance with the re-proposed rule, these compliance costs would be lower.

Section IV below estimates the initial and ongoing compliance costs to implement, maintain, and enforce written policies and procedures for securitization participants that would be relying on the risk-mitigating hedging activities or bona fide market-making activities exceptions of the re-proposed rule.[237] As estimated in Section IV, we expect the industry-wide total annual paperwork burden of the re-proposed rule for securitization participants to prepare, review, and update the policies and procedures under the re-proposed

[234] *See* Section II.D for a more detailed discussion of possible conflicting transactions.

[235] *See, e.g.,* Zhiguo He & Zhaogang Song, *Agency MBS as Safe Assets,* NBER Working Paper no. 29899 (2022).

[236] One commenter suggested that the rule would significantly increase costs, including legal costs. *See* ABA Letter at 15.

[237] *See* Section IV (discussing costs and burdens relating to the re-proposed rule for purposes of the Paperwork Reduction Act).

rule to be 45,540 burden hours. Using the same $600 hourly cost of either retaining outside professionals or estimates of internal hourly salaries of senior compliance officers, we estimate that the total annual direct compliance cost would be $27,324,000.

As required by Section 27B(a), the scope of securitization participants in the re-proposed rule includes affiliates and subsidiaries of underwriters, placement agents, initial purchasers, and sponsors. In some instances, the activities of an affiliate or subsidiary may not be known to the underwriter, placement agent, initial purchaser, or sponsor, and could, inadvertently, involve or result in a material conflict of interest with the investors in the ABS. Monitoring the activities of the affiliate or subsidiary for conflicts could be operationally difficult, especially when there are existing information barriers between the entities, including for reasons unrelated to the ABS (*e.g.,* between investment banking and trading). This additional monitoring could also impose additional compliance costs for large groups of affiliated financial entities.

Despite the inclusion of the risk-mitigating hedging activities exception, restrictions under the re-proposed rule could limit risk mitigation and revenue-enhancing investment options available to affected securitization participants. For example, by restricting the type and extent of hedging allowed to those activities excepted from the re-proposed rule, securitization participants may not be able to actively hedge their portfolio exposure. This outcome could require securitization participants to increase their fees to compensate for the loss of ability to hedge some risks. Alternatively, such costs could be borne by securitization participants or passed to investors in the form of lower expected returns or to borrowers in the form of higher cost of capital.

We recognize that the re-proposed rule could affect the scope of some current activities undertaken by underwriters, sponsors, and other securitization participants, if they perceive such activities as conflicting with the re-proposed rule. For example, one commenter to the 2011 proposed rule suggested that financial firms might not be able to determine with a sufficient level of certainty that a conflict of interest exists or does not exist with respect to a transaction, and that this lack of clarity will provide significant disincentive for activity in ABS.[238] This commenter also stated that potential participants in ABS transactions could be conflicted out and, as a result, securitization markets in some situations could function less effectively, which could ultimately be detrimental to consumers of credit, the economy, and investors.[239] Further, we recognize that curtailment or cessation of some activities, in turn, could lead to potential costs for such participants and the broader securitization market. As described below, material conflicts of interest might only arise between an investor and a particular securitization participant, which might lead the investor to seek a relationship with another securitization participant. However, other material conflicts of interest could arise as a result of the nature or structure of the transaction as a whole (without regard to the identity of the securitization participants involved), such that these types of transactions might be effectively prohibited. In such cases, there might be costs to the marketplace as a whole as investors and securitization participants seek alternative and potentially less efficient transaction structures to effect a similar investment strategy in a way that would not result in a material conflict of interest, or if investors and securitization participants were unable to effect their investment strategies at all.

Thus, the re-proposed rule could result in the loss of clientele for some securitization participants, especially diversified firms that service different risk-mitigation and investment needs of clients, customers, or counterparties. This could have an adverse impact on securitization participant revenues as well as costs, due to the nature of the business (for example, underwriting), where finding and retaining clientele could be an expensive activity.

At the same time, clients, customers, or counterparties of covered parties in the ABS market could also face higher search costs as they might need to find new, non-conflicted counterparties. The clients, customers, or counterparties also could bear undesirable costs by losing the ability to utilize firms with particular expertise or specialization in certain areas due to real or perceived material conflicts of interest. Clients, customers, or counterparties might also incur costs in searching for a different firm to consummate a transaction, where they have a preexisting relationship that they too have invested resources into developing. In addition, to retain their ability to utilize specific firms for non-asset-backed security related transactions, some potential clients, customers, or counterparties might choose to forgo the ABS investment. We recognize that if the re-proposed rule were to cause an investor to forgo an ABS investment entirely, the investor could incur costs in seeking out alternative investments as well as the opportunity cost of the loss of return from the ABS investment.

Taken together, conflicting out certain relationships can reduce market liquidity and investor choice through a decline in the available set of investment opportunities. This decline could be more acute in the short-term when securitization participants and clients, customers, or counterparties realign their business practices to comply with the rule, but it could persist even in the long run.

The re-proposed rule could impose certain costs upon departments within a firm not directly involved with the securitization process, by influencing their ability to conduct transactions that could result in a material conflict of interest with investors in an asset-backed security for which the firm is a securitization participant. The scope of the re-proposed rule could require monitoring for potential material conflicts of interest within all or many departments of the firm. If any department's proposed transaction were determined to raise a potential material conflict of interest, that department would have to abandon the proposed transaction or wait until the re-proposed rule's prohibition period ended.

The re-proposed rule may have significant costs with respect to how firms and clients, customers, or counterparties establish, maintain, and benefit from relationships. For instance, because larger financial entities tend to be organized in an effort to achieve synergies and economies of scope in combining and offering multiple services, restrictions on such activities could lead to changes to their business activities that could reduce firm earnings. These potential changes could have some disruptive effect on the firms, their clients, customers, or counterparties, and the broader marketplace, reducing current efficiencies that may exist. Restricting the ability of securitization participants to maintain relationships that service multiple objectives could ultimately negatively affect both financial firms and their clients', customers', or counterparties' ability to conduct economically efficient activities.

As discussed above, we do not believe that there is a significant amount of activity in the synthetic or hybrid cash and synthetic securitization markets

[238] *See* SIFMA Letter at 2, 22.

[239] SIFMA Letter at 5–6, 22, 33. Similarly, another commenter also suggested that the rule could affect the availability of credit. CRE Letter at 3.

outside of the Enterprises' CRT market, and therefore, we do not believe that any economic effects stemming from the synthetic securitization markets would be substantial. We do, however, recognize that—to the extent that the re-proposed rule could curtail some prospective activity in the market—the transactions prohibited by the re-proposed rule may involve or result in a material conflict of interest that is prohibited by Section 27B, and as a result, there may be some investor protection benefits for synthetic securitizations associated with the re-proposed rule, as discussed above.

Paragraph (ii)(B) of the re-proposed definition of the term ''sponsor''—proposing to define a ''sponsor'' functionally as any person that directs or causes the direction of the structure, design, or assembly or the composition of the pool of assets of an ABS—might increase securitization participants' costs because entities would have to determine, under the specific facts and circumstances, whether they fall under this definition. Such costs might arise even for entities that perform solely administrative, legal, due diligence, custodial, or ministerial functions because such entities would also need to determine whether they fall within the ministerial exception of the term ''sponsor.''

The re-proposed rule would also commence application of the rule's prohibition when a person has reached, or has taken substantial steps to reach, an agreement to become a securitization participant. This commencement point would increase costs on securitization participants and those who seek to become securitization participants, because of the need to determine whether and at what point they are covered by prohibitions under the re-proposed rule. Additionally, some entities might avoid participation in some other market activities even if they are not participating in any securitizations, due to potential uncertainty and perceived difficulties in making the determination of whether they are securitization participants for purposes of the re-proposed rule, thus reducing the efficiency of those markets.

The re-proposed rule would also define the terms ''material conflict of interest'' and ''conflicted transaction'' by including explicit descriptions of specific types of conflicting transactions and also including any transaction through which the securitization participant would benefit from the actual, anticipated, or potential adverse performance of an ABS or its underlying asset pool. Although complying with the statutory prohibition could result in the re-proposed rule imposing the costs discussed earlier in this section, these costs might be mitigated by the certainty and clarity provided by the proposed definitions of these key terms. In particular, the proposed detailed definitions of ''material conflict of interest'' and ''conflicted transaction'' might make it easier for securitization participants to evaluate a potentially conflicting transaction, including those covered by the proposed anti-circumvention provision.

Exceptions under the re-proposed rule might give rise to additional costs. As discussed above, the re-proposed rule provides exceptions for risk-mitigating hedging activities, liquidity commitments, and bona fide market-making activities, which are consistent with Section 27B. As discussed in Section III.D.1., we believe that such exceptions would preserve the ability of securitization participants to reduce and mitigate specific risks that arise out of underwriting, placement, initial purchase, or sponsorship of an asset-backed security, and may preserve secondary market liquidity and efficiency, while enhancing investor protections. However, we recognize that securitization participants would bear additional costs in dedicating resources to determine whether their activities fall within these exceptions. Moreover, securitization participants would incur costs of complying with conditions for the availability of these exceptions, such as costs related to the policies and procedures requirement for risk-mitigating hedging activities and bona fide market-making activities exceptions, as discussed in greater detail in Section III.D.2.

Finally, the re-proposed rule would provide an exception for the Enterprises while the Enterprises are in conservatorship and when they act as sponsors of securitizations. If the Enterprises exit conservatorship, the Enterprises would likely face increased costs similar to those outlined above for private-label ABS issuers and might have to re-structure or abandon their CRT offerings to comply with the re-proposed rule. As a result, an Enterprise exit from conservatorship might result in increased costs for U.S. mortgage borrowers and higher Enterprise capital requirements.

E. Anticipated Effects on Efficiency, Competition, and Capital Formation

The scope of activities under the re-proposed rule that could constitute material conflicts of interest could potentially impact market efficiency, competition among asset-backed securitization market participants, and capital formation via the ABS markets.

As discussed above in Section III.D.1., the re-proposed rule would generally lead to lower adverse selection costs, higher expected liquidity, and lower expected volatility in the ABS markets. Taken together, these benefits would improve the efficiency of the ABS markets.

Other factors could also affect efficiency. As an initial matter, larger entities with multiple business lines could have, as a result of their structure, unavoidable material conflicts of interest and such entities might abandon their participation in securitizations to avoid violating the re-proposed rule. An investor that utilizes such entities for multiple services could have to switch to competitors or, depending on the structure of asset-backed security, forgo the transaction. Thus, the re-proposed rule could increase competition amongst covered parties and relatively smaller entities might gain market share at the expense of relatively larger entities. The re-proposed rule could create competitive benefits for less diversified firms and firms that already have in place policies and procedures similar to the ones required by the re-proposed rule. One commenter to the 2011 proposed rule similarly stated that the rule could lead to increased competition among underwriters in the ABS market, which could in turn increase efficiency and help reduce moral hazard related to having fewer underwriters in the ABS market who may, therefore, be more inclined to take larger risks.[240] In addition, some of the parties and capital could move out of ABS market and into alternative markets that cater to customers' investment needs.

On the other hand, certain requirements of the re-proposed rule that would be applicable to the risk-mitigating hedging activity exception and bona fide market-making activities exception are similar to those under the Volcker Rule (see discussion in Sections II.E. and II.G.). Such similarity would be more beneficial to securitization participants that are already familiar with the Volcker Rule compliance issues and already have relevant programs in place, because these securitization participants would incur lower initial costs of compliance. Securitization participants of this type tend to be larger entities (*e.g.,* bank holding companies). Accordingly, those that are not subject to the requirements of the Volcker Rule could incur larger initial compliance costs.

[240] *See* Tewary 1 Letter at 17.

ABS investors could incur additional search costs and enjoy less efficient business processes due to the loss of relationships with securitization participants described above. Securitization participants could also lose profits or fees that would have resulted from conflicting transactions,[241] and, potentially, future profits and fees if investors take future business to other securitization participants. In addition, investors and financial firms could both lose the financial benefits from established relationships with securitization participants. As firm-investor relationships are costly to develop, but valuable to maintain,[242] securitization participants and ABS investors might find application of the re-proposed rule to be disruptive in some circumstances of maintaining firm-investor relationships. Thus, the re-proposed rule may result in a contraction in securitization markets' size, liquidity, or efficiency, and these adverse effects may flow through to asset markets underlying ABS and investors in such asset markets.

Since the ABS offering process can involve multiple lead underwriters or underwriting syndicates with several members,[243] the re-proposed rule could have a multiplicative effect by conflicting out several unaffiliated financial institutions. Securitization participants may react to the re-proposed rule by reducing the number of parties involved in a securitization, which may negatively affect the manner in which ABS are structured and underwritten and may reduce the efficiency of the securitization process. As previously stated, the scope of the statutory prohibition could amplify the inability of departments within a securitization participant to conduct business as they have in the past, which could increase financial costs, as well as heighten market inefficiency. These inefficiencies could ultimately negatively impact investors in ABS, as well as the consumers whose loans back the ABS.

The re-proposed rule may reduce informational efficiency of ABS prices. Informed short positions of securitization participants can aid in price discovery and the re-proposal would reduce information about intrinsic values that would otherwise have been embedded in ABS prices due to informed trades of securitization participants. However, the re-proposed rule would also reduce the effects of information asymmetries between securitization participants and ABS investors, which may reduce adverse selection costs and may increase the willingness of ABS investors to engage in ABS transactions, thus, possibly improving informational efficiency of ABS prices.

The re-proposed rule could adversely impact short-term and medium-term operational efficiency of the ABS market because covered parties and their customers may seek less efficient transaction structures to effect investment strategies similar to the current baseline. However, as securitization participants adapt their transaction activity to avoid conflicted transactions, the ABS market is likely to become more accessible, more liquid, and less volatile. This may improve the longer-term operational efficiency of the ABS market and the underlying debt markets.

Enhanced investor protection and more stable ABS markets could result in greater investor participation, resulting in higher capital formation. To the extent that the re-proposed rule reduces the adverse selection costs and improves pricing efficiency that follow from the asymmetric information problem discussed in Section III.C. above, it would result in more efficient allocation of capital and thereby enhance capital formation.

However, the potential benefits of the re-proposal for capital formation could be offset by potential losses in investment opportunities due to disruptions in relationships with securitization participants, at least in the short-term. The re-proposed rule could negatively impact economic efficiency both from the point of view of securitization participants, and sometimes also from the point of view of investors who seek to invest in asset pools that back ABS, if certain ABS transactions did not occur because of the scope of the re-proposed rule.

The re-proposed rule also provides an exception from the proposed definition of ''sponsor'' for the United States or an agency of the United States or for the Enterprises, while the Enterprises are in conservatorship, when they act as sponsors of securitizations that are fully guaranteed. If the Enterprises do exit conservatorship, additional frictions created by the need for the Enterprises to comply with the re-proposed rule requirements would likely weaken the competitive position of the Enterprises compared to private-label ABS issuers, in particular, increasing costs and possibly hampering capital formation in the mortgage market via the Enterprise channel. However, some of that capital formation could move to private-label ABS markets that might gain some competitive advantage if Enterprises have to incur additional costs. If the Enterprises were to become private entities and to maintain an exemption post conservatorship, that would disadvantage other private entities that would not enjoy such an exemption.

F. Reasonable Alternatives

We considered a number of alternative approaches, with some of the alternatives suggested by commenters to the 2011 proposed rule. This section considers potential economic effects of reasonable alternatives.

1. Scope

We could change the scope of the definition for securitization participants. One alternative to our proposed definition would be to broaden the definition of the terms ''placement agent'' and ''underwriter'' to include language used in the Volcker Rule that would include ''a person who has agreed to participate or is participating in a distribution of such securities for or on behalf of the issuer or selling security holder.'' While this approach could offer additional investor protections, we preliminarily believe that the benefits associated with applying the rule's prohibitions to persons with an ancillary role in the distribution of an ABS, such as selling group members who have no direct relationship with an issuer or selling security holder, would not offer substantial benefit, and could substantially increase compliance costs. Alternatively, we could also narrow the scope of securitization participants. We could, for example, exclude persons who have only taken substantial steps to reach an agreement—but have not reached such agreements—to become an underwriter, placement agent, initial purchaser, or sponsor, of an ABS. This could reduce compliance costs associated with determining when the potential securitization participant has taken substantial steps to reach an agreement to participate. We believe, however, that this could increase the circumstances in which a person attempts to evade the rule by engaging

[241] This may result in reduced fees or a move of transaction activity to other securitization participants that offer similar services at lower fees, which may benefit ABS investors. *See also* Tewary 1 Letter at 16.

[242] *See, e.g.,* Murat M. Binay, Vladimir A. Gatchev, and Christo A. Pirinsky. *The Role of Underwriter-Investor Relationships in the IPO Process,* Journal of Financial and Quantitative Analysis 42, no. 3, 785–809 (2007), and the literature reviewed therein.

[243] We observe that out of 1,441 non-municipal ABS deals in the baseline period, 660 deals had more than one underwriter and out of 1,928 municipal ABS deals, 841 had more than one underwriter.

in prohibited conduct prior to when the person signed an agreement to be securitization participant. We could also narrow the scope of securitization participants, as suggested by some commenters, to exclude persons such as underwriters, initial purchasers, or placement agents who did not structure an ABS transaction or select the assets underlying the ABS.[244] We preliminarily believe, however, that this approach would not offer the investor protection benefits associated with including these persons, given that this could also create opportunities to evade the intended prohibition of Section 27B and the re-proposed rule.

As discussed above in Section II.A., the re-proposal would specify the scope of material conflicts of interest for purposes of the re-proposed rule as conflicts of interest that arise between a securitization participant for an ABS and investors in such ABS, as a result of engaging in any transaction through which the securitization participant would benefit from the actual, anticipated, or potential adverse performance of an ABS or its underlying asset pool. This aspect of the re-proposal would limit the scope of the prohibition to certain conflicts of interest, rather than extending the re-proposed rule's prohibition to broader conflicts of interest that are wholly independent of and unrelated to a specific ABS. Defining the scope of the re-proposed rule to broadly cover any conflict of interest between securitization participants and investors would significantly increase the costs of the rule and decrease efficiency of the securitization markets. Therefore, the tailoring of this prohibition in the re-proposed rule may reduce the economic costs of the re-proposal as discussed above.

2. Information Barriers

The re-proposal could have included an exception for affiliates or subsidiaries of securitization participants that rely on information barriers, under certain conditions. Such conditions could include a requirement that the affiliate or subsidiary is engaged in a business wholly unrelated to securitization; that the securitization participant establishes, maintains, and enforces information barriers, such as physical separation of personnel and functions, and limits permissible activities as memorialized in reasonably designed written policies and procedures; that existing rules and regulations already provide for managing conflicts of interest or restricting information flow at the affiliate or subsidiary; and that offering documents for the ABS disclose the types of transaction that the affiliate or subsidiary could engage in as part of their normal, ordinary course of business.

As discussed above in Sections II.B.3. and III.D.2., the re-proposed rule may be significantly more costly for large and diversified securitization participants that have an extensive network of affiliates and subsidiaries, such as investment companies and investment advisers, engaged in unrelated businesses. Relative to the re-proposed rule, an information barriers exception could reduce the above costs of the prohibition for securitization participants with large affiliate and subsidiary networks, especially if the affiliate or subsidiary is already subject to existing rules and regulations that provide for conflict management or restricting information flow.[245] To the degree that such an alternative could reduce the scope of ABS transactions that would become conflicted, it could allow a greater number of securitization participants to retain relationships with ABS investors and continue transacting in ABS. Thus, the alternative may reduce disruptions to counterparty relationships, with potential beneficial effects on efficiency and capital formation in ABS and underlying asset markets.

However, an alternative that reduces the scope of conflicted transactions, but adds information barriers, may be insufficient to manage conflicts of interest intended to be addressed by the re-proposed rule and may be difficult to monitor and enforce.[246] Thus, such an alternative may reduce the scope of adverse selection and investor protection benefits relative to the re-proposal. However, conditions on the availability of the information barriers alternative, such as those listed above, could reduce those adverse effects of the alternative.

In addition, an information barriers alternative would give rise to its own costs related to the conditions for the applicability of the alternative exception, such as costs of physically separating personnel and functions, costs of designing related policies and procedures, and costs of monitoring and enforcing information barriers. Notably, under the alternative, securitization participants would choose to rely on such an exception only if costs of complying with the information barriers exception would be lower than costs of complying with the re-proposed rule's prohibitions.

3. ''Sponsor'' Exceptions

Potential alternatives to excluding from the definition of ''sponsor'' the United States or an agency of the United States or the Enterprises, while the Enterprises are in conservatorship, and when they act as sponsors of securitizations that are fully guaranteed, would likely result in lower benefits or higher costs. Providing no exclusion from the definition for such entities as sponsors of government-guaranteed securitizations or for the Enterprises' securitizations may increase frictions in the government-guaranteed or the Enterprise ABS or CRT processes, perhaps increasing costs for U.S. mortgage borrowers or limiting the transfer of credit risk to investors, without attendant benefits of reducing the adverse selection problem in securitizations, which is alleviated by the government guarantee or the conservatorship. Making the Enterprise exclusion permanent (*e.g.,* keeping it regardless of whether the Enterprises are in conservatorship) may reduce investor benefits in the long run because post-conservatorship structure of the Enterprises might affect their incentives when they participate in securitizations. If the Enterprises were to become private entities and to maintain an exemption post conservatorship, that would also disadvantage other private entities that would not enjoy such an exemption. Indeed, uncertainty persists regarding the nature or timing of the Enterprises' exit from conservatorship, private or government participation in the Enterprises after conservatorship, or how any changes in Enterprise structure surrounding conservatorship may affect conflicts of interest. Finally, an alternative that would provide an exception for government-guaranteed securities and Enterprise-guaranteed securities accordingly would provide an exception to all participants in such securitizations (and not just the sponsors), which would reduce the scope of adverse selection and investor protection benefits relative to the re-proposal.

Another alternative exception concerns synthetic CLOs. As described in Section II.A., we received comments to the 2011 proposed rule that suggested an exception for certain synthetic balance sheet CLOs. Providing such exception would reduce compliance costs to certain banks and CLO managers who could use such CLOs as a risk management tool. However, such

[244] *See* SIFMA Letter at 10.

[245] *See, e.g.,* ABA Letter at 11–12; ASF Letter at 10–11; Roundtable Letter at 10; SIFMA Letter at 14–15.

[246] *See* Barnard Letter at 2; Better Markets Letter at note 23; Public Citizen Letter at 1, 4–5; Tewary 1 Letter at 13–14.

an alternative may reduce the scope of adverse selection and investor protection benefits relative to the re-proposal because a conflicted transaction could be structured using such instruments.

4. Conditions of the Exceptions

We considered alternative conditions of the proposed exceptions for risk-mitigating hedging activities, liquidity commitments, and bona fide market-making activities as described in detail in Sections II.E., II.F., and II.G., respectively, including alternatives suggested by the comments to the 2011 proposed rule. Generally, making the conditions for the exceptions less stringent would reduce investor protection benefits of the re-proposed rule while also reducing compliance costs. Conversely, making the exceptions more stringent (*e.g.,* making the exception for bona fide market-making activities more stringent than the equivalent concept in the Volcker Rule) would increase compliance costs and could restrict the relevant activities, although it may provide additional investor protection benefits. We believe that the re-proposed conditions, in particular their similarity to the existing rules (*e.g.,* in the case of the bona fide market-making activities exception, with the concept of market-making in both the Volcker Rule as well as 15 U.S.C. 78c(a)(38)), would strike the appropriate balance between investor protection benefits and compliance costs of the re-proposed rule. The re-proposed conditions would allow securitization participants sufficient flexibility to design their securitization related risk-mitigating hedging activities, liquidity commitments, and bona fide market-making activities in a way that is not unduly complicated or cost prohibitive.

We also considered proposing a certification requirement for using the risk-mitigating hedging activities, liquidity commitments, and bona fide market-making activities exceptions. Under this alternative, an officer within the securitization participant would certify that the conditions supporting the exception had been met. This additional step might provide additional investor protection, but might also create additional paperwork and procedural burdens associated with documenting the exception. To avoid these burdens, or perceived enforcement or liability risk, securitization participants might choose not to engage in the excepted activities even in legitimate circumstances.

G. Request for Comments

We request comment on all aspects of our economic analysis, including the potential costs and benefits of the re-proposed rule and alternatives thereto, and whether the rule, if we were to adopt it, would promote efficiency, competition, and capital formation. In addition, we request comments on our selection of data sources, empirical methodology, and the assumptions we have made throughout the analysis. Commenters are requested to provide empirical data, estimation methodologies, and other factual support for their views, in particular, on costs and benefits estimates. We especially appreciate comments that distinguish between costs and benefits that are attributed to Section 27B itself and costs and benefits that are a result of policy choices made by the Commission in implementing the statutory requirements. In particular, we request comments on the following questions on the Economic Analysis:

98. What additional qualitative or quantitative information should be considered as part of the baseline for the economic analysis of the re-proposed rule?

99. Are the costs and benefits of the re-proposed rule accurately characterized? If not, why not? Should any of the costs or benefits be modified? What, if any, other costs or benefits should be taken into account? If possible, please offer ways of estimating these costs and benefits. What additional considerations can be used to estimate the costs and benefits of the proposed amendments?

100. What would be the impact of the re-proposed rule on the ultimate borrowers (*e.g.,* households, businesses)? What aspects of the re-proposed rule would have the biggest impact, and how would the impact change if that aspect of the rule were revised? What would be the direction and magnitude of possible impact of the re-proposed rule on the borrowing rates and credit availability? What, if any, data could be used to estimate the impact?

101. Would the types, or extent, of any benefits or costs of the re-proposed rule differ between different types of securitizations? For example, do potential benefits or costs differ in their application to ABS backed by different types of assets? Do the types, or extent, of any benefits or costs from the re-proposed rule differ between ABS and synthetic ABS? If so, how do the benefits or costs differ?

102. Would the potential benefits and costs differ for securitizations of different size?

103. Are the costs and benefits of the re-proposed rule different between municipal ABS and non-municipal ABS? How does the re-proposed rule affect ultimate borrowers of loans that back municipal ABS?

104. Would potential benefits and costs differ for securitization participants of different size?

105. What potential costs might arise in relation to monitoring for transactions that would result in a material conflict of interest between a securitization participant and investors in the ABS? Do securitization participants have existing procedures that might help mitigate potential costs? What is the proportion of securitization participants that currently enter into contractual assurances that would be compliant with the re-proposed rule?

106. With respect to potential costs related to the re-proposed rule prohibiting transactions by affiliates, subsidiaries, or another department within the firm that would result in a material conflict of interest with investors in the ABS, is it possible to quantify the cost of not being permitted to undertake such transactions?

107. Are the effects on competition, efficiency, and capital formation arising from the proposed amendments accurately characterized? If not, why not?

108. Are the economic effects of the above alternatives accurately characterized? If not, why not? Should any of the costs or benefits be modified? What, if any, other costs or benefits should be taken into account?

109. Are there other reasonable alternatives to the proposed amendments that should be considered? What are the costs, benefits, and effects on competition, efficiency, and capital formation of any other alternatives?

110. Are there data sources or data sets that can help refine the estimates of the costs and benefits associated with the proposed amendments? If so, please identify them.

111. What are the benefits and costs of reasonable alternatives to the proposed conditions for the exceptions for risk-mitigating hedging activities, liquidity commitments, and bona fide market-making activities? Are there alternative conditions we should include, and if so, why?

112. What benefits and costs might result from requiring an officer to certify that the conditions supporting the

exceptions for risk-mitigating hedging activities, liquidity commitments, and bona fide market-making activities had been met? In what ways (if any) would such a requirement alter the behavior of securitization participants?

IV. Paperwork Reduction Act

A. Summary of the Collection of Information

Certain provisions of the re-proposed rule would impose a new ''collection of information'' requirement within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[247] The Commission is submitting the re-proposed rule to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[248] The title for this proposed new information collection is ''Prohibition Against Conflicts of Interest in Certain Securitizations.'' OMB has not yet an assigned control number to the collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number.

The re-proposed rule would implement Section 621 of the Dodd-Frank Act, which added Section 27B to the Securities Act, by prohibiting securitization participants from directly or indirectly engaging in any transaction that would involve or result in any material conflict of interest between a securitization participant for such ABS and an investor in such ABS. A more detailed description of the re-proposed rule, including the need for the information and its proposed use, as well as a description of the likely respondents, can be found in Section II above, and a discussion of the economic effects of the re-proposed rule can be found in Section III above.

The collection of information would be mandatory for securitization participants that rely on two exceptions to the re-proposed rule described below. Additionally, the collection of information is not required to be filed with the Commission or otherwise made publicly available but would not be confidential.

B. Respondents Subject to Rule

The re-proposed rule would not require a securitization participant to implement, maintain, or enforce written policies and procedures, unless it is relying on the risk-mitigating hedging activities or bona fide market-making activities exceptions of the re-proposed rule. The proposed policies and procedures requirements are intended to help prevent evasion of the re-proposed rule and the abusive conduct at which Section 27B to the Securities Act is aimed by requiring the implementation, maintenance, and enforcement of frameworks to facilitate compliance with the other conditions of each exception. If a securitization participant were a regulated entity, the collection of such information (*i.e.,* policies and procedures) would be used by the Commission staff in its examination and oversight program, and if such securitization participant were also subject to oversight by a self-regulatory organization, the collection of such information might also be used by the relevant self-regulatory organization in connection with its oversight of the securitization participant.[249]

As stated below in PRA Table 1, we estimate that there are a total of 1,265 securitization participants, all of whom could rely on the risk-mitigating hedging activities exception and 150 of these securitization participants could rely on the bona fide market-making activities exception. For the purposes of this analysis, as described below, we have made assumptions regarding actions respondents might take to manage and memorialize compliance with the re-proposed rule.

The availability of the proposed exceptions would be conditioned on securitization participants implementing, maintaining, and enforcing written policies and procedures reasonably designed to ensure compliance with the requirements of the exceptions, including the identification, documentation, and monitoring of such activities. Accordingly, securitization participants would be required to either prepare new policies and procedures or update existing ones in order to rely on the exception.[250]

PRA Table 1—Estimated Number of Securitization Participants [1]

Private-label ABS sponsors	455
Municipal ABS sponsors	590
Sponsors related to government-backed securities	185
Unique underwriters, placement agents, and initial purchasers	150
Total	1,380

[1] The securitization participant estimates are derived from data in the Green Street Asset-Backed Alert Database, the Green Street Commercial Mortgage Alert Database, the Mergent Municipal Bond Securities Database, and information on *www.ginniemae.gov* and *https://capitalmarkets.freddiemac.com/mbs/products/dealer-groups.*

We estimate that for each securitization participant relying on the proposed exceptions, it would take approximately 80 hours to initially prepare new written policies and procedures [251] and approximately 10 hours annually to review and update those policies and procedures.[252] As a result, we estimate that the annual burden for each securitization participant would be 33 hours.[253]

[247] 44 U.S.C. 3501 *et seq.*

[248] *See* 44 U.S.C. 3507(d); 5 CFR 1320.11.

[249] We recognize that not all securitization participants that would rely on the risk-mitigating hedging activities exception or the bona fide market-making activities exception (*e.g.,* municipal entities that are sponsors of municipal ABS) would be subject to the Commission's examination and oversight programs (or, if applicable, those of the relevant self-regulatory organization).

[250] We estimate that only a subset of covered securitization participants (*e.g.,* broker-dealers) would rely on the bona fide market-making activities exception and that, while amending their written policies and procedures to address the more broadly applicable risk-mitigating hedging activities exception, such securitization participants would also amend their written policies and procedures to address the bona fide market-making activities exception.

[251] While some securitization participants may have policies and procedures in place related to hedging or market-making, we are estimating the same burden hour estimates for all securitization participants. Burden hour estimates for the preparation of new policies and procedures (80 hours) are derived from similar estimates for the documentation of policies and procedures by RIAs as required by Rule 206(4)–7 of the Investment Advisers Act of 1940. *See Compliance Programs of Investment Companies and Investment Advisers,* Release No. IA–2204 (Dec. 17, 2003) [68 FR 74714 (Dec. 24, 2003)] (taking into account industry participant comments specific to the 80-hour estimate). Because the proposed exceptions would require the drafting or updating of reasonably designed written policies and procedures regarding each requirement applicable to such exception, we believe 80 hours is an appropriate burden estimate.

[252] Burden hour estimates for the annual review of policies and procedures (10 hours) are derived from the same estimates for recently proposed Exchange Act Rule 17Ad–25(h). Rule 17Ad–25(h) requires updating current policies and procedures or establishing new policies and procedures to ensure ongoing compliance, which would impose an ongoing annual burden similar to the one imposed by the proposed risk-mitigating hedging activities exception here. *See Clearing Agency Governance and Conflicts of Interest,* Release No. 34–95431 (Aug. 8, 2022) [87 FR 51812 (Aug. 23, 2022)].

[253] These estimates represent the average burden for all issuers, both large and small. In deriving our estimates, we recognize that the burdens will likely vary among individual issuers based on a number of factors, including the size and complexity of their organizations. The OMB PRA filing inventories represent a three-year average. In deriving our estimate, the burden hour estimates for the preparation of new policies and procedures (80 hours) were added to the ongoing estimates for the annual review of policies and procedures (10 hours) for the following two years resulting in a 100 hour burden over three years, or approximately 33 hours per year. Some issuers may experience costs in excess of this average in the first year of compliance with the amendments and some issuers may

Because these estimates are an average, the burden could be more or less for any particular securitization participant, and might vary depending on a variety of factors, such as the degree to which the participant uses the services of outside professionals or internal staff.

The following table summarizes the estimated paperwork burdens associated with the re-proposed rule.

PRA TABLE 2—ESTIMATED PAPERWORK BURDEN OF PROPOSED RULE 192

Proposed rule 192	Estimated burden increase	Brief explanation of estimated burden increase
Require policies and procedures implementing, maintaining, and enforcing written policies and procedures reasonably designed to ensure compliance with the requirements of the applicable exceptions, including the identification, documentation, and monitoring of such activities.	An increase of 33 burden hours.	This is the estimated effect to initially prepare and subsequently review and update the policies and procedures.

C. Burden and Cost Estimates

Below we estimate the paperwork burden in hours and costs as a result of the new collection of information established by the re-proposed rule. These estimates represent the average burden for all securitization participants, both large and small. In deriving our estimates, we recognize that the burdens would likely vary among individual securitization participants. We estimate the total annual burden of the re-proposed rule to be 45,540 burden hours. We calculated the burden estimate by multiplying the estimated number of securitization participants by the estimated average amount of time it would take a securitization participant to prepare and review and update the policies and procedures under the re-proposed rule. For purposes of the PRA, the burden is to be allocated between internal burden hours and outside professional cost. PRA Table 3 sets forth the percentage estimate for the burden allocation for the new collection of information. We also estimate that the average cost of retaining outside professionals is $600 per hour.[254]

PRA TABLE 3—ESTIMATED BURDEN ALLOCATION FOR THE COLLECTION OF INFORMATION

Collection of information	Internal (%)	Outside professionals (%)
Prohibition Against Conflicts of Interest in Certain Securitizations	75	25

PRA TABLE 4—REQUESTED PAPERWORK BURDEN FOR THE NEW COLLECTION OF INFORMATION

Collection of information	Requested paperwork burden		
	Securitization participants	Burden hours	Cost burden ($)
	(A)	(A) × 33 × (0.75)	(A) × 33 × (0.25) × $600
Prohibition Against Conflicts of Interest in Certain Securitizations	1,380	34,155	$6,831,000

D. Request for Comment

We are using the above estimates for the purposes of calculating reporting burdens associated with the re-proposed rule. Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comments in order to:

- Evaluate whether the proposed collection of information would be necessary for the performance of the functions of the Commission, including whether the information would have practical utility;
- Evaluate the accuracy of our estimates of the burdens of the proposed collection of information;
- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;
- Evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology; and
- Evaluate whether the proposed amendments would have any effects on any other collection of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503; and send a copy to Vanessa Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090, with reference to File No. S7–01–23. Requests for materials submitted to OMB by the Commission with regard to the collection of information requirements should be in writing, refer to File No. S7–01–23 and be submitted to the U.S. Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

experience less than the average costs. Averages also may not align with the actual number of filings in any given year.

[254] We recognize that the costs of retaining outside professionals (*e.g.,* compliance professionals and outside counsel) might vary depending on the nature of the professional services, but for purposes of this PRA analysis, we estimate that such costs would be an average of $600 per hour, consistent with other recent rulemakings.

V. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA''),[255] the Commission must advise OMB as to whether the proposed amendments constitute a ''major'' rule. Under SBREFA, a rule is considered ''major'' where, if adopted, it results in or is likely to result in:

- An annual effect of the U.S. economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment, or innovation.[256]

We request comment on whether the re-proposed rule would be a ''major'' rule for purposes of SBREFA. In particular, we request comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;
- Any potential increase in costs or prices for consumers or individual industries; and
- Any potential effect on competition, investment, or innovation.

VI. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act (''RFA'') [257] requires an agency, when issuing a rulemaking proposal, to prepare and make available for public comment an Initial Regulatory Flexibility Analysis (''IRFA'') that describes the impact of the re-proposed rule on small entities.[258] We have prepared the following IRFA in accordance with Section 3(a) of the RFA.[259] It relates to proposed Rule 192 under the Securities Act.

A. Reason for and Objections of the Proposed Action

We are proposing Rule 192 to implement Section 27B of the Securities Act. The re-proposed rule seeks to prevent the sale of ABS that are tainted by material conflicts of interest by prohibiting securitization participants from engaging in certain transactions that could incentivize a securitization participant to structure an ABS in a way that would put the securitization participant's interests ahead of those of ABS investors. The re-proposed rule also provides a standard for determining which types of transactions would be prohibited so that activities that are routinely undertaken in connection with the securitization process or with respect to the types of financial assets underlying securitizations covered by the re-proposed rule that do not give rise to the risks that Section 27B was intended to address would not be unnecessarily restricted. The requirements of the re-proposed rule are discussed in more detail in Section II above. We discuss the economic impact and potential alternatives to the re-proposed rule in Section III above, and the estimated compliance costs and burdens of the re-proposed rule under the PRA in Section IV above.

B. Legal Basis

The re-proposed rule is being proposed under authority set forth in in Sections 10, 17(a), 19(a), 27B, and 28 of the Securities Act.

C. Small Entities Subject to Proposed Rule 192

The re-proposed rule would affect some small entities—such as municipal entities, small broker-dealers, and RIAs that advise hedge funds—that would be ''sponsors'' for purposes of the re-proposed rule.[260] The RFA defines ''small entity'' to mean ''small business,'' ''small organization,'' or ''small governmental jurisdiction.'' [261]

For purposes of the RFA, under 17 CFR 230.157 and 17 CFR 240.0–10(a), an issuer, other than an investment company, is a ''small business'' or ''small organization'' if it had total assets of $5 million or less on the last day of its most recent fiscal year and is engaged or proposing to engage in an offering of securities not exceeding $5 million. We estimate that no sponsors of private-label ABS would meet the definition of ''small entity'' applicable to issuers.

A municipal entity is a small entity for purposes of the RFA (*i.e.,* a ''small government jurisdiction'') if it is a city, county, town, township, village, school district, or special district, with a population of less than fifty thousand.[262] We estimate that, of the 478 municipal entities who act as sponsors of ABS, between 75 and 104 would meet the definition of small entity applicable to municipal entities.[263]

A broker-dealer is a small entity if it has total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to 17 CFR 240.17a–5(d), or, if not required to file such statements, had total capital of less than $500,000 on the last business day of the preceding fiscal year (or in the time that it has been a business, if shorter); and it is not affiliated with any person (other than a natural person) that is not a small business or small organization.[264] We estimate that one sponsor that is a broker-dealer would meet the applicable definition of small entity.[265]

RIAs other than broker-dealers that advise hedge funds and municipal advisors that advise with respect to municipal securitizations, could also qualify as a ''sponsor'' under the re-proposed rule. A RIA is a small entity if it: (i) has assets under management having a total value of less than $25 million; (ii) did not have total assets of $5 million or more on the last day of its most recent fiscal year; and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year.[266] We estimate that, of the RIAs that advise hedge funds, up to 17 would be a small entity as defined for investment advisers.[267]

We estimate that there are 112 municipal advisors who would be sponsors of ABS for purposes of the re-proposed rule.[268] There is no Commission definition regarding when a municipal advisor is a small entity. In adopting rules relating to municipal advisors, the Commission has used the

[255] 5 U.S.C. 801 *et seq.*

[256] 5 U.S.C. 804(2).

[257] 5 U.S.C. 601 *et seq.*

[258] 5 U.S.C. 603(a).

[259] 5 U.S.C. 603(a).

[260] We preliminarily believe that the re-proposed rule would not affect small entities other than those that would be a ''sponsor'' for purposes of the re-proposed rule.

[261] 5 U.S.C. 601(6).

[262] 5 U.S.C. 601(5).

[263] We analyzed calendar year 2021 data from the Mergent Municipal Bond Securities Database to determine the scope and characteristics of the issuers of municipal ABS.

[264] *See* 17 CFR 240.0–10.

[265] We evaluated all ABS sponsors for the period of Jan. 2021 through Dec. 2021 to determine whether their characteristics and affiliations (as described in FOCUS data and other disclosures) would result in their being ''small entities'' for purposes of Section 605 of the RFA.

[266] *See* 17 CFR 275.0–7(a).

[267] Based on Form ADV data, we estimate that only 17 RIAs that advise hedge funds, representing 0.7% of all RIAs advising hedge funds, would be a small entity as defined by Rule 0–7(a) of the Investment Advisers Act of 1940. *See Definitions of* ''*Small Business*'' *or* ''*Small Organization*'' *Under the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Exchange Act of 1934, and the Securities Act of 1933,* Release Nos. 33–7548, 34–40122, IC–23272, and IA–1727 (June 24, 1998) [63 FR 35508 (June 30, 1998)]. Furthermore, we believe that not all 17 of those RIAs act as sponsors of ABS transactions.

[268] Mergent Municipal Bond Securities Database. We note that some municipal advisors are broker-dealers and/or RIAs.

Small Business Administration's definition of small business for municipal advisors.[269] The Small Business Administration defines small business for purposes of entities that provide financial investment and related activities as a business that had annual receipts of less than $7 million during the preceding fiscal year and is not affiliated with any person that is not a small business or small organization.[270] Based on this definition, a majority of municipal advisors would be small businesses. In the MA Adopting Release, the Commission estimated that approximately 62% of municipal advisors would be small entities; therefore, we estimate that 69 would be small entities.

This results in a Commission estimate of 162 to 191 small entities that could be impacted by the re-proposed rule.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

If adopted, the re-proposed rule would apply to small entities to the same extent as other entities, irrespective of size. Therefore, we expect that most of the benefits and costs associated with the re-proposed rule would be similar for large and small entities. Accordingly, we refer to the discussion of the re-proposed rule's economic effects on all affected parties, including small entities, in Section III above. Consistent with that discussion, we anticipate that the economic benefits and costs could vary widely among small entities based on a number of factors, such as the nature and conduct of their businesses, which makes it difficult to project the economic impact on small entities with precision. We note, however, that the similarity of certain proposed exceptions to the re-proposed rule to the Volcker Rule might be more beneficial to larger entity securitization participants (*e.g.,* banking entities and affiliated broker-dealer entities) due to their familiarity with the Volcker Rule. Conversely, as discussed above in Sections II.B.3. and III.D.2., compliance with the re-proposed rule might be more costly for large and diversified securitization participants that have an extensive network of affiliates and subsidiaries. As a general matter, we also recognize that costs of the re-proposed rule potentially could have a proportionally greater effect on small entities, as such costs may be a relatively greater percentage of the total cost of operations for smaller entities than larger entities, and thus small entities might be less able to bear such costs relative to larger entities.

Compliance with the re-proposed rule might require the use of professional skill, including legal skills. We request comment on how the re-proposed rule would affect small entities.

E. Duplicative, Overlapping, or Conflicting Federal Rules

We have not identified any Federal rules that currently duplicate, overlap, or conflict with the re-proposed rule. We request comment on whether commenters perceive any such duplication, overlap, or conflict if the re-proposed rule is adopted and, if so, how we should address any such duplication, overlap, or conflict.

F. Significant Alternatives

The RFA directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, we considered the following alternatives:

- Establishing different compliance requirements that take into account the resources available to small entities;
- Delaying the implementation of compliance requirements for small entities to take into account the resources available to them;
- Exempting small entities from all or part of the requirements;
- Using performance rather than design standards; and
- Clarifying, consolidating, or simplifying compliance and reporting requirements under the rules for small entities.

The re-proposed rule seeks to prevent the sale of ABS that are tainted by material conflicts of interest by prohibiting securitization participants from engaging in certain transactions that could incentivize a securitization participant to structure an ABS in a way that would put the securitization participant's interests ahead of those of ABS investors. We believe that all ABS investors should be protected from securitization participants entering into conflicted transactions, and exempting small entities from the re-proposed rule's prohibition, establishing different compliance requirements for small entities, or delaying the implementation of the compliance requirements for small entities could frustrate that goal by protecting only ABS investors in transactions with respect to which the relevant securitization participants are larger entities. We do not believe that imposing different standards or requirements based on the size of the securitization participant would be appropriate, and doing so might result in additional costs associated with ascertaining whether a particular securitization participant may avail itself of such different standards. For these reasons, we are not proposing differing compliance or reporting requirements or timetables, or an exception, for small entities. For the same reasons we do not believe it would be appropriate to impose different standards or requirements based on the size of the securitization participant, we do not believe that the implementation of compliance requirements for small entities should be delayed. We request comment below whether the implementation of compliance requirements for small entities should be delayed. Section II.B. above includes specific requests for comment on whether certain categories of securitization participants should be exempted from the re-proposed rule.

We do not believe that clarifying, consolidating, or simplifying the compliance requirements under the re-proposed rule would permit us to achieve our stated objective. We have sought to create a clear, consolidated, and simple regulatory framework as we believe appropriate under the circumstances. With respect to using performance rather than design standards, the prohibition of the re-proposed rule is a performance standard that would prohibit a securitization participant from entering into a conflicted transaction during the covered time-period. Although the proposed bona fide market-making activities and risk-mitigating hedging activities exceptions do include design standards, we believe that those design standards would promote the objective of the re-proposed rule while still providing flexibility to securitization participants to design compliance programs that are tailored to their specific business models. Sections II.E. and II.G. above include specific requests for comment on whether smaller securitization participants should be exempted from the proposed compliance program requirements applicable to the bona fide market-making activities and risk-mitigating hedging activities exceptions, and if so, how ''smaller securitization participant'' should be defined for purposes of any such exemption.

G. Request for Comment

We encourage the submission of comments with respect to any aspect of the IRFA. In particular, we request comment regarding:

[269] *See Registration of Municipal Advisors,* Release No. 34–70462 (Sep. 20, 2013) [78 FR 67468 (Nov. 12, 2013)] (''MA Adopting Release'').

[270] *See* 13 CFR 121.201.

- The number of small entities that may be affected by the re-proposed rule;
- The existence or nature of the potential impact of the re-proposed rule on small entities discussed in the analysis;
- How the re-proposed rule could further lower the burden on small entities by, for example, exempting small entities from compliance requirements applicable to such entities or delaying the implementation of compliance requirements for such entities; and
- How to quantify the impact of the re-proposed rule.

Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the re-proposed rule is adopted, and will be placed in the same public file as comments on the re-proposed rule itself.

Statutory Authority

The Commission is proposing new 17 CFR 230.192 under the authority set forth in Sections 10, 17(a), 19(a), 27B, and 28 of the Securities Act.

List of Subjects in 17 CFR Part 230

Reporting and recordkeeping requirements, Securities.

Text of Proposed Amendments

For the reasons set forth in the preamble, the Commission is proposing to amend title 17, chapter II of the Code of Federal Regulations as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

■ 1. The general authority citation for part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78*l,* 78m, 78n, 78o, 78o–7 note, 78t, 78w, 78*ll*(d), 78mm, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, and Pub. L. 112–106, sec. 201(a), sec. 401, 126 Stat. 313(2012), unless otherwise noted.

■ 2. Add § 230.192 to read as follows:

§ 230.192 Conflicts of interest relating to certain securitizations.

(a) *Unlawful activity.* (1) *Prohibition.* A securitization participant shall not, for a period commencing on the date on which a person has reached, or has taken substantial steps to reach, an agreement that such person will become a securitization participant with respect to an asset-backed security and ending on the date that is one year after the date of the first closing of the sale of such asset-backed security, directly or indirectly engage in any transaction that would involve or result in any material conflict of interest between the securitization participant and an investor in such asset-backed security.

(2) *Material conflict of interest.* For purposes of this section, engaging in any transaction would involve or result in a material conflict of interest between a securitization participant for an asset-backed security and an investor in such asset-backed security if such a transaction is a conflicted transaction.

(3) *Conflicted transaction.* For purposes of this section, a conflicted transaction means any of the following transactions with respect to which there is a substantial likelihood that a reasonable investor would consider the transaction important to the investor's investment decision, including a decision whether to retain the asset-backed security:

(i) A short sale of the relevant asset-backed security;

(ii) The purchase of a credit default swap or other credit derivative pursuant to which the securitization participant would be entitled to receive payments upon the occurrence of specified credit events in respect of the relevant asset-backed security; or

(iii) The purchase or sale of any financial instrument (other than the relevant asset-backed security) or entry into a transaction through which the securitization participant would benefit from the actual, anticipated or potential:

(A) Adverse performance of the asset pool supporting or referenced by the relevant asset-backed security;

(B) Loss of principal, monetary default, or early amortization event on the relevant asset-backed security; or

(C) Decline in the market value of the relevant asset-backed security.

(b) *Excepted activity.* The following activities are not prohibited by paragraph (a) of this section:

(1) *Risk-mitigating hedging activities.* (i) *Permitted risk-mitigating hedging activities.* Risk-mitigating hedging activities of a securitization participant conducted in accordance with this paragraph (b)(1) in connection with and related to individual or aggregated positions, contracts, or other holdings of the securitization participant arising out of its securitization activities, including the origination or acquisition of assets that it securitizes, except that the initial distribution of an asset-backed security is not risk-mitigating hedging activity for purposes of paragraph (b)(1) of this section.

(ii) *Conditions.* Risk-mitigating hedging activities are permitted under paragraph (b)(1) of this section only if:

(A) At the inception of the hedging activity and at the time of any adjustments to the hedging activity, the risk-mitigating hedging activity is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks arising in connection with and related to identified positions, contracts, or other holdings of the securitization participant, based upon the facts and circumstances of the identified underlying and hedging positions, contracts or other holdings and the risks and liquidity thereof;

(B) The risk-mitigating hedging activity is subject, as appropriate, to ongoing recalibration by the securitization participant to ensure that the hedging activity satisfies the requirements set out in paragraph (b)(1) of this section and does not facilitate or create an opportunity to benefit from a conflicted transaction other than through risk-reduction; and

(C) The securitization participant has established, and implements, maintains, and enforces, an internal compliance program that is reasonably designed to ensure the securitization participant's compliance with the requirements set out in paragraph (b)(1) of this section, including reasonably designed written policies and procedures regarding the risk-mitigating hedging activities that provide for the specific risk and risk-mitigating hedging activity to be identified, documented, and monitored.

(2) *Liquidity commitments.* Purchases or sales of the asset-backed security made pursuant to, and consistent with, commitments of the securitization participant to provide liquidity for the asset-backed security.

(3) *Bona fide market-making activities.* (i) *Permitted bona fide market-making activities.* Bona fide market-making activities, including market-making related hedging, of the securitization participant conducted in accordance with this paragraph (b)(3) in connection with and related to asset-backed securities with respect to which the prohibition in paragraph (a)(1) of this section applies, the assets underlying such asset-backed securities, or financial instruments that reference such asset-backed securities or underlying assets, except that the initial distribution of an asset-backed security is not bona fide market-making activity for purposes of paragraph (b)(3) of this section.

(ii) *Conditions.* Bona fide market-making activities are permitted under paragraph (b)(3) of this section only if:

(A) The securitization participant routinely stands ready to purchase and sell one or more types of the financial

instruments described in paragraph (b)(3)(i) of this section as a part of its market-making related activities in such financial instruments, and is willing and available to quote, purchase and sell, or otherwise enter into long and short positions in those types of financial instruments, in commercially reasonable amounts and throughout market cycles on a basis appropriate for the liquidity, maturity, and depth of the market for the relevant types of financial instruments;

(B) The securitization participant's market-making related activities are designed not to exceed, on an ongoing basis, the reasonably expected near term demands of clients, customers, or counterparties, taking into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments described in paragraph (b)(3)(i) of this section;

(C) The compensation arrangements of persons performing the foregoing activity are designed not to reward or incentivize conflicted transactions;

(D) The securitization participant is licensed or registered to engage in the activity described in paragraph (b)(3) of this section in accordance with applicable law and self-regulatory organization rules; and

(E) The securitization participant has established, and implements, maintains, and enforces, an internal compliance program that is reasonably designed to ensure the securitization participant's compliance with the requirements of paragraph (b)(3) of this section, including reasonably designed written policies and procedures that demonstrate a process for prompt mitigation of the risks of its market-making positions and holdings.

(c) *Definitions.* For purposes of this section:

Asset-backed security has the same meaning as in section 3(a)(79) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(79)), and also includes synthetic asset-backed securities and hybrid cash and synthetic asset-backed securities.

Distribution means:

(i) An offering of securities, whether or not subject to registration under the Securities Act of 1933, that is distinguished from ordinary trading transactions by the presence of special selling efforts and selling methods; or

(ii) An offering of securities made pursuant to an effective registration statement under the Securities Act of 1933.

Initial purchaser means a person who has agreed with an issuer to purchase a security from the issuer for resale to other purchasers in transactions that are not required to be registered under the Securities Act in reliance upon 17 CFR 230.144A or that are otherwise not required to be registered because they do not involve any public offering.

Placement agent and *underwriter* each mean a person who has agreed with an issuer or selling security holder to:

(i) Purchase securities from the issuer or selling security holder for distribution;

(ii) Engage in a distribution for or on behalf of such issuer or selling security holder; or

(iii) Manage or supervise a distribution for or on behalf of such issuer or selling security holder.

Securitization participant means:

(i) An underwriter, placement agent, initial purchaser, or sponsor of an asset-backed security; or

(ii) Any affiliate (as defined in 17 CFR 230.405) or subsidiary (as defined in 17 CFR 230.405) of a person described in paragraph (i) of this definition.

Sponsor means:

(i) Any person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the entity that issues the asset-backed security; or

(ii) Any person:

(A) with a contractual right to direct or cause the direction of the structure, design, or assembly of an asset-backed security or the composition of the pool of assets underlying the asset-backed security; or

(B) that directs or causes the direction of the structure, design, or assembly of an asset-backed security or the composition of the pool of assets underlying the asset-backed security.

(C) Notwithstanding paragraphs (ii)(A) and (ii)(B) of this definition, a person that performs only administrative, legal, due diligence, custodial, or ministerial acts related to the structure, design, or assembly of an asset-backed security or the composition of the pool of assets underlying the asset-backed security will not be a sponsor for purposes of this rule.

(iii) Notwithstanding paragraphs (i) and (ii) of this definition:

(A) The United States or an agency of the United States will not be a sponsor for purposes of this rule with respect to an asset-backed security that is fully insured or fully guaranteed as to the timely payment of principal and interest by the United States.

(B) The Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation operating under the conservatorship or receivership of the Federal Housing Finance Agency pursuant to section 1367 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4617) with capital support from the United States; or any limited-life regulated entity succeeding to the charter of either the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation pursuant to section 1367(i) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4617(i)), provided that the entity is operating with capital support from the United States; will not be a sponsor for purposes of this rule with respect to an asset-backed security that is fully insured or fully guaranteed as to the timely payment of principal and interest by such entity.

(d) *Anti-circumvention.* If a securitization participant engages in a transaction that circumvents the prohibition in paragraph (a)(1) of this section, the transaction will be deemed to violate paragraph (a)(1) of this section.

By the Commission.

Dated: January 25, 2023.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2023–02003 Filed 2–13–23; 8:45 am]

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Part IV

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Chapter 1
Federal Acquisition Regulations; Final Rules

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR–2023–0051, Sequence No. 1]

Federal Acquisition Regulation; Federal Acquisition Circular 2023–02; Introduction

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of final rules.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) in this Federal Acquisition Circular (FAC) 2023–02. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC.

DATES: For effective dates see the separate documents, which follow.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below in relation to the FAR case. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.*

RULES LISTED IN FAC 2023–02

Item	Subject	FAR case	Analyst
I	Accelerated Payments Applicable to Contracts with Certain Small Business Concerns	2020–007	Delgado.
II	Small Business Program Amendments	2019–008	Jones.
III	Technical Amendments.		

ADDRESSES: The FAC, including the SECG, is available at *https://www.regulations.gov.*

SUPPLEMENTARY INFORMATION: Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR rules, refer to the specific item numbers and subjects set forth in the documents following these item summaries. FAC 2023–02 amends the FAR as follows:

Item I—Accelerated Payments Applicable to Contracts With Certain Small Business Concerns (FAR Case 2020–007)

This final rule provides for accelerated payments to contractors that are small businesses and to small business subcontractors by accelerating payments to their prime contractors. The rule implements section 873 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Pub. L. 116–92), which amends 31 U.S.C. 3903(a). The rule also implements section 815 of the William M. (Mac) Thornberry NDAA for FY 2021, which amended 10 U.S.C. 2307(a) (now found at 10 U.S.C. 3801). This final rule may have a positive impact on small entities, but it will not have a significant economic impact on a substantial number of small entities.

Item II—Small Business Program Amendments (FAR Case 2019–008)

This final rule amends the FAR to align with SBA's regulations related to several topic areas. This rule clarifies that SBA determines size status as of the date of initial offer for a multiple-award contract, whether or not the offer includes price, or the price is evaluated. Additionally, in accordance with FAR 19.301–2(b)(2), the ''ostensible subcontractor rule'' (a small business must not be unduly reliant on a nonsimilarly situated small business subcontractor or have such a subcontractor perform the primary and vital requirements of the contract) is implemented in this rule as a new ground for socioeconomic status protest. The rule also clarifies that contracting officers will not be able to exercise options past the fifth year of long-term 8(a) contracts if the 8(a) contractor no longer qualifies for the 8(a) program. Lastly, the rule clarifies the size standard for the information technology value added resellers under North American Industry Classification System code 541519 is 150 employees, not 500 employees.

Item III—Technical Amendments

Administrative change is made at FAR 2.101.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Federal Acquisition Circular (FAC) 2023–02 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator of National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2023–02 is effective February 14, 2023 except for Items I through III, which are effective March 16, 2023.

John M. Tenaglia,

Principal Director, Defense Pricing and Contracting, Department of Defense.

Jeffrey A. Koses,

Senior Procurement Executive/Deputy CAO, Office of Acquisition Policy, U.S. General Services Administration.

Karla Smith Jackson,

Assistant Administrator for Procurement, Senior Procurement Executive, National Aeronautics and Space Administration.

[FR Doc. 2023–02424 Filed 2–13–23; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12, 32, and 52

[FAC 2023–02; FAR Case 2020–007; Item I; Docket No. FAR–2020–0007, Sequence 1]

RIN 9000–AO10

Federal Acquisition Regulation: Accelerated Payments Applicable to Contracts With Certain Small Business Concerns

AGENCY: Department of Defense (DoD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act for Fiscal Year 2020 to provide for accelerated payments to small business contractors and subcontractors and a comparable statute applicable only to the Department of Defense.

DATES: Effective March 16, 2023.

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202–969–7207 or by email at *zenaida.delgado@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* Please cite FAC 2023–02, FAR Case 2020–007.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule at 86 FR 53923 on September 29, 2021, to implement a policy that provides for accelerated payments to contractors that are small businesses and to small business subcontractors by accelerating payments to their prime contractors. This change implements section 873 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Pub. L. 116–92). Section 873 amends 31 U.S.C. 3903(a).

Specifically, section 873 requires agencies to establish an accelerated payment date for small business prime contractors, to the fullest extent permitted by law, with a goal of 15 days after receipt of a proper invoice, if a specific payment date is not established by contract. Section 873 also requires that, to the fullest extent permitted by law, the head of an agency establish an accelerated payment date for prime contractors that subcontract with small businesses, with a goal of 15 days after receipt of a proper invoice, if—

(1) A specific payment date is not established by contract; and

(2) The contractor agrees to make accelerated payments to the subcontractor without any further consideration from, or fees charged to, the subcontractor. The final rule implements both aspects of section 873. For DoD, however, this case implements section 815 of the William M. (Mac) Thornberry NDAA for FY 2021, which amended 10 U.S.C. 2307(a)(2)(A) (now found at 10 U.S.C. 3801) by striking the language ''if a specific payment date is not established by contract.'' Accordingly, this case excludes from DoD contracts the condition reflected in the language ''a specific payment date is not established by contract.''

Four respondents submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of Significant Changes

There are no significant changes from the proposed rule.

B. Analysis of Public Comments

Of the four responses received, none provided negative comments on the rule, although they suggested changes as described below. No changes resulted from the public comments.

Comment: A respondent suggested adding the following language: ''the term ''other required documentation'' shall exclude documentation that is not commercially reasonable in the circumstances, unless such documentation is required by law.'' This respondent stated that its suggested change is meant to prevent ''the occasional agency or prime contractor [from evading] acceleration of payment under the proposed rules by establishing unreasonable requirements for documentation that a small business cannot meet.''

Response: The Councils cannot accept the suggestion because it is not consistent with the statute being implemented. Section 873 of the NDAA for FY 2020 did not create or modify a definition of ''other required documentation.'' The term ''other required documentation'' and other similar variations are used in many instances in the FAR and other agency regulations. Also, such ''documentation'' may be required by the contract or law, or both. The Councils concluded that ''other required documentation'' should be sufficient; and that adding the suggested language will not make the issue any clearer.

Comment: A respondent expressed the need for the rule to clarify the statement ''with a goal of 15 days after receipt of proper invoice, if—(1) a specific payment date is not established by contract . . .'' The respondent expressed concern that a contracting officer may insert ''any type of specific date—*i.e.,* 30 days, 60 days or 90 days into their contracts.'' This respondent suggested to remove the term ''goal'' and make the accelerated payment ''a requirement and that there be oversight within contracts to make certain the requirement is being achieved.''

Response: Congress has directed DoD to ''establish an accelerated payment date with a goal of 15 days after a proper invoice for the amount due is received.'' See section II.C. of this preamble. For civilian agencies, the Councils cannot accept the suggestion because it is not consistent with the statute.

Comment: A respondent expressed that small business contractors having to flow down the accelerated payment to their small business subcontractors would ''essentially eliminate any financial assistance by negating the benefit of the accelerated timeline.'' This respondent expressed that the flowdown requirement ''could put an undue burden onto many small business primes who do not track the size status of their subcontractors since they are not subject to the same reporting requirements of large businesses. Being required to implement a tracking system to comply with the flowdown of accelerated payments could prove to be an additional unintended expense on the small business that would once again negate the financial benefit of accelerated payment.''

Response: The Councils cannot accept the suggestions because they are not consistent with the statute being implemented. Section 873 of the NDAA for FY 2020 requires the flowdown. The statute and the final rule do not include additional reporting or recordkeeping requirements.

Comment: A respondent expressed strong support for the rule and urged the Councils ''to include in the final rule an expansion of the provision to apply these accelerated payment requirements to large business subcontractors.'' A respondent expressed support for the rule but believed that more analysis of the financial and administrative impact of accelerating payments to large subcontractors is required. This respondent provided three examples of questions that need to be answered: (1) How will it affect contractor ERP systems and reporting? (2) What administrative costs will be incurred and what is the overall financial impact? (3) How will the requirement be integrated with existing regulations that already dictate when payments must be made to subcontractors (*i.e.,* FAR 52.232–16, FAR 52.216–7)?

Response: In the preamble to the proposed rule, the Councils noted their interest in understanding the

implications of applying the accelerated payment requirements to large business subcontractors and flowing them down to lower tier small business subcontractors. Interest in this issue remains, but additional research is needed to properly inform the process. The Councils, in coordination with the Office of Federal Procurement Policy, will consider whether further action through a new rulemaking should be pursued to address flowdown of accelerated payments, as well as other refinements that may be necessary to ensure the policy objective of accelerating payments to small business concerns has been achieved by the changes set forth in this rule.

C. Other Changes

Other changes made to the final rule are as follows:

- To add a clarification at FAR 32.009–1(a) by creating paragraphs (a)(1) and (a)(2) to differentiate DoD from civilian agencies regarding the removal of the phrase ''if a specific payment date is not established by contract'' at 10 U.S.C. 3801 per section 815 of the William M. (Mac) Thornberry NDAA for FY 2021, Public Law 116–283; the statutory text was moved from 10 U.S.C. 2307(a) to 10 U.S.C. 3801.
- To make editorial corrections at: 52.213–4(a)(1)(x) to be consistent with the FAR 52.233–4 citation at FAR 52.212–5.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items, or for Commercial Services

This rule does not add any new solicitation provisions or contract clauses. This rule amends the following FAR clauses: 52.212–5, Contract Terms and Conditions Required To Implement Statutes or Executive Orders-Commercial Products and Co mmercial Services; 52.213–4, Terms and Conditions-Simplified Acquisitions (Other Than Commercial Products and Commercial Services); 52.232–40, Providing Accelerated Payments to Small Business Subcontractors; and 52.244–6, Subcontracts for Commercial Products and Commercial Services.

The FAR rule makes the 10 U.S.C. 2307(a) (now found at 10 U.S.C. 3801) and 31 U.S.C. 3903 statutory changes to a requirement already applicable to contracts at or below the SAT and to contracts for the acquisition of commercial products and commercial services, including COTS items.

The Federal Acquisition Regulatory Council (FAR Council) is applying the rule to contracts at or below the SAT and acquisitions of commercial products and commercial services, including acquisitions for COTS items, in accordance with 41 U.S.C. 1905, 41 U.S.C. 1906, and 41 U.S.C. 1907. Discussion of the FAR Council determinations is set forth below.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to acquisitions at or below the SAT. Section 1905 generally limits the applicability of new laws when agencies are making acquisitions at or below the SAT, but provides that such acquisitions will not be exempt from a provision of law under certain circumstances, including when the FAR Council makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts and subcontracts in amounts not greater than the SAT from the provision of law.

The FAR Council has made a determination to apply this statute to contracts and subcontracts at or below the SAT. These accelerated payments provide benefits to contractors that are small businesses, to contractors that subcontract with small businesses, and to small business subcontractors by accelerating payments to their prime contractors, without adding any reporting or recordkeeping requirements. Approximately 96 percent of Federal contracts are in amounts at or below the SAT. An exception for contracts and subcontracts at or below the SAT would exclude contracts and subcontracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

B. Applicability to Contracts for the Acquisition of Commercial Products, Including Commercially Available Off-The-Shelf (COTS) Items, or for Commercial Services

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial products and commercial services and is intended to limit the applicability of laws to those contracts. Section 1906 provides that if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts and subcontracts for commercial products and commercial services the provision of law will apply to them.

41 U.S.C. 1907 states that acquisitions of COTS items will be exempt from certain provisions of law unless the Administrator for Federal Procurement Policy makes a written determination and finds that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items.

The FAR Council has made a determination to apply this statute to contracts and subcontracts for commercial products and commercial services. The Administrator for Federal Procurement Policy has made a determination to apply this statute to acquisitions for COTS items. These accelerated payments provide benefits to contractors that are small businesses, to contractors that subcontract with small businesses, and to small business subcontractors by accelerating payments to their prime contractors, without adding any reporting or recordkeeping requirements. Over 50 percent of Federal contracts are awarded using commercial procedures. An exception for commercial products and commercial services, including COTS items, contracts and subcontracts would exclude contracts and subcontracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

IV. Expected Impact of the Rule

The final rule expands the FAR policy regarding accelerated payments to small business contractors by: (1) providing accelerated payments to prime contractors that are small businesses; (2) establishing a goal of payment within 15 days after receipt of a proper invoice; and (3) prohibiting prime contractors from requesting any further consideration from the subcontractor in exchange for the accelerated payments. The Government expects this rule to improve cash flow and access to the Federal marketplace for small businesses, which are likely to have lower cash reserves and less access to inexpensive credit when compared to other than small businesses, *i.e.,* large businesses.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of

E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD, GSA, and NASA will send the rule and the ''Submission of Federal Rules Under the Congressional Review Act'' form to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has determined that this is not a major rule under 5 U.S.C. 804.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601–612. The FRFA is summarized as follows:

This final rule amends the FAR to provide for accelerated payments to contractors that are small businesses, and to small business subcontractors by accelerating payments to their prime contractors. Specifically, the statute requires agencies, to the fullest extent permitted by law, to establish an accelerated payment date for small business contractors, with a goal of 15 days after receipt of a proper invoice, if a specific payment date is not established by contract. For contractors that subcontract with small businesses, the statute requires agencies, to the fullest extent permitted by law, to establish an accelerated payment date, with a goal of 15 days after receipt of a proper invoice, if—

(a) A specific payment date is not established by contract; and

(b) The contractor agrees to make accelerated payments to the subcontractor without any further consideration from, or fees charged to, the subcontractor.

For DoD, however, this rule implements section 815 of the William M. (Mac) Thornberry NDAA for FY 2021, which amended 10 U.S.C. 2307(a)(2)(A) (now found at 10 U.S.C. 3801) by striking the language ''if a specific payment date is not established by contract.'' Accordingly, the final rule excludes from DoD contracts the condition reflected in the language ''a specific payment date is not established by contract.''

The objective is to implement section 873 of the NDAA for FY 2020 (Pub. L. 116–92), which amends 31 U.S.C. 3903(a). The rule also implements a change made by section 815 of the William M. (Mac) Thornberry NDAA for FY 2021 to 10 U.S.C. 2307(a), now found at 10 U.S.C. 3801, which requires DoD to keep the 15 days rather than allow a different specific date to be established in the contract.

There were no significant issues raised by the public comments in response to the initial regulatory flexibility analysis.

The final rule applies to small businesses that are prime contractors, and to small businesses that are subcontractors on Federal prime contracts. Based on data obtained from the Federal Procurement Data System, 120,907 unique entities (including 78,813 small businesses) were awarded contracts for FY 2021. There is no data source to know how many subcontracts are awarded to small businesses. With regard to the impact of the prohibition on fees or other consideration in return for accelerated payments, it is not possible to estimate how many of these small business subcontractors may have been required to provide consideration or pay fees to the prime contractor in order to receive accelerated payments.

The final rule does not include additional reporting or recordkeeping requirements. There are no available alternatives to the final rule to accomplish the desired objective of the statute.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. Paperwork Reduction Act

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

List of Subjects in 48 CFR Parts 12, 32, and 52

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 12, 32, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 12, 32, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

PART 12—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

12.301 [Amended]

■ 2. Amend section 12.301 by removing paragraph (d)(15).

PART 32—CONTRACT FINANCING

■ 3. Revise sections 32.009 and 32.009–1 to read as follows:

32.009 Providing accelerated payments to small business contractors and to prime contractors that subcontract with a small business concern.

32.009–1 General.

(a)(1) Pursuant to 31 U.S.C. 3903(a), agencies other than the Department of Defense (DoD) shall provide accelerated payments, to the fullest extent permitted by law, with a goal of 15 days after receipt of a proper invoice and all other required documentation, if a specific payment date is not established by contract, to—

(i) Small business contractors; and

(ii) Prime contractors that subcontract with a small business concern, if the prime contractor agrees to make payments to the small business subcontractor within 15 days of receiving the accelerated payment from the Government, after receipt of a proper invoice and all other required documentation from the small business subcontractor, to the maximum extent practicable, without any further consideration from or fees charged to the subcontractor.

(2) Pursuant to 10 U.S.C. 3801(b), DoD shall provide accelerated payments, to the fullest extent permitted by law, with a goal of 15 days after receipt of a proper invoice and all other required documentation, to—

(i) Small business contractors; and

(ii) Prime contractors that subcontract with a small business concern, if the prime contractor agrees to make payments to the small business subcontractor within 15 days of receiving the accelerated payment from the Government, after receipt of a proper invoice and all other required documentation from the small business subcontractor, to the maximum extent practicable, without any further consideration from or fees charged to the subcontractor.

(b) This acceleration does not provide any new rights under the Prompt Payment Act and does not affect the application of the Prompt Payment Act late payment interest provisions.

(c) Agencies may use the Governmentwide commercial purchase card as a method of payment (see 32.1108) to facilitate accelerated payment, to earn refunds, and to reduce invoice processing costs.

32.903 [Amended]

■ 4. Amend section 32.903 by removing from paragraph (a)(5) ''5 CFR 1315.5'' and adding ''5 CFR 1315.5, but see 32.009–1(a)'' in its place.

■ 5. Amend section 32.906 by removing from paragraph (a)(2) ''are necessary (see 32.903(a)(5))'' and adding ''is

necessary'' in its place, and adding a sentence to the end of the paragraph.

The addition reads as follows:

32.906 Making payments.

(a) * * *

(2) * * * See 32.903(a)(5), but see 32.009–1(a).

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 6. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Redesignating paragraphs (a)(5) and (6) as paragraphs (a)(6) and (7); and adding a new paragraph (a)(5);

■ c. Redesignating paragraph (e)(1)(xxii) as paragraph (e)(1)(xxiii); and adding a new paragraph (e)(1)(xxii); and

■ d. In Alternate II—

■ i. Revising the date of the Alternate;

■ ii. Redesignating paragraph (e)(1)(ii)((U) as paragraph (e)(1)(ii)(V); and adding a new paragraph (e)(1)(ii)((U);

The revisions and additions read as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services.

* * * * *

Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Products and Commercial Services (MAR 2023)

(a) * * *

(5) 52.232–40, Providing Accelerated Payments to Small Business Subcontractors (MAR 2023) (31 U.S.C. 3903 and 10 U.S.C. 3801).

* * * * *

(e)(1) * * *

(xxii) 52.232–40, Providing Accelerated Payments to Small Business Subcontractors (MAR 2023) (31 U.S.C. 3903 and 10 U.S.C. 3801). Flow down required in accordance with paragraph (c) of 52.232–40.

* * * * *

Alternate II (MAR 2023). * * *

(e)(1) * * *

(ii) * * *

(U) 52.232–40, Providing Accelerated Payments to Small Business Subcontractors (MAR 2023) (31 U.S.C. 3903 and 10 U.S.C. 3801). Flow down required in accordance with paragraph (c) of 52.232–40.

* * * * *

■ 7. Amend section 52.213–4 by—

■ a. Revising the date of the clause;

■ b. Redesignating paragraphs (a)(1)(viii) and (ix) as paragraphs (a)(1)(ix) and (x); and adding a new paragraph (a)(1)(viii);

■ c. Revising the newly redesignated paragraph (a)(1)(x);

■ d. Removing paragraph (a)(2)(vi);

■ e. Redesignating paragraphs (a)(2)(vii) through (ix) as paragraphs (a)(2)(vi) through (viii); and

■ f. Removing from the newly redesignated paragraph (a)(2)(vii) ''(DEC 2022)'' and adding ''(MAR 2023)'' in its place.

The revisions and addition read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Products and Commercial Services).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Products and Commercial Services) (MAR 2023)

(a) * * *

(1) * * *

(viii) 52.232–40, Providing Accelerated Payments to Small Business Subcontractors (MAR 2023) (31 U.S.C. 3903 and 10 U.S.C. 3801).

* * * * *

(x) 52.233–4, Applicable Law for Breach of Contract Claim (OCT 2004) (Pub. L. 108–77 and 108–78 (19 U.S.C. 3805 note)).

* * * * *

■ 8. Amend section 52.232–40 by revising the date of the clause and paragraph (a) to read as follows:

52.232–40 Providing Accelerated Payments to Small Business Subcontractors.

* * * * *

Providing Accelerated Payments to Small Business Subcontractors (MAR 2023)

(a)(1) In accordance with 31 U.S.C. 3903 and 10 U.S.C. 3801, within 15 days after receipt of accelerated payments from the Government, the Contractor shall make accelerated payments to its small business subcontractors under this contract, to the maximum extent practicable and prior to when such payment is otherwise required under the applicable contract or subcontract, after receipt of a proper invoice and all other required documentation from the small business subcontractor.

(2) The Contractor agrees to make such payments to its small business subcontractors without any further consideration from or fees charged to the subcontractor.

* * * * *

■ 9. Amend section 52.244–6 by—

■ a. Revising the date of the clause; and

■ b. Removing from paragraph (c)(1)(xix) ''(NOV 2021)'' and adding ''(MAR 2023)'' in its place.

The revision reads as follows:

52.244–6 Subcontracts for Commercial Products and Commercial Services.

* * * * *

Subcontracts for Commercial Products and Commercial Services (MAR 2023)

* * * * *

[FR Doc. 2023–02425 Filed 2–13–23; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 19, 49, and 52

[FAC 2023–02; FAR Case 2019–008; Item II; Docket No. 2019–0008; Sequence No. 1]

RIN 9000–AN91

Federal Acquisition Regulation: Small Business Program Amendments

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement several changes made to the Small Business Administration (SBA) regulations.

DATES: Effective March 16, 2023.

FOR FURTHER INFORMATION CONTACT: Ms. Malissa Jones, Procurement Analyst, at 571–886–4687, or by email at *malissa.jones@gsa.gov,* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov*. Please cite FAC 2023–02, FAR Case 2019–008.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule at 87 FR 10327 on February 24, 2022, to amend the FAR to implement several revisions that the Small Business Administration (SBA) made to its regulations in its final rule published on November 29, 2019, at 84 FR 65647. Five respondents submitted comments in response to the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule; a minor change was made to 19.307(d)(1)(iii) as a result of the public comments received. A discussion of the comments is provided as follows:

A. Summary of Significant Changes

There are no significant changes from the proposed rule.

B. Analysis of Public Comments

1. Support for the Rule

Comment: One respondent expressed support for the rule.

Response: The Councils acknowledge the respondent's support for the rule.

2. Negative Impacts of the Rule

Comment: One respondent expressed concern regarding potential negative impacts of the rule. The respondent believes that the new rule is unfair to 8(a) program participants who spend time and money in pursuit of long-term contracts with the Federal Government, specifically category management-type contracts. The respondent indicated that the proposed rule will shorten the lifespan of 8(a) contracts if an 8(a) participant graduates from the program before the contract ends. The respondent also indicated the proposed rule may result in a reduction in the number and value of long-term 8(a) contracts for the Government and small businesses.

Response: The Councils acknowledge the respondent's concerns regarding the impact this rule will have on 8(a) participants and the Government with regard to long-term 8(a) contracts. As a result of this rule, the Government will not be able to exercise a fifth-year option on a long-term contract if the contractor is no longer eligible under the 8(a) program. However, this rule implements several revisions SBA made to its regulations in its final rule published on November 29, 2019, at 84 FR 65647. SBA modified 13 CFR 124.521(e)(2) to require contracting officers to verify that a business concern continues to be an eligible 8(a) participant no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising an option, and where a concern no longer qualifies the rule precludes contracting officers from exercising the option. In its final rule, SBA pointed out that Congress intended that 8(a) program participation be limited to nine years, and for 8(a) participants to leave the program and go on to participate successfully and independently in the Government contracting arena. Therefore, allowing contracting officers to continue to exercise options for 8(a) program participants under these circumstances would not meet Congress' intent.

3. Clarifications

a. Clarify SBA Requirements for 8(a) Eligibility Prior To Exercising the Fifth (5th) Option Year

Comment: One respondent asked if an 8(a) participant is not eligible for the award of a fifth year option, can SBA authorize an extension to an 8(a) participant's program term to allow agencies time for re-procurement.

Response: An 8(a) participant's eligibility is determined in accordance with SBA's regulations and a participant's status is reflected in DSBS.

Comment: One respondent asked if current procurements are grandfathered from this rule.

Response: In accordance with FAR 1.108(d), FAR changes made by this rule apply to solicitations issued on or after the effective date of the change unless otherwise specified.

Comment: One respondent requested that eligibility verification be changed from ''no more than 120 days prior'' to ''no less than 120 days prior''.

Response: This rule is consistent with 13 CFR 124.521(e)(2) and implements SBA's final rule at 84 FR 65647 (see comment category 2).

b. Clarify SBA Protest Procedures and Applicability

Comment: One respondent asked if an 8(a) contractor that did not receive the award could protest the exercise of an option during the 6th, 7th, or 8th year of a contract if they suspect the contractor has graduated from the 8(a) program.

Response: Protests of small business representations and rerepresentations by an 8(a) contractor are made in accordance with FAR 19.813, Protesting a small business representation or rerepresentation. This rule does not make changes to FAR 19.302.

Comment: One respondent indicated that the addition of ''sole source'' at FAR 19.306(d)(1)(iv) and 19.308(d)(1)(iii) is inconsistent with SBA regulations regarding the new ostensible subcontractor protest grounds (*e.g.,* HUBZone and WOSB/EDWOSB protests (13 CFR 126.601(d) and 13 CFR 127.504(g)).

Response: Although the ostensible subcontractor protest grounds in SBA's regulations at 13 CFR 126.601(d) and 13 CFR 127.504(g) do not include ''or sole source'', SBA did include ''sole source'' when describing the ostensible subcontractor rule in its final rule published on November 29, 2019 at 84 FR 65647, to make clear that the ostensible subcontractor rule applies to set-aside and sole source contracts.

Comment: One respondent recommended that ''or order'' be added to FAR 19.307(d)(1)(iii) following ''sole-source service contract'' to be consistent with SBA's regulations at 13 CFR 125.18(f).

Response: The Councils adopted the recommendation and conforming edits were made at FAR 19.306(d) and 19.308(d).

c. Clarify Date of Size Representation

Comment: One respondent indicated that the size determination for contractors under Federal Supply Schedule Multiple-Award Schedule contracts should be determined as of the date of each response to a request for quotation instead of the date of the initial offer for the multiple-award schedule contract.

Response: This rule implements SBA's final rule at 84 FR 65647 dated November 29, 2019, which clarified that SBA determines size as of the date of initial offer for the multiple-award contract, whether or not the offer includes price. Therefore, this rule is consistent with SBA's regulations at 13 CFR 121.404(a)(1)(iv), which specify the timing of SBA's size determination.

Comment: One respondent recommended that the words ''or the price is evaluated'' at FAR 19.102(a)(4), 19.301–1(b), and 19.301–1(e)(1) be deleted to be consistent with 13 CFR 121.404(a)(1)(iv).

Response: SBA's final rule published at 84 FR 65647 dated November 29, 2019, clarified that when an agency uses indefinite delivery, indefinite quantity (IDIQ), multiple-award contracts that do not require offerors to include price, size will be determined as of the date of the initial offer which may not include price. The phrase ''may not'' here means ''might not.'' This rule adds the words ''or the price is evaluated'' at 19.102(a)(4), 19.301–1(b), and 19.301–1(e)(1) to clarify SBA's intent.

d. Clarify the Language in the Proposed FAR Rule to More Closely Align With SBA's Regulations

Comment: While recognizing that the proposed rule is likely sufficient, one respondent recommended that the rule be amended to include ''which is found at section 121.201, footnote 18'' from SBA's regulation regarding the size standard for Information Technology

Value-added Reseller under NAICS Code 541519.

Response: The proposed rule included the size standard for nonmanufacturers and the size standard for information technology value added resellers under NAICS code 541519. In addition, FAR 19.102(a) includes a reference to SBA's Small business size standards and corresponding (NAICS) codes at 13 CFR 121.201 and provides the website for NAICS codes at *https://www.sba.gov/document/support--table-size-standards. The 150 employee size is easy to find in the SBA size standards;* therefore, it is not necessary to include a reference to 13 CFR 121.201 and footnote 18 in the FAR text associated with this rule.

Comment: One respondent recommended including ''IDIQ'' in the proposed rule for consistency with SBA regulations in referencing multiple-award contracts.

Response: Although SBA's regulations reference IDIQ after multiple-award contract, FAR 19.504 provides guidance on placing orders under multiple-award contracts; therefore, it is not necessary to add IDIQ at FAR 19.504(b). In addition, the definition of *multiple-award contract* at FAR 2.101 indicates that this kind of contract is an IDIQ contract.

4. Outside the Scope

Comment: One respondent asked what acquisition options agencies have if an 8(a) participant is not eligible for the award of an option under a long-term 8(a) contract.

Response: This is outside of the scope of this rule.

C. Other Changes

Minor editorial changes were made at FAR 19.306(d), 19.307(d), and 19.308(d)(2).

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Products (Including Commercially Available Off-the-Shelf (COTS) Items), or for Commercial Services

This rule amends several solicitation provisions and contract clauses at FAR 52.204–8, 52.212–1, 52.212–5, 52.219–1, 52.219–18, and 52.219–28. However, this rule does not impose any new requirements on contracts at or below the SAT or for commercial products, or for commercial services, including commercially available off-the-shelf (COTS) items. The clauses continue to apply to acquisitions at or below the SAT, to acquisitions for commercial products and commercial services including COTS items.

IV. Expected Impact of the Rule

This rule will impact the operations of the Government and contractors as described in this section.

This rule will impact the Government with regard to long-term 8(a) contracts. Contracting officers will not be able to exercise options past the fifth year of long-term 8(a) contracts if the 8(a) contractor no longer qualifies for the 8(a) program. Contractors who are 8(a) participants with long-term contracts may find that the Government cannot exercise a fifth-year option on that contract if the contractor is no longer eligible for the 8(a) program.

Offerors who are information technology value-added resellers should be able to more easily understand the size standard that applies to them.

The ''ostensible subcontractor rule'' is implemented in this rule as a new ground for protest. Small business contractors must not be overly reliant on non-similarly situated small business subcontractors or have such a subcontractor perform primary and vital requirements of the contract. Therefore, a small business contractor must have the necessary expertise within its own organization.

This rule is not expected to result in any costs to contractors or offerors.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD, GSA, and NASA will send the rule and the ''Submission of Federal Rules Under the Congressional Review Act'' form to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has determined that this is not a major rule under 5 U.S.C. 804.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601–612. The FRFA is summarized as follows:

DoD, GSA, and NASA are issuing a final rule to amend the Federal Acquisition Regulation (FAR) to implement several revisions made to the Small Business Administration (SBA) regulations in SBA's final rule published on November 29, 2019, at 84 FR 65647. The revisions address the point in the procurement process at which small business size status is determined for offers for multiple-award contracts. SBA generally determines size status at the time of initial offer including price. However, for a solicitation for a multiple-award contract that does not require offers to include price or where price is not evaluated, SBA will determine size as of the date of initial offer, whether or not the offer includes price or the price is evaluated. The revisions also address the eligibility requirements for 8(a) participants under long-term contracts (*i.e.,* with a duration of more than five years including option periods). For long-term 8(a) contracts, contracting officers will be required to verify in the Dynamic Small Business Search (DSBS) or the System for Award Management (SAM) that the contractor is still an SBA-certified 8(a) participant no more than 120 days prior to the end of the fifth year of the contract. If the contractor is no longer an SBA-certified 8(a) participant, the contracting officer shall not exercise the option. In addition, SBA's revisions specified that the size standard for information technology value added resellers under North American Industry Classification System (NAICS) code 541519 is 150 employees. The revisions also address SBA's new grounds for a socioeconomic status protest based on an allegation that a contractor is unduly reliant on a small, non-similarly situated entity subcontractor or if such subcontractor performs the primary and vital requirements of the contract (the ''ostensible subcontractor rule'').

There were no significant issues raised by the public comments in response to the initial regulatory flexibility analysis.

This rule will apply to small entities that do business with the Federal Government. According to the data in SAM, as of January 2022, 420,000 of the active entity registrations are for entities that are small business concerns for at least one NAICS code. This rule will impact 8(a) participants who are Federal contractors with contracts that have a duration of more than five years, including options. An analysis of the data in the Federal Procurement Data System (FPDS) indicates that, for fiscal years 2019 through 2021, an average of 326 long-term contracts (*i.e.,* greater than five years) were awarded to 279 unique entities each year under the 8(a) program. The rule may reduce the number of long-term contracts awarded to 8(a) participants by agencies that are concerned about having a contract in place beyond the

fifth year. Contracts outside the 8(a) program will not have such obstacles to continued performance. However, SBA pointed out that Congress intended that 8(a) program participation be limited to nine years, and for 8(a) participants to leave the program and go on to participate successfully and independently in the Government contracting arena. Therefore, allowing contracting officers to continue to exercise options for 8(a) program participants under these circumstances would not meet Congressional intent.

This rule will affect information technology value added resellers under NAICS code 54159. An analysis of the data in FPDS shows that, for fiscal years 2019 through 2021, an average of 699 unique large businesses and 1,129 unique small businesses were awarded contracts each year under NAICS code 541519.

This rule does not include any new reporting, recordkeeping, or other compliance requirements for small entities.

This rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches that would accomplish the stated objectives.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. Paperwork Reduction Act

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

List of Subjects in 48 CFR Parts 19, 49, and 52

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 19, 49, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 19, 49, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

PART 19—SMALL BUSINESS PROGRAMS

■ 2. Amend section 19.102 by revising the last sentence of paragraph (a)(1) and adding paragraphs (a)(3) and (4) to read as follows:

19.102 Small business size standards and North American Industry Classification System codes.

(a) * * *

(1) * * * They are also available at *https://www.sba.gov/document/support--table-size-standards*.

* * * * *

(3) SBA determines the size status of a concern, including its affiliates, as of the date the concern represents that it is small to the contracting officer as part of its initial offer, which includes price.

(4) When an agency uses a solicitation for a multiple-award contract that does not require offers for the contract to include price, SBA determines size as of the date of initial offer for the multiple-award contract, whether or not the offer includes price or the price is evaluated. (See 13 CFR 121.404(a)(1)(iv)).

* * * * *

19.301–1 [Amended]

■ 3. Amend section 19.301–1 by—

■ a. Removing from paragraph (b) introductory text the phrase ''initial offer'' and adding ''initial offer, (whether or not the offer includes price or the price is evaluated)'' in its place; and

■ b. Removing from paragraph (e)(1) the phrase ''for the contract'' and adding ''for the contract (whether or not the offer includes price or the price is evaluated (see 13 CFR 121.404(a)(1)(iv)),'' in its place.

■ 4. Amend section 19.306 by adding paragraph (d)(3) to read as follows:

19.306 Protesting a firm's status as a HUBZone small business concern.

* * * * *

(d) * * *

(3) SBA will consider protests for HUBZone set-aside or sole-source service contracts or orders, if a HUBZone prime contractor is unduly reliant on a small entity subcontractor that is not a similarly-situated entity as defined in 13 CFR 125.1, or if such subcontractor performs the primary and vital requirements of the contract. For allegations that the prime contractor is unduly reliant on an other-than-small subcontractor, see size protests at 19.302, and 13 CFR 121.103(h)(2), which treats the pair as joint venturers for size determination purposes (the ''ostensible subcontractor rule'').

* * * * *

■ 5. Amend section 19.307 by—

■ a. Removing from paragraph (d)(1) introductory text the phrase ''service disabled'' and adding ''service–disabled'' in its place;

■ b. Removing from paragraph (d)(1)(i) the phrases ''service disabled'' and ''125.8; or'' and adding ''service-disabled'' and ''125.12;'' in their places, respectively;

■ c. Removing from paragraph (d)(1)(ii) the phrase ''such veteran.'' and adding ''such veteran; or'' in its place; and

■ d. Adding paragraph (d)(1)(iii).

The addition reads as follows:

19.307 Protesting a firm's status as a service-disabled veteran-owned small business concern.

* * * * *

(d) * * *

(1) * * *

(iii) For set-aside or sole-source service contract or order ostensible subcontractor protests, the protester presents credible evidence of the alleged undue reliance on a small entity subcontractor that is not a similarly-situated entity as defined in 13 CFR 125.1, or credible evidence that the small non-similarly situated entity is performing the primary and vital requirements of the contract. For allegations that the prime contractor is unduly reliant on an other-than-small subcontractor, see size protests at 19.302, and 13 CFR 121.103(h)(2), which treats the pair as joint venturers for size determination purposes (the ''ostensible subcontractor rule'').

* * * * *

■ 6. Amend section 19.308 by—

■ a. Removing from the end of paragraph (d)(1)(i) the word ''or'';

■ b. Removing from the end of paragraph (d)(1)(ii) the phrase ''EDWOSB contract.'' and adding ''EDWOSB contract; or'' in its place; and

■ c. Adding paragraph (d)(1)(iii).

The addition reads as follows:

19.308 Protesting a firm's status as an economically disadvantaged women-owned small business concern or women-owned small business concern eligible under the Women-Owned Small Business Program.

* * * * *

(d) * * *

(1) * * *

(iii) For WOSB or EDWOSB set-aside or sole-source service contracts or orders, the protest presents evidence that the prime contractor is unduly reliant on a small entity subcontractor that is not a similarly-situated entity as defined in 13 CFR 125.1, or a protest alleging that such subcontractor is performing the primary and vital requirements of a set-aside or sole-source WOSB or EDWOSB contract. For allegations that the prime contractor is unduly reliant on an other-than-small subcontractor, see size protests at 19.302, and 13 CFR 121.103(h)(2), which treats the pair as joint venturers

for size determination purposes (the ''ostensible subcontractor rule'').

* * * * *

■ 7. Amend section 19.504 by—
■ a. Removing from the paragraph (b) heading the phrase ''partial set-aside contracts.'', and adding the phrase ''set-aside contracts-'' in its place;
■ b. Redesignating paragraphs (b)(1) and (2) as paragraphs (b)(2)(i) and (ii), respectively;
■ c. Adding a new paragraph (b)(1); and
■ d. Adding a paragraph heading to the newly redesignated paragraph (b)(2).

The addition and revision read as follows:

19.504 Orders under multiple-award contracts.

* * * * *

(b) * * *

(1) *Orders under total set-aside contracts.* Under a total small business set-aside, contracting officers may at their discretion set aside orders for any of the small business socioeconomic concerns identified in 19.000(a)(3) provided that the requirements at paragraph (a) of this section, 19.502–2(b), and the specific program eligibility requirements are met.

(2) *Orders under partial set-aside contracts.*

* * * * *

19.505 [Amended]

■ 8. Amend section 19.505 by removing from paragraphs (c)(1)(ii) and (c)(2)(i) the phrase ''500 employees'' and adding ''500 employees, or 150 employees for information technology value-added resellers under NAICS code 541519'' in its place.

■ 9. Amend section 19.802 by adding two sentences at the end to read as follows:

19.802 Determining eligibility for the 8(a) program.

* * * SBA designates the concern as an 8(a) participant in the Dynamic Small Business Search (DSBS) at *https://web.sba.gov/pro-net/search/dsp_dsbs.cfm*. SBA's designation also appears in the System for Award Management (SAM).

■ 10. Amend section 19.804–1 by—
■ a. Removing from the end of paragraph (a)(1) the word ''and'';
■ b. Redesignating paragraph (a)(2) as paragraph (a)(3); and
■ c. Adding a new paragraph (a)(2).

The addition reads as follows:

19.804–1 Agency evaluation.

(a) * * *

(2) Length of contract, including option periods (see 19.812(d)); and

* * * * *

■ 11. Amend section 19.812 by—
■ a. Redesignating paragraph (d) as paragraph (e); and
■ b. Adding a new paragraph (d).

The addition reads as follows:

19.812 Contract administration.

* * * * *

(d) For 8(a) contracts exceeding 5 years including options, the contracting officer shall verify in DSBS or SAM that the concern is an SBA-certified 8(a) participant no more than 120 days prior to the end of the fifth year of the contract. If the concern is not an SBA-certified 8(a) participant, the contracting officer shall not exercise the option (see 13 CFR 124.521(e)(2)).

* * * * *

PART 49—TERMINATION OF CONTRACTS

49.402–3 [Amended]

■ 12. Amend section 49.402–3 by removing from paragraph (e)(4) the phrase ''Small Business Administration Regional'' and adding ''Small Business Administration Area'' in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 13. Amend section 52.204–8 by—
■ a. Revising the date of the provision;
■ b. Removing from paragraph (a)(3) introductory text the phrase ''500 employees'' and adding ''500 employees, or 150 employees for information technology value-added resellers under NAICS code 541519,'' in its place;
■ c. In Alternate I:
■ i. Revising the date of Alternate I; and
■ ii. Removing from paragraph (a)(2) introductory text the phrase ''500 employees'' and adding ''500 employees, or 150 employees for information technology value-added resellers under NAICS code 541519,'' in its place.

The revisions read as follows:

52.204–8 Annual Representations and Certifications.

* * * * *

Annual Representations and Certifications (Mar 2023)

* * * * *

Alternate I ([MAR 2023 * * *

* * * * *

■ 14. Amend section 52.212–1 by—
■ a. Revising the date of the provision; and
■ b. Removing from paragraph (a) introductory text the phrase ''500 employees'' and adding ''500 employees, or 150 employees for information technology value-added resellers under NAICS code 541519,'' in its place.

The revision reads as follows:

52.212–1 Instructions to Offerors—Commercial Products and Commercial Services.

* * * * *

Instructions to Offerors—Commercial Products and Commercial Services (MAR 2023)

* * * * *

■ 15. Amend section 52.212–5 by—
■ a. Revising the date of the clause; and
■ b. Removing from paragraph (b)(22)(i) the date ''(OCT 2022)'' and adding ''(MAR 2023)'' in its place.

The revision reads as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services (MAR 2023)

* * * * *

■ 16. Amend section 52.219–1 by—
■ a. Revising the date of the provision;
■ b. Removing from paragraph (b)(3) introductory text the phrase ''500 employees'' and adding ''500 employees, or 150 employees for information technology value-added resellers under NAICS code 541519,'' in its place;
■ c. In Alternate II:
■ i. Revising the date of Alternate II; and
■ ii. Removing from paragraph (b)(2) introductory text the phrase ''500 employees'' and adding ''500 employees, or 150 employees for information technology value-added resellers under NAICS code 541519,'' in its place.

The revisions read as follows:

52.219–1 Small Business Program Representations.

* * * * *

Small Business Program Representations (MAR 2023)

* * * * *

Alternate II (MAR 2023) * * *

* * * * *

■ 17. Amend section 52.219–18 by—
■ a. Revising the date of Alternate I; and
■ b. Removing from paragraph (iii) in Alternate I the phrase ''*Regional Office(s)*'' and adding ''*Area Office(s)*'' in its place.

The revision reads as follows:

52.219–18 Notification of Competition Limited to Eligible 8(a) Participants.

* * * * *

Alternate I (MAR 2023)

* * * * *

■ 18. Amend section 52.219–28 by—

■ a. Revising the date of the clause; and

■ b. Removing from paragraph (e) introductory text the phrase ''500 employees'' and adding ''500 employees, or 150 employees for information technology value-added resellers under NAICS code 541519,'' in its place.

The revision reads as follows:

52.219–28 Post-Award Small Business Program Rerepresentation.

* * * * *

Post-Award Small Business Program Rerepresentation (MAR 2023)

* * * * *

[FR Doc. 2023–02426 Filed 2–13–23; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 2

[FAC 2023–02; Item III; Docket No. FAR–2023–0052; Sequence No. 1]

Federal Acquisition Regulation; Technical Amendments

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: This document makes an amendment to the Federal Acquisition Regulation (FAR) in order to make needed editorial changes.

DATES: Effective: February 14, 2023.

FOR FURTHER INFORMATION CONTACT: Ms. Lois Mandell, Regulatory Secretariat Division (MVCB), at 202–501–4755 or *GSARegSec@gsa.gov*. Please cite FAC 2023–02, Technical Amendments.

SUPPLEMENTARY INFORMATION: This document makes an editorial change to 48 CFR part 2.

List of Subjects in 48 CFR Part 2

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR part 2 as set forth below:

■ 1. The authority citation for 48 CFR part 2 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

PART 2—DEFINITIONS OF WORDS AND TERMS

2.101 [Amended]

■ 2. Amend section 2.101, in paragraph (b), in the definition of ''Contingency operation'' by removing from paragraph (2) the phrase ''Chapter 15 of title 10 of the United States Code,'' and adding the phrase ''Chapter 13 of title 10 of the United States Code, and section 3713 of title 14 of the United States Code,'' in its place.

[FR Doc. 2023–02427 Filed 2–13–23; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR–2023–0051, Sequence No. 1]

Federal Acquisition Regulation; Federal Acquisition Circular 2023–02; Small Entity Compliance Guide

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide (SECG).

SUMMARY: This document is issued under the joint authority of DoD, GSA, and NASA. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rules appearing in Federal Acquisition Circular (FAC) 2023–02, which amends the Federal Acquisition Regulation (FAR). Interested parties may obtain further information regarding these rules by referring to FAC 2023–02, which precedes this document.

DATES: February 14, 2023.

ADDRESSES: The FAC, including the SECG, is available at *https://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact the analyst whose name appears in the table below. Please cite FAC 2023–02 and the FAR Case number. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov*. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared.

RULES LISTED IN FAC 2023–02

Item	Subject	FAR case	Analyst
I*	Accelerated Payments Applicable to Contracts with Certain Small Business Concerns	2020–007	Delgado.
II*	Small Business Program Amendments	2019–008	Jones.
III	Technical Amendments.		

SUPPLEMENTARY INFORMATION: Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR rules, refer to the specific item numbers and subjects set forth in the documents following these item summaries. FAC 2023–02 amends the FAR as follows:

Item I—Accelerated Payments Applicable to Contracts With Certain Small Business Concerns (FAR Case 2020–007)

This final rule provides for accelerated payments to contractors that are small businesses and to small business subcontractors by accelerating payments to their prime contractors. The rule implements section 873 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Pub. L. 116–92), which amends 31 U.S.C. 3903(a). The rule also implements section 815 of the William M. (Mac) Thornberry NDAA for FY 2021, which amended 10 U.S.C. 2307(a) (now found at 10 U.S.C. 3801). This final rule may have a positive impact on small entities, but it will not have a significant economic impact on a substantial number of small entities.

Item II—Small Business Program Amendments (FAR Case 2019–008)

This final rule amends the FAR to align with SBA's regulations related to several topic areas. This rule clarifies that SBA determines size status as of the date of initial offer for a multiple-award contract, whether or not the offer includes price, or the price is evaluated. Additionally, in accordance with FAR 19.301–2(b)(2), the ''ostensible subcontractor rule'' (a small business must not be unduly reliant on a nonsimilarly situated small business subcontractor or have such a subcontractor perform the primary and vital requirements of the contract) is implemented in this rule as a new ground for socioeconomic status protest. The rule also clarifies that contracting officers will not be able to exercise options past the fifth year of long-term 8(a) contracts if the 8(a) contractor no longer qualifies for the 8(a) program. Lastly, the rule clarifies the size standard for the information technology value added resellers under North American Industry Classification System code 541519 is 150 employees, not 500 employees.

Item III—Technical Amendments

Administrative change is made at FAR 2.101.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

[FR Doc. 2023–02429 Filed 2–13–23; 8:45 am]

BILLING CODE 6820–EP–P

FEDERAL REGISTER

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Part V

The President

Memorandum of February 3, 2023—Delegation of Authority Under Section 506(a)(1) of the Foreign Assistance Act of 1961

Federal Register
Vol. 88, No. 30
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Presidential Documents

Title 3—

The President

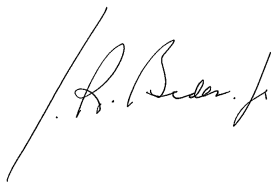
Memorandum of February 3, 2023

Delegation of Authority Under Section 506(a)(1) of the Foreign Assistance Act of 1961

Memorandum for the Secretary of State

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 621 of the Foreign Assistance Act of 1961 (FAA), I hereby delegate to the Secretary of State the authority under section 506(a)(1) of the FAA to direct the drawdown of up to $425 million in defense articles and services of the Department of Defense, and military education and training, to provide assistance to Ukraine and to make the determinations required under such section to direct such a drawdown.

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



THE WHITE HOUSE,
Washington, February 3, 2023

[FR Doc. 2023–03259
Filed 2–13–23; 11:15 am]
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